**ORAL ARGUMENT NOT YET SCHEDULED**

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

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| AIR ALLIANCE HOUSTON, *et al.*,<br><br>*Petitioners*,<br><br>v.<br><br>U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,<br><br>*Respondents*. | Case No. 17-1155 |

**PETITIONERS' AND MOVANT-INTERVENOR UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION'S MOTION FOR STAY AND EXPEDITED CONSIDERATION OF THE APPEAL, OR, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION AND VACATUR**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Air Alliance Houston *et al.* and Movant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("USW") ("Movants") respectfully move, pursuant to Rules 18 and 27, for a stay pending judicial review of final action by the U.S. Environmental Protection Agency ("EPA") and expedited consideration and briefing of this case, or, in the alternative, for summary vacatur.

After years of study, EPA finalized important new protections in January 2017 under the Clean Air Act's accidental toxic release or "Bhopal" provision (42 U.S.C. § 7412(r)) to prevent and reduce harm from chemical disasters. 82 Fed. Reg. 4594, 4595 (Jan. 13, 2017) ("Chemical Disaster Rule"). EPA has suddenly postponed the effectiveness of that rule so that no facility needs to take any steps to strengthen chemical safety before February 19, 2019, while EPA completes a reconsideration proceeding under § 7607(d)(7)(B) of the Clean Air Act. 82 Fed. Reg. 27,133 (June 14, 2017) ("Delay Rule").

EPA's Delay Rule is clearly unlawful and Movants need judicial action staying or vacating this rule to avoid irreparable harm. Movants asked EPA not to finalize the delay, and also submitted requests for a stay to EPA, but received no response. Movants notified opposing counsel in advance of this motion.

A party seeking emergency relief must make "a clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters v. Newby*, 838 F.3d 1, 2 (D.C. Cir. 2016) (quotation omitted)).

A stay is warranted because EPA has postponed for twenty months critical protections from chemical disasters while EPA "conduct[s] a reconsideration" under § 7607(d)(7)(B) of the Clean Air Act, and seeks comment on "any other matter that will benefit from additional comment." 82 Fed. Reg. at 27,136. The point of the Delay Rule is to make sure no facilities need "prepare to comply with, or … immediately comply with, rule provisions that might be changed during the subsequent reconsideration." *Id.* at 27,139 (emphasis added).

EPA simply cannot do this. The Clean Air Act is explicit that reconsideration "shall not postpone the effectiveness of the rule," beyond a three-month period. 42 U.S.C. § 7607(d)(7)(B). EPA's stay under this provision expired June 19. 82 Fed. Reg. 13,968, 13,968 (Mar. 16, 2017). EPA's intention to perform reconsideration through 2019 and solicit comment "on any other matter" regarding the Chemical Disaster Rule cannot nullify that rule now; only a new final action that lawfully changed course through reasoned decisionmaking could do so.

Movants, who represent thousands of industrial workers and community members living near chemical facilities, are thus likely to succeed on the merits, but victory will be pyrrhic at best if EPA is still able to delay protections for a substantial period while Movants seek judicial review. Delaying the Chemical Disaster Rule means the extreme dangers EPA tailored the rule to prevent will remain unaddressed for nearly two more years. Accidents will continue to take lives and cause other irreparable yet preventable harm to workers and nearby communities. Harm to Movants' members – including injury or possible death – will not be remediable later. For these reasons and because the balance of the equities and the public interest favor keeping the original rule in force, Movants request this Court stay EPA's Delay Rule and expedite consideration and briefing of this case. In the alternative, because EPA's action is plainly illegal under this Court's prior holdings, Movants request summary vacatur of the Delay Rule. Swift relief is necessary to save lives and prevent other irreparable harm to Movants, and to direct EPA to stay within the bounds of its authority.

## BACKGROUND

### I. THE CHEMICAL DISASTER RULE

The Chemical Disaster Rule that EPA's final action delays is an update to EPA's regulations under 42 U.S.C. § 7412(r) for the prevention of explosions, fires, releases of poisonous gases, and other "accidental releases" at facilities that

use or store certain extremely dangerous chemical substances. Congress enacted § 7412(r) as part of the Clean Air Act Amendments of 1990 "in response to a number of catastrophic chemical accidents occurring worldwide that had resulted in public and worker fatalities and injuries, environmental damage, and other community impacts," including the tragic release of methyl isocyanate in Bhopal, India in 1984 that killed and injured thousands of people, and a release a year later at Union Carbide in Institute, West Virginia that sent hundreds of workers and residents to seek medical care. 81 Fed. Reg 13,638, 13,645, 13,697 (Mar. 14, 2016).

Section 7412(r) directs EPA to list substances which, "in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment." 42 U.S.C. § 7412(r)(3); *see* 40 C.F.R. § 68.130 (current list, including, *e.g.*, methyl isocyanate, chlorine, and hydrogen fluoride). Section 7412(r) further authorizes and directs EPA to set regulatory requirements to prevent, detect, correct, and respond to releases of these hazardous substances in order to prevent and reduce harm from chemical disasters. *See* 42 U.S.C. § 7412(r)(7)(A) (authorizing measures "to prevent accidental releases of regulated substances"); *id.* § 7412(r)(7)(B)(i) (requiring regulations that provide, "to the greatest extent

practicable, for the prevention and detection of accidental releases … and for response to such releases").

EPA's Chemical Disaster Rule is the first major update to the Clean Air Act Risk Management Program in over 20 years. *See* 82 Fed. Reg. at 4599-600. There are over 12,500 covered facilities, including oil refineries, chemical manufacturers, and others, that use, store, and have the potential to release highly hazardous chemicals that can cause death, serious injury, and other health threats. *Id.* at 4596 tbl.1. EPA issued this rule to protect the people most vulnerable to death, poisoning, injury, and other harms from chemical disasters: facility workers, first responders, and fenceline community members. *See* Regulatory Impact Analysis at 9-10 (Dec. 16, 2016), EPA-HQ-OEM-2015-0725-0734 ("RIA").

EPA has been considering possible revisions to its regulations since at least 2012, when a coalition of over fifty labor, environmental, health, and safety groups filed a petition urging EPA to require chemical facilities to recognize and adopt inherently safer technologies. EPA-HQ-OEM-2015-0725-0249. After a series of major releases at chemical facilities, President Barack Obama signed an executive order directing federal agencies to modernize regulations to prevent chemical disasters. Exec. Order No. 13,650, 78 Fed. Reg. 48,029 (Aug. 7, 2013). EPA then requested information on its chemical safety regulations from the public. 79 Fed. Reg. 44,604 (July 31, 2014). In March 2016, EPA published a proposed rule based

on this input and consultations with the U.S. Chemical Safety Board ("CSB"); Occupational Safety and Health Administration; Department of Homeland Security; and Bureau of Alcohol, Tobacco, Firearms, and Explosives. 81 Fed. Reg. at 13,644.

Finally, on December 21, 2016, after extensive public comment and hearings, EPA signed the final Chemical Disaster Rule, concluding that under the prior regulations, "major incidents" continue to occur, and emphasizing "the importance of reviewing and evaluating current practices and regulatory requirements, and applying lessons learned from other incident investigations to advance process safety." 82 Fed. Reg. at 4696. EPA highlighted a series of recent chemical disasters as showing the need for and guiding its action:

> In addition to the tragedy at the West Fertilizer facility …, a number of other incidents have demonstrated a significant risk to the safety of American workers and communities. On March 23, 2005, explosions at the BP Refinery in Texas City, Texas, killed 15 people and injured more than 170 people. On April 2, 2010, an explosion and fire at the Tesoro Refinery in Anacortes, Washington, killed seven people. On August 6, 2012, at the Chevron Refinery in Richmond, California, a fire involving flammable fluids endangered 19 Chevron employees and created a large plume of highly hazardous chemicals that traveled across the Richmond, California, area. Nearly 15,000 residents sought medical treatment due to the release. On June 13, 2013, a fire and explosion at Williams Olefins in Geismar, Louisiana, killed two people and injured many more.

*Id.* at 4599 (footnotes omitted); 81 Fed. Reg. at 13,644. EPA based the rule on data from 2,291 incidents at covered facilities that occurred between 2004 and 2013, including 1,517 where facilities reported measurable harm on- and off-site. RIA at 80; *see also* EPA, RMP Facility Accident Data, 2004-2013 (Feb. 2016), EPA-HQ-OEM-2015-0725-0002 ("Accident Data"). A review of EPA's data shows that 997 of these incidents caused physical harm, reported as 59 deaths, and 17,099 injuries, hospitalizations, or other health impacts that required people to seek medical treatment. *Id.*; RIA at 87 ex.6-5. In total, these incidents also required almost 500,000 people to evacuate or shelter-in-place; and resulted in over $2 billion in property damage. RIA at 87 ex.6-5. EPA tallied the quantified damages from RMP-covered facility accidents at about $274.7 million per year. 82 Fed. Reg. at 4683 tbl.17; RIA at 10-11 & ex.C.

EPA determined the Chemical Disaster Rule would reduce the frequency and magnitude of these incidents. 82 Fed. Reg. at 4683. Specifically, the Rule clarifies and enhances the preventative measures of the RMP framework applicable to processes at facilities that have potential to cause significant off-site impacts or have had a fatal or serious accident within the last five years. Under the Chemical Disaster Rule, if a facility experiences an incident that results in a "catastrophic release" or which "[c]ould reasonably have resulted in a catastrophic release," it must investigate the root cause of the incident with the goal of preventing a similar

future incident. 40 C.F.R. §§ 68.3, 68.60, 68.81; *see also* 82 Fed. Reg. at 4595; 81 Fed. Reg. at 13,648-49 (listing examples of "missed opportunities to address the proper causes of the incidents, share the lessons learned[,] and prevent further similar accidents" because of lack of this requirement). The Rule also requires that compliance audits be conducted by a third party when incidents have occurred or other conditions are met at a facility. 40 C.F.R. §§ 68.58, 68.79; *see also* 81 Fed. Reg. at 13,654-57 (finding that, despite prior self-auditing requirement, "[i]ncident investigations often reveal that these facilities have deficiencies in some prevention program requirements" and providing examples); 81 Fed. Reg. at 13,654 (noting the "CSB identified a lack of rigorous compliance audits as a contributing factor behind the March 23, 2005[,] explosion and fire at the BP Texas City Refinery" which "killed 15 people, injured another 180, led to a shelter-in-place order that required 43,000 people to remain indoors, and damaged houses as far away as three-quarters of a mile from the refinery.").

For the three industry sectors with the highest accident rates – petroleum refineries, chemical manufacturers, and pulp and paper mills – the Rule also requires facilities to assess "safer technology and alternative risk management measures applicable to eliminating or reducing risk from process hazards." 40 C.F.R. § 68.67(c)(8); 82 Fed. Reg. at 4632. Facilities must consider safer practicable ways to use or store hazardous chemicals and determine whether to

implement such methods. 40 C.F.R. §§ 68.67(c)(8)(i)-(ii); *see* 81 Fed. Reg. at 13,663 ("there is a benefit in requiring that some facilities evaluate whether they can improve risk management of current hazards through potential implementation of [inherently safer technologies] or risk management measures that are more robust and reliable"); *see also* 82 Fed. Reg. at 4629.

In addition, as a result of the Rule, all covered facilities are required to coordinate annually with local first responders and emergency planning committees to strengthen preparation to protect communities in the event of accidents and disasters. Emergency preparedness requirements include: testing notification systems, ensuring facilities provide emergency coordination information, and scheduling simulated-emergency tabletop exercises at least once every three years and field exercises at least once every 10 years. *See, e.g.*, 40 C.F.R. §§ 68.96(a), 68.90(b)(5), 68.93, 68.96(b); *see also* 82 Fed. Reg. at 4595. As EPA found, providing first responders with "easier access to appropriate facility chemical hazard information … can significantly improve emergency preparedness and their understanding of how the facility is addressing potential risks." 82 Fed. Reg. at 4596; *see also* 81 Fed. Reg. at 13,671-72 (listing examples of poor coordination and noting that "recent feedback provided to EPA's [docket] and during Executive Order 13650 listening sessions indicate that many regulated sources have not provided for an adequate emergency response.").

Finally, so that vulnerable fenceline communities may more effectively participate in emergency preparedness exercises and be aware of hazards and appropriate ways to respond, the Rule also strengthens interactions between facilities and concerned community members. *See, e.g.*, 40 C.F.R. §§ 68.210(e) (public meeting requirement), 68.210(b) (requiring information on chemical hazards, accident history, and emergency response to be provided to community members); 82 Fed. Reg. at 4596. These provisions will help community members assure themselves "that the facility is adequately prepared to properly handle a chemical emergency," to "improve their awareness of risks[,] … and to be prepared to protect themselves in the event of an accidental release." 81 Fed. Reg. at 13,681; 82 Fed. Reg. at 4668-70; *see also* 81 Fed. Reg. at 13,678 (noting that "[p]oor communication between facility personnel and first responders, as well as poor communication between facility personnel and communities, has been shown to contribute to the severity of chemical accidents" and providing examples).

EPA set the Chemical Disaster Rule's compliance deadlines relative to the rule's original effective date (Mar. 14, 2017), and determined that the following compliance dates represented the "necessary" amount of time for facilities to understand and implement the rule's provisions after the rule's effectiveness: March 14, 2018, for the emergency response coordination requirements; three years to develop an emergency response plan (upon determination it is required);

March 15, 2021, for the audit, root cause analysis, safer technology and alternatives analysis, emergency response exercise, and community information requirements; and March 14, 2022 to update the full Risk Management Plan. 82 Fed. Reg. at 4676-78 & tbl.6. EPA found that one- or two-year compliance times were impracticable for all but the emergency response coordination requirements. *Id.* at 4676.

## II. THE DELAY RULE

After receiving petitions for administrative reconsideration from industry groups which include oil and gas, refining, chemical, and other companies ("the RMP Coalition" (Feb. 28, 2017), EPA-HQ-OEM-2015-0725-0759, and "Chemical Safety Advocacy Group" (Mar. 13, 2017), EPA-HQ-OEM-2015-0725-0766), on March 13, EPA convened a reconsideration proceeding. Letter from Adm'r Pruitt to RMP Coalition, EPA-HQ-OEM-2015-0725-0763. EPA also delayed the effective date of the Chemical Disaster Rule for a period of three months, through June 19, 2017, citing 42 U.S.C. § 7607(d)(7)(B). 82 Fed. Reg. 13,968, 13,969 (Mar. 16, 2017).[1] On March 14, 2017, eleven states, including Oklahoma, submitted a third reconsideration petition, stating "support" for EPA's decision "to reconsider the rule." EPA-HQ-OEM-2015-0725-0762.

[1] That date had been previously extended by one week, through March 21, 2017, based on the "Regulatory Freeze Pending Review" Memorandum. 82 Fed. Reg. 8499, 8499 (Jan. 26, 2017).

EPA then proposed and finalized a further 20-month delay of the Chemical Disaster Rule, through February 2019. 82 Fed. Reg. 16,146 (Apr. 3, 2017); 82 Fed. Reg. at 27,133. EPA called the delay "adequate and necessary for the reconsideration." 82 Fed. Reg. at 27,142. The Federal Register notice states: "EPA is issuing this rule as a revision of the Risk Management Program Amendments," and explains "its purpose … is to not only to [*sic*] conduct a reconsideration on the issues identified in that letter but also to solicit comment on any other matter that will benefit from additional comment." *Id.* at 27,136.

## III. PROCEDURAL HISTORY

On June 15, 2017, Movant-Petitioners Air Alliance Houston *et al.*, local and national nonprofits that include fenceline community groups, filed a petition for review of the Delay Rule. DN1679956. Petitioners represent members and constituents who live and take care of their families in numerous communities around the country in close proximity to refineries and chemical plants where disasters have occurred and continue to take place. *See, e.g.*, Hays Decl. ¶¶ 5-7; Kelley Decl. ¶¶ 2-4; Moench Decl. ¶¶ 10-16; Marquez Decl. ¶¶ 2, 6; Nixon Decl. ¶ 1; Medina Decl. ¶ 3; Nelson Decl. ¶ 5; Parras Decl. ¶¶ 2-3, 8, 10-11. Some of Petitioners' members have experienced disasters first-hand. *See, e.g.*, Marquez Decl. ¶¶ 4-5, 7-12; Nixon Decl. ¶¶ 5-6.

On June 20, Movant USW moved to intervene in support of Petitioners. DN1680462. USW has over 850,000 members employed in heavy industry, including approximately 25,000 members at refineries and the majority of organized workers in the petrochemical industry. Fendley Decl. ¶ 2. Many USW members would be hurt "first and worst" in a chemical disaster, and many have personally experienced or worked to prevent prior chemical accidents. *Id.* ¶ 3; Nibarger Decl. ¶¶ 7, 13-18, 21-22; Lilienfeld Decl. ¶¶ 8-11.

Movants submitted comments opposing EPA's proposed delay. Petrs' Comments, EPA-HQ-OEM-2015-0725-0861; USW Comments, EPA-HQ-OEM-2015-0725-0859. On June 16, Movants sent petitions to EPA requesting a stay of the Delay Rule pending judicial review, but received no response. Exs. 1, 2.

Movants now seek a stay of the Delay Rule and expedited consideration and briefing of this case, or, in the alternative, summary vacatur.[2]

[2] EPA has not yet provided a position on USW's pending motion to intervene. It previously reserved its position but did not oppose the USW's motion to intervene as a respondent-intervenor in defense of the Chemical Disaster Rule in case Nos. 17-1085, 17-1087, and 17-1088. USW joins and supports Petitioners' motion to stay the rule in the interest of efficiency, to avoid the need for multiple filings before this Court, and to ensure USW can support this urgent motion now, rather than waiting to file a separate additional motion at a future time.

## ARGUMENT

### I. MOVANTS ARE LIKELY TO SUCCEED ON THE MERITS

EPA promulgated the Delay Rule in violation of the Clean Air Act, 42 U.S.C. §§ 7607(d)(7)(B) and 7412(r)(7), and in contravention of an agency's basic duty to "at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009)); Petrs' Comments at 23-35. Any one of these failings is sufficient reason to vacate the Delay Rule.

#### A. The Delay Rule Violates § 7607(d) Of The Clean Air Act.

The Clean Air Act provides a carefully tailored mechanism for agencies to reconsider final rules and, for up to three months, delay those rules pending reconsideration. 42 U.S.C. § 7607(d)(7)(B). However, beyond the three-month stay allowed, "[s]uch reconsideration shall not postpone the effectiveness of the rule." *Id.*; *see Lead Indus. Ass'n v. EPA*, 647 F.2d 1184, 1186 (D.C. Cir. 1980) (the Act "limits any stay that may be issued by EPA or a court during … reconsideration to a period of no longer than three months."); *Natural Res. Def. Council* ("*NRDC*") *v. Reilly*, 976 F.2d 36, 39, 41 (D.C. Cir. 1992) (similar); *see also* S. Rep. No. 101-228 at 312 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3755 (emphasizing reconsideration shall not be used "as a delay tactic"). Where

"Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *United States v. Smith*, 499 U.S. 160, 167 (1991) (quotation omitted). EPA's Delay Rule, which postpones the original rule for 20 months past the end of a three-month stay, contravenes both the letter and spirit of § 7607(d)(7)(B).

Furthermore, EPA itself has long acknowledged that a three-month stay for reconsideration is the sole exception to what is otherwise a bright-line rule. 82 Fed. Reg. at 16,148; 82 Fed. Reg. at 13,968-69; EPA Mem. in Opp. to Sierra Club's Mot. for Summ. J. at 11, *Sierra Club v. Jackson*, 1:11-cv-01278-PLF (D.D.C. Aug. 25, 2011) ("[§ 7607](d)(7)(B) establishes the only process by which EPA or the D.C. Circuit could stay the effectiveness of emission standards based on pending reconsideration."); *see also Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 22 (D.D.C. 2012) ("EPA concludes that … [§ 7607](d)(7)(B) of the Clean Air Act establishes the only process by which the agency can stay the effectiveness of emission standards pending reconsideration."). EPA's new interpretation of § 7607(d)(7)(B) not only conflicts with the statute, it is also an unexplained reversal of its prior position deserving no deference (even if there were ambiguity not present here).

EPA now asserts a general power under § 7607(d) to delay any rule "with a future effective date … simply by a timely rulemaking amending its effective date before the original date." 82 Fed. Reg. at 27,136. But § 7607(d) contains only procedural requirements for rulemaking and grants no such general authority to EPA, much less authority that supersedes § 7607(d)(7)(B)'s more specific and carefully prescribed limit. EPA's reading of that provision fails at *Chevron* step one. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

EPA does not invoke its rulemaking authority under § 7601 here, nor could it as this Court has already held the specific three-month limit under § 7607(d)(7)(B) cannot be circumvented by use of EPA's general authorities under that provision. *See Reilly*, 976 F.2d at 40-41. There, EPA tried to stay the effective date of a previously finalized rule using its rulemaking authority under § 7601(a)(1) of the Clean Air Act. *Id.* at 40. The court unequivocally "decline[d] to read such open-ended power into section 301." *Id.* To the extent EPA has any rulemaking authority at all under § 7607(d), it remains true that "EPA ha[s] no authority to stay the effectiveness of a promulgated standard except for the single, three-month period authorized by [§ 7607](d)(7)(B)." *Id.* at 41.

The two cases EPA's preamble cites in support of its alleged authority under § 7607(d) do not contradict the plain prohibition in § 7607(d)(7)(B), and instead provide further reasoning as to why EPA's attempt to arrogate broad authority that

contradicts clear statutory text is both illegal and impermissible under *Chevron*, 467 U.S. at 843. Both are cases where agency action delaying an effective date was struck down for not complying with notice and comment requirements under the Administrative Procedure Act. *NRDC v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982); *NRDC v. Abraham*, 355 F.3d 179, 206 (2d Cir. 2004). Holding that notice and comment was necessary – but not necessarily sufficient – both courts explain that delaying the effective date of a rule is a substantive change that deserves no less scrutiny than rescission of a final rule. *See Abraham*, 355 F.3d at 194 ("altering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards"); *NRDC*, 683 F.2d at 762 ("If the effective date were not 'part of an agency statement' such that material alterations in that date would be subject to the rulemaking provisions of the APA, it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date."); *see also Envt'l Def. Fund v. Gorsuch*, 713 F.2d 802, 817 (D.C. Cir. 1983) (approving of Third Circuit's reasoning in *NRDC*, 683 F.2d 752).

The concerns of these courts are equally central here, where EPA's delay is an attempt to nullify the Chemical Disaster Rule by postponing the rule for 20 months while avoiding all applicable statutory requirements. *See, e.g.*, 82 Fed.

Reg. at 16,149 (limiting comment on its proposal to "the issue of whether to further extend the effective date and for how long," expressly reserving all other issues for a future rulemaking). The Delay Rule renders the Chemical Disaster Rule a legal nullity for 20 months, without finding that the Chemical Disaster Rule is no longer necessary or meeting any statutory requirements that apply to EPA's authority to regulate accidental releases under Clean Air Act § 7412(r)(7). Rather than authorizing such extra-statutory exercises of power, § 7607(d) provides procedural safeguards precisely intended to ensure public participation, strengthen the agency rulemaking record, and to prevent such unsupported or arbitrary action. *E.g.*, 42 U.S.C. § 7607(d)(3), (6), (9). There is no stopping point to EPA's argument that it can evade the plain text of § 7607(d)(7)(B) and delay a Clean Air Act rule (like the Chemical Disaster Rule) for any amount of time, based only on reconsideration or a potential future rulemaking "revisiting issues" within that rule, 82 Fed. Reg. at 27,136. EPA does not have such unfettered discretion to nullify air rules through delay.

### B. The Delay Rule Violates § 7412(r) Of The Clean Air Act.

The Delay Rule amends the Chemical Disaster Rule and must therefore comply with statutory authority governing that rule § 7412(r)(7). 82 Fed. Reg. at 4600; 81 Fed. Reg. at 13,646; Response to Comments at 17-18 (Dec. 19, 2016), EPA-HQ-OEM-2015-0725-0729 ("RTC-1"). But EPA fails to show that the Delay

Rule helps prevent accidental releases or minimizes the consequences of such releases – rather, it delays prevention and reduces requirements the agency found necessary. *See* 42 U.S.C. § 7412(r)(1) ("[i]t shall be the objective of the regulations and programs authorized under this subsection to prevent the accidental release and to minimize the consequences of any such release …."); *id.* § 7412(r)(7)(A) (authorizing rules "to prevent accidental releases of regulated substances").

The Delay Rule specifically violates § 7412(r)(7)(B), which requires EPA's regulations "to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases." *Id.* § 7412(r)(7)(B)(i). The Delay Rule also violates § 7412(r)(7)(A), which requires regulations under that section to "have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable." *Id.* § 7412(r)(7)(A). EPA baldly asserts that its 20-month delay represents compliance to the greatest extent and as expeditiously as practicable, but fails to support that. Delay Rule RTC at 21, EPA-HQ-OEM-2015-0725-0881 ("RTC-2"). EPA previously found that March 14, 2017, was a reasonable and practicable effective date to assure compliance with necessary requirements pursuant to its statutory authority and EPA has not shown how a new effective date that is two years later

could comply with the statute. *See* 82 Fed. Reg. at 4594; *id.* at 4676-78 & tbl.6 (setting compliance dates).

EPA asserts that "'to the greatest extent practicable' does not prohibit 'weighing the difficulties of compliance planning and other implementation issues,'" but that is not what the agency is doing. 82 Fed. Reg. at 27,137. EPA's delay is not due to practicability – it is due to the agency's unidentified, new "policy preferences" and has nothing to do with what is practicable for sources to implement. *Id.* at 27,136. Regardless, EPA weighed implementation and compliance planning already when setting the compliance deadlines in the Chemical Disaster Rule. 82 Fed. Reg. at 4676. EPA disingenuously claims it is not taking any action with respect to those deadlines, and thus did not revisit those determinations here or even open them for comment. 82 Fed. Reg. at 27,142; 82 Fed. Reg. at 16,149. The reconsideration proceeding itself cannot render compliance impracticable, when Congress determined rules would generally be in effect during reconsideration. 42 U.S.C. § 7607(d)(7)(B).

Lastly, § 7412(r)(7)(B) requires that EPA's "regulations shall include procedures and measures for emergency response after an accidental release of a regulated substance in order to protect human health and the environment." *Id.* § 7412(r)(7)(B)(i). The Chemical Disaster Rule strengthens this part of the RMP framework, which EPA determined was failing to protect human health and the

environment. 82 Fed. Reg. at 4600; 81 Fed. Reg. at 13,671-73. EPA does not show how delaying a rule the agency determined would prevent serious harm, 82 Fed. Reg. at 4597-98, could actually protect human health and the environment. EPA thus fails to meet the statutory test applicable to its action.

### C. EPA's Delay Is Arbitrary And Capricious.

The Delay Rule is arbitrary and capricious because EPA fails to acknowledge or justify its sudden reversal of course, considers an unlawful factor, and provides a justification for delay that is irrational based on the record. 42 U.S.C. § 7607(d)(9). In general, a rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). When EPA amends a rule, it "is obligated to supply a reasoned analysis for the change." *Id.* at 42; *see also Encino*, 136 S. Ct. at 2126 ("an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'") (quotation omitted). Because EPA's delay contradicts factual findings that underlay the Chemical Disaster Rule, "a more detailed justification than what

would suffice for a new policy created on a blank slate" is required, *Fox*, 556 U.S. at 515; *see also Encino*, 136 S. Ct. at 2126.

Amendments to effective dates are no less subject to the basic constraints on rulemaking. *See Envt'l Def. Fund*, 713 F.2d at 815 ("If the effective date were not" treated as part of a rule and subject to rulemaking provisions "it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by postponing its operative date.") (quoting *NRDC*, 683 F.2d at 762). By "postponing the effective date" of the Chemical Disaster Rule, "EPA reversed its course of action up to the postponement." *NRDC*, 683 F.2d at 760; *see also Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (explaining that suspending a rule pending a new notice and comment process, "is a paradigm of a revocation" and represents "a 180 degree reversal of [the agency's] 'former views as to the proper course'") (quoting *State Farm*, 463 U.S. at 41). EPA has failed to recognize or explain this sudden reversal. *Cf. NRDC*, 683 F.3d at 760 (noting that "where the agency has acted, within a compressed time frame, to reverse itself by the procedure under challenge," the reversal itself "constitutes a danger signal").

EPA is issuing the Delay Rule "as a revision" of the Chemical Disaster Rule, but is not providing any reasoned basis for rejecting or revising the conclusions made during that rulemaking. 82 Fed. Reg. at 27,136. EPA previously found that

a number of catastrophic incidents had "demonstrated a significant risk to the safety of American workers and communities," 82 Fed. Reg. at 4599, and determined that "EPA expects that some portion of future damages would be prevented through implementation of this final rule," *id.* at 4597. EPA identified a number of shortcomings in the pre-existing framework and gave specific examples of serious accidents that demonstrated these failures. *See, e.g.*, 81 Fed. Reg. at 13,648, 13,655, 13,663, 13,671, 13,673, 13,675, 13,677-78; *see also id.* at 13,648-49, 13,655-56, 13,671-72, 13,674-75, 13,678 (listing examples).

EPA is delaying protections it issued to prevent grave dangers that had occurred and that it expected to continue absent the Chemical Disaster Rule, but has not shown why it can reject any of its findings accompanying that Rule. *See Fox*, 556 U.S. at 516 ("a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy"). Instead, EPA delays the protections because of petitions for reconsideration. EPA has identified one objection from one petition as warranting reconsideration (which Petitioners dispute, Petrs' Comments at 30-31), but has not concluded these petitions have merit. EPA previously considered and rejected most of the reconsideration petitioners' objections. *See generally* RTC-1 (addressing concerns related to information sharing and security, among others). EPA "does not now concede that it should make" any changes, but renders the Chemical Disaster Rule

ineffective anyway because "the existence of such a large set of unresolved issues demonstrates the need for careful reconsideration and reexamination of the [Chemical Disaster Rule]." 82 Fed. Reg. at 27,138.

EPA does not acknowledge the manifest change of position encapsulated in its Delay Rule, much less provide the necessary, more detailed justification for this change. *Compare* 82 Fed. Reg. at 27,135-37 *and* RTC-2 at 13-15, *with Encino*, 136 S. Ct. at 2126. Because the delay would expire before "most" of the compliance deadlines, 82 Fed. Reg. at 27,138, EPA does not even analyze the public health consequences of its delay – consequences it identified clearly as the basis for its prior rule. EPA ignores the serious consequences of delaying essential emergency preparedness provisions which originally had a compliance deadline of March 14, 2018, and of specifically delaying efforts to prepare for compliance in anticipation of the remaining deadlines – and even expressly refused to take comment on these matters. EPA previously found that compliance would require years of preparation, 82 Fed. Reg. at 4675-78, and now concedes that delaying the effective date, which is the trigger for all such preparation and ultimate compliance, will inevitably delay the eventual protections; that indeed is the point of the Delay Rule. *See* 82 Fed. Reg. at 27,139. Unexplained reversal is particularly suspect due to Administrator Pruitt's prior involvement in this matter

on behalf of reconsideration petitioner Oklahoma, threatening the impartiality and rationality of this proceeding. Petrs' Comments at 33 (quotation omitted).

The Delay Rule is also arbitrary and capricious because it is based on and considers an unlawful factor: that reconsideration is occurring under § 7607(d)(7)(B). *Id.* at 27,136. Congress unambiguously limited the agency's discretion to postpone rules based on reconsideration proceedings. 42 U.S.C. § 7607(d)(7)(B). To the extent EPA wants to revisit other objections, which do not meet the criteria in § 7607(d)(7)(B), it cannot nullify the effectiveness of a final rule now simply because it plans to conduct a new rulemaking in the future. To change course, the agency must acknowledge it is doing so, provide a reasoned explanation as to how it meets applicable statutory requirements rather than illegal factors, and then finalize a lawful rule. EPA has failed to do so.

Finally, rather than a reasoned explanation, the preamble to the Delay Rule is replete with evasive statements regarding "issues" EPA may reconsider or take comment on, actions EPA may take as a result, and how long these steps might take as an attempt to provide justification for the delay. *See* 82 Fed. Reg. at 27,140 ("Resolution of issues may require EPA to revise" the Chemical Disaster Rule through rulemaking); *see also, e.g.*, *id.* at 27,133, 27,135, 27,139-40, 27,142 (repeated use of "may"). Because EPA does not yet know which issues it will revisit, it did not even consider alternatives to the total delay of that rule – and

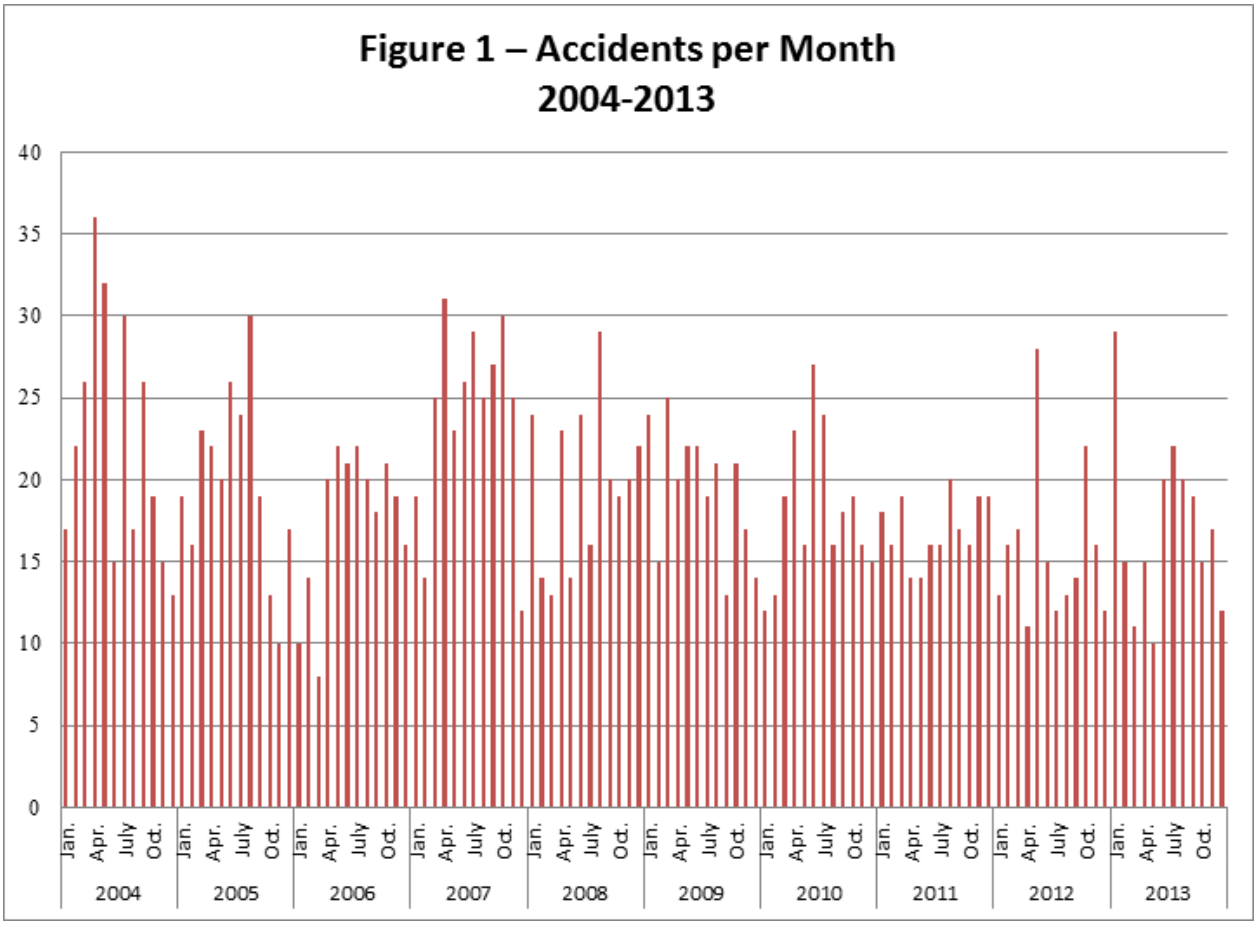
there is no evidence the agency truly considered the option of leaving the Chemical Disaster Rule in place, pending any potential improvements EPA might possibly in make in the future. *See Public Citizen*, 733 F.2d at 99 (when an agency changes course, "we will demand that the [agency] consider reasonably obvious alternative[s] … and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review."). Delaying all health and safety protections in the Chemical Disaster Rule for an unprecedented period of time, based on as-of-yet-unidentified hypothetical "issues" is not reasoned decisionmaking.

## II. EPA'S DELAY WILL CAUSE IRREPARABLE HARM TO MOVANTS.

An immediate stay of the Delay Rule is required to prevent the grave and irreparable harm to Movants' members that EPA found the Chemical Disaster Rule would prevent and reduce, 82 Fed. Reg. at 4597-98 & tbls.2-4. Movants must demonstrate irreparable harm is "likely," and the harm itself must be "certain and great," "actual and not theoretical," and so "imminent that there is a clear and present need for equitable relief to prevent irreparable harm." *League of Women Voters*, 838 F.3d at 6, 8 (citations and quotations omitted). The injury must "be beyond remediation." *Id.* at 8. Although a stay requires "only a likelihood of irreparable injury," *id.* at 8-9, years of evidence in the rulemaking record and declarations submitted by Movants show with certainty there will be serious

accidents resulting from the period of delay and that they will cause death, injury, and other grave and irreparable harms to Movants' members and the public.

Accidents involving covered industrial processes have happened almost like clockwork under the prior regulations, on average every other day during the decade of data collected in the rulemaking record from 2004-2013. Accident Data. There were at least 200 such incidents every year during that time period. *Id*. No one-month period passed without at least 8, and sometimes dozens of, accidents. Fig.1 (summarizing Accident Data). EPA's accident history data, combined with the evidence of substantial harm these incidents have caused repeatedly, including at facilities at or near where Movants' members live and work, together provide strong evidence "that the harm has occurred in the past and is likely to occur again." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Movants' members have experienced catastrophic accidents in their communities and places of work. *See, e.g.*, Marquez ¶¶ 4-5, 7-14; Fontenot Decl. ¶¶ 6-7; Kelley Decl. ¶¶ 8-11; Land Decl. ¶ 5; Medina ¶ 5; Nibarger Decl. ¶¶ 13-18; Nixon ¶¶ 5-6; Parras Decl. ¶¶ 10-11. These members' experiences and the evidence in the record demonstrate a strong likelihood that future accidents will occur and will seriously harm Movants' members if the Delay Rule is not stayed. *See* Accident Data. This is especially true given the proximity of Movants' members to chemical facilities




in sectors with the most serious accident records. *See, e.g.*, Fendley Decl. ¶ 2; Marquez Decl. ¶ 6; Moench Decl. ¶ 11; Nixon Decl. ¶ 6.

Irreparable harm frequently results from these accidents. Someone – usually a worker, first responder, or local community resident – is injured by a chemical disaster every 4 days on average. Accident Data. EPA found that 997 of the 2,291 accidents studied took the lives of 59 people, and resulted in injuries or medical treatment for over 17,000 people. *Id.*; RIA at 87 ex.6-5. Thus, with each preventable disaster that occurs as a result of this delay, Movants' members face a threat of death, injury, hazardous chemical exposure, and other serious adverse

impacts. Fendley Decl. ¶¶ 2-3, 19-21; Lilienfeld Decl. ¶¶ 2-6, 8-11; Moench Decl. ¶¶ 10-16; Nibarger Decl. ¶¶ 2, 7, 13-18, 21-22; Wright Decl. ¶¶ 2-3, 12-14.

The harms that result from these disasters are beyond remediation. There is no harm more irreparable than death because "there is no way of rectifying that injury if, in fact, two months down the line … the court concludes that the agency has acted in … an illegal fashion." *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 221 (D.D.C. 2003) (citation and quotations omitted) (finding likely loss of life of endangered animals constituted irreparable harm). Even if there were no likelihood of death, which has occurred at facilities that Movants' members work at or live near, "courts often find a showing of irreparable harm where the movant's health is in imminent danger." *See, e.g.*, *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 20 (D.D.C. 2005); *see also Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1307 (1976) (finding "irreparable harm" if motor vehicle safety standards were "not permitted to remain in effect during the pendency of the litigation on the merits" because illegal stay of the safety standards intended to "reduce traffic accidents and deaths and injuries" would not be redressable later).

Many of these incidents also expose workers and nearby residents to excessive pollution from smoke, accidental gas releases, chemical evaporation, flaring, or other sources. Because chemical facilities release carcinogens such as benzene and other chemicals that have no safe level of human exposure, even

accidental releases that do not cause immediately reported death or injury can cause irreparable harm through hazardous chemical exposure. *See, e.g.*, Petrs' Comments at 12-13 (citing research on the 1984 Bhopal tragedy, and World Health Organization information on technological disasters showing the types of health impacts chemical exposure can cause); *id.* at 14 (citing CSB report on Chevron Richmond Refinery fire that led 15,000 people to seek medical attention); *see also, e.g.*, Kelley Decl. ¶¶ 9-11; Marquez Decl. ¶¶ 13, 14; Moench Decl. ¶¶ 6-10; Nixon Decl. ¶ 8; Rolfes Decl. ¶ 11. Disasters often cause evacuations and shelter-in-place orders applicable to thousands of people to prevent or reduce chemical exposures and related harms. Within a 10-year period, nearly half a million people experienced such reported measures, although the Accident Data does not track how many people were still exposed to chemical hazards from reported accidents. RIA at 87, ex.6-5. Exposure to such environmental health hazards is another form of irreparable harm Movants' members face as a result of the Delay Rule. *See, e.g.*, *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313-14 (1977) ("any adverse economic effect … over the next two months is balanced to some considerable extent by the irreparable injury that air pollution may cause during that period"); Moench Decl. ¶¶ 6-8; Nixon Decl. ¶¶ 5-6. Further, shelter-in-place orders evacuations and other indicators of constant chemical threats are traumatic experiences that cannot be unlived, also cause lost time at work, school, and at

home that cannot be recovered, and force residents and workers to live in constant fear. *E.g.*, Marquez Decl. ¶¶ 4-5, 7-13, 16; Medina Decl. ¶ 5; Moench Decl. ¶¶ 13, 16; Nibarger Decl. ¶¶ 13, 17-18, 21; Nixon Decl. ¶¶ 6-8; Williams Decl. ¶¶ 7, 13.

Without the Chemical Disaster Rule, no action to implement the safety measures it contains – that EPA found would prevent and reduce the seriousness of accidents – will be required. *See* 82 Fed. Reg. at 4683-84; *see supra* at 7-11. Thus, there will be more frequent and worse chemical accidents likely near where Movants' members live and work. No compliance with emergency response coordination requirements will be required by March 14, 2018, and protective measures and steps needed to comply with all other provisions will be pushed back because facilities will no longer be required to "prepare to comply with, or in some cases, immediately comply with" the Chemical Disaster Rule. 82 Fed. Reg. at 27,139. EPA previously determined that compliance will take significant time to achieve. 82 Fed. Reg. at 4676, 4678. Thus, preventable disasters will continue to occur, their impact will not be lessened, and Movants' members will suffer the consequences.

Delaying the compliance deadline for emergency response coordination requirements alone justifies a stay. Contrary to comments from fire fighters and emergency officials, EPA nullifies those requirements in their entirety until at least February 19, 2019, 11 months past the compliance date of March 14, 2018. EPA-

HQ-OEM-2015-0725-0834 ("further delay would potentially endanger not only the public, but the lives of fire fighters responsible for responding to incidents at chemical facilities."); EPA-HQ-OEM-2015-0725-0830 (emergency coordination "provisions will protect first responders and … will likely prevent injuries and save lives"); Testimony of Tim Gablehouse, Pub. Hrg. Tr. at 11 ll.1-5 & 13 ll.13-17 (Apr. 19, 2017), EPA-HQ-OEM-2015-0725-0798 (urging against delay because "we want to make sure the first responders have information adequate to their situation"); Fendley Decl. ¶ 18; Nibarger Decl. ¶ 20. As an emergency response official stated: "We want people coming home at night, which means we want to have adequate coordination." Gablehouse, Pub. Hrg. Tr. at 13 ll.15-17. Yet the Delay Rule guarantees eleven more months where "[p]oor coordination between chemical facilities and local emergency responders" will continue to "contribut[e] to the severity of chemical accidents." 81 Fed. Reg. at 13,671.

There can be "no do over and no redress," *League of Women Voters*, 838 F.3d at 9 (quotation omitted), for the irreparable harm workers and fenceline communities, including Movants' members, have too often experienced, live in constant fear of, and are virtually certain to experience again absent a stay. The only way to prevent this harm is to stay the Delay Rule.

## III. A STAY WILL NOT HARM OTHER PARTIES.

Rather than harm EPA, a stay will prevent it from implementing an action that violates the law and contravenes its responsibility to protect public health. Besides, EPA may perform reconsideration with the Chemical Disaster Rule in effect, just as the Act directs. 42 U.S.C. § 7607(d)(7)(B).

## IV. THE PUBLIC INTEREST STRONGLY FAVORS A STAY.

A stay is in the public interest because it will preserve requirements that the record shows and EPA previously found would protect public safety by reducing lethal and other serious chemical accidents. 82 Fed. Reg. at 4597-98; Fig. 1. A staggering 177 million Americans live in worst-case scenario zones for chemical disasters. RIA at 94; *see, e.g.*, Moench Decl. ¶¶ 14-16 & Adds.; Petrs' Comments at 5 (one in three schoolchildren attend school in vulnerability zones). EPA determined the prior regulations failed to prevent thousands of serious accidents and resulting death, injury, and other serious harm to workers, fenceline communities, and first responders, and that the Chemical Disaster Rule is needed to prevent and reduce this harm. Expert agencies, first responders, and former Army Generals agreed. CSB, EPA-HQ-OEM-2015-0725-0428; Fire Fighters, EPA-HQ-OEM-2015-0725-0834; Gen. Russell Honore, EPA-HQ-OEM-2015-0725-0778.

Furthermore, requiring EPA to fulfill statutory requirements, act within its authority, and meet fundamental requirements of reasoned decisionmaking before it may nullify or change health and safety protections will serve the public interest. *See, e.g.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision.").

A stay will not harm regulated facilities, for whom EPA provided sufficient time to achieve compliance and found the costs reasonable. 82 Fed. Reg. at 4675-78, 4697. Staying the Delay Rule will instead benefit regulated facilities and other parties by reducing property damage and liability and protecting the lives of workers and first-responder teams. RIA at 81 ex.6-2 (1,955 employee injuries, over $2 billion of on-site property-damage); Fendley Decl. ¶¶ 2, 19; Lilienfeld Decl. ¶¶ 2, 4-5, 8-10; Nibarger Decl. ¶¶ 2, 17-18, 21; Wright Decl. ¶¶ 12-13. Any potential harm to regulated facilities would, at most, weigh in favor of expediting resolution of this case, while staying the Delay Rule to avoid irreparable harm to Movants and the public and to ensure EPA cannot achieve its purpose of delay simply due to the time required for judicial review.

## CONCLUSION

Therefore, Movants request a stay of the Delay Rule pending judicial review and expedited briefing and consideration of this appeal, or, in the alternative, summary vacatur.

DATED: June 22, 2017

Respectfully submitted,

*/s/ Susan J. Eckert* (by permission)
Susan J. Eckert
Joseph M. Santarella Jr.
SANTARELLA & ECKERT, LLC
7050 Puma Trail
Littleton, CO 80125
(303) 932-7610
susaneckert.sellc@comcast.net
jmsantarella.sellc@comcast.net

*Counsel for Movant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC*

*/s/ Gordon E. Sommers*
Gordon E. Sommers
Emma C. Cheuse
EARTHJUSTICE
1625 Massachusetts Ave., NW
Suite 702
Washington, DC 20036
(202) 667-4500
gsommers@earthjustice.org
echeuse@earthjustice.org

*Counsel for Movants and Petitioners Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, and Utah Physicians for a Healthy Environment*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

Counsel hereby certifies, in accordance with Federal Rules of Appellate Procedure 32(g)(1) and 27(d)(2) and D.C. Circuit Rule 18(b), that the foregoing **Petitioners and Movant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union's Motion for Stay and Expedited Consideration of the Appeal, or, in the Alternative, for Summary Disposition and Vacatur** contains 7,788 words, as counted by counsel's word processing system, and thus complies with the 7,800 word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** using **size 14 Times New Roman** font.

DATED: June 22, 2017

*/s/ Gordon E. Sommers*
Gordon E. Sommers

## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2017, I have served the foregoing **Petitioners and Movant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union's Motion for Stay and Expedited Consideration of the Appeal, or, in the Alternative, for Summary Disposition and Vacatur** on all registered counsel through the Court's electronic filing system (ECF).

*/s/ Gordon E. Sommers*
Gordon E. Sommers