UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date	)	**Docket No. EPA-HQ-OEM-2015-0725** *Via regulations.gov and e-mail* *May 19, 2017*

Comments submitted in response to Federal Register Notice "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date"

Docket Number EPA-HQ-OEM-2015-0725

May 19, 2017

Earthjustice submits these comments on behalf of the following listed organizations on May 19, 2017 in response to EPA's proposed rule entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date," and published at 82 Fed. Reg. 16,146 (Apr. 3, 2017), EPA-HQ-OEM-2015-0725-0760.

COMMENTS OF:

Air Alliance Houston
California Communities Against Toxics
California Safe Schools
Citizens Against Ruining the Environment
Clean Air Council
Clean Wisconsin
Coalition For A Safe Environment
Community In-Power and Development Association
Del Amo Action Committee
Desert Citizens Against Pollution
Earthjustice
Elyria & Swansea Neighborhood Association
Environmental Integrity Project
Louisiana Bucket Brigade
OH Citizen Action
Ohio Valley Environmental Coalition
PT AirWatchers
Respiratory Health Association
Sierra Club
Texas Environmental Justice Advocacy Services
Union of Concerned Scientists
Utah Physicians for a Healthy Environment

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INTRODUCTION

In response to EPA's proposed rule entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date," and published at 82 Fed. Reg. 16,146 (Apr. 3, 2017), EPA-HQ-OEM-2015-0725-0760, Earthjustice submits these comments on behalf of: Air Alliance Houston, California Communities Against Toxics, California Safe Schools, Citizens Against Ruining the Environment, Clean Air Council, Clean Wisconsin, Coalition For A Safe Environment, Community In-Power and Development Association, Del Amo Action Committee, Desert Citizens Against Pollution, Earthjustice, Elyria & Swansea Neighborhood Association,

Environmental Integrity Project, Louisiana Bucket Brigade, OH Citizen Action, Ohio Valley Environmental Coalition, PT AirWatchers, Respiratory Health Association, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, and Utah Physicians for a Healthy Environment.

On January 13, 2017, EPA finalized its first significant revisions in over 20 years to the agency's chemical disaster regulations to strengthen protections for industrial workers, first responders, and local communities. 82 Fed. Reg. 4594, 4595 (Jan. 13, 2017) ("Chemical Disaster Rule" or "the Rule"). During a process that lasted years, EPA evaluated the danger of chemical disasters and the effectiveness of its prior rules, requested information from the public, held public hearings, and took public comment in the development of this rule. EPA's process began after stakeholder groups petitioned the agency for action in 2012,[1] and following a string of catastrophic chemical disasters that demonstrated the urgent need for EPA to amend its regulations.

Responding to the "significant risk to the safety of American workers and communities" that EPA identified, the Chemical Disaster Rule provides common-sense updates to help protect fenceline communities, first responders, and workers from the threat of chemical disasters. *Id.* at 4599. In an abrupt reversal, EPA now unlawfully and irrationally proposes to delay the effective date of that rule by nearly two years on the pretext of an unjustified "reconsideration" process. 82 Fed. Reg. at 16,146 (Apr. 3, 2017). This is one more in a series of delays recently initiated by the agency in a sweeping attempt to roll back and undermine important health, safety, and environmental protections for illegal reasons, without regard for other applicable legal and procedural requirements.

Not only is the proposal unlawful, but EPA's own rulemaking record demonstrates the dangers that fenceline communities, workers, and first responders around the country will face from the resulting 20 month-delay in compliance if EPA finalizes this proposed delay. The record shows an average of 225 accidents per year, such as toxic releases, fires, and explosions, occurring at covered facilities in processes that involve dangerous chemicals known to cause death, injury, or serious adverse effects. Incidents like these can cause grave consequences to human health and the environment.

EPA developed its Chemical Disaster Rule in response to a series of such disasters, including events in: Texas City, Texas (2005, 15 killed); Anacortes, Washington (2010, 7 killed); Richmond, California (2012, nearly 15,000 residents forced to seek medical attention); West, Texas (2013, 15 killed); and Geismar, Louisiana (2013, 2 killed). 81 Fed. Reg. 13,638, 13,640, 13,644 (Mar. 14, 2016). In total, the over 2,000 incidents between 2004 and 2013 that facilities reported to EPA caused 58 deaths and over $2 billion in property damage; resulted in over 17,000 people suffering injures, seeking medical attention, or being hospitalized; and forced almost 500,000 people to evacuate or shelter in place during an incident. Regulatory Impact

[1] Community groups had been highlighting the need for better disaster prevention regulations for much longer. *See, e.g.*, Baumann *et al.*, Accidents Waiting to Happen (1999), http://grconnect.com/reports/accidentswaitingtohappen99.pdf.

Analysis ("RIA") at 87 ex.6-5 (Dec. 16, 2016), EPA-HQ-OEM-2015-0725-0734. How EPA can now consider delaying protections in view of these facts – after having found its existing regulations inadequate and finalized the important new Chemical Disaster Rule to protect public health – is beyond logic. *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 (listing examples of disasters prior rule failed to prevent), 13,655-56 (same), 13,671 (same), 13,674-75 (same), 13,678 (same).

The agency's disregard for the law and for human life threatened by chemical disasters is startling. Not only does EPA's proposed delay blatantly contradict the Clean Air Act, but EPA also fails to include a reasoned explanation for its proposal. EPA's unsound proposal to delay the Chemical Disaster Rule directly contradicts its own findings and evidence in the rule record. EPA does not even attempt to reconcile its proposed delay with the imminent harms it identified and sought to address during the rulemaking process. Further, by simply proposing its conclusions and declining to explain the thinking that underlies them or to assess their impact, EPA denies the public and stakeholders a meaningful opportunity to comment.

The agency's only basis for this proposed delay is the existence of a special reconsideration process, something allowed by the Clean Air Act in limited circumstances that are not actually met here. Seeking a pretext to delay and alter the Chemical Disaster Rule, EPA recasts the 2013 West, Texas fertilizer plant explosion – one of many incidents mentioned in the agency's proposed and final Federal Register notices for the Rule – as being suddenly of singular importance and solely determinative of the Rule's content. The devastating West, Texas chemical disaster gained significant national media attention and thus, along with many other recent incidents, helped to show the need for common-sense, bipartisan attention to prevent the severe consequences of chemical disasters, whatever their cause. The rulemaking record demonstrates that the Chemical Disaster Rule was intended to and will help address and prevent harm from various kinds of chemical disasters, regardless of cause. *See, e.g.*, 82 Fed. Reg. at 4599 (background for final rule); 81 Fed. Reg. at 13,644 (background for proposed rule).

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") announced during the public comment period for the Chemical Disaster Rule that it believed the fire that caused a subsequent explosion at the West, Texas fertilizer plant was intentionally set, seeking evidence and information on this possibility. Distorting the facts, EPA treats that announcement as a blanket license to delay the Chemical Disaster Rule by nearly two years without a reasoned basis or explanation. Twelve first responders died as a result of the explosion in West, Texas, along with three community members in a nearby nursing home and apartment complex. It is shocking for EPA to attempt to use that tragedy to delay requirements critical to the safety of other first responders, industrial workers, and community members threatened by accidental releases and the disasters they can cause. EPA has acknowledged that workers, first responders, and nearby community members are the most vulnerable to and the first to suffer during a chemical disaster, yet does not even mention the impact this delay will have on them. RIA at 9-10. EPA's proposed delay ignores not only the law, but also the very real risks and consequences that a delay of these critical protections will entail, as community members living near oil refineries and chemical facilities know all too well from their experience with regular accidents and near misses.

I. BACKGROUND

A. EPA Adopted The Chemical Disaster Rule In Response To A Series Of High-Profile Chemical Disasters That Illustrated That The Prior Regulations Are Insufficient.

The Chemical Disaster Rule that EPA now seeks to delay is an update to EPA's regulations under 42 U.S.C. § 7412(r) for the prevention of 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." 82 Fed. Reg. at 4599. A few years before the Amendments, in 1984, a catastrophic release of a cloud of methyl isocyanate over the densely populated city of Bhopal, India quickly killed over 3,400 people and injured more than 200,000. 82 Fed. Reg. at 13,697. In 1985, a similar incident took place at Bhopal's sister facility in Institute, West Virginia, and sent 409 residents and chemical workers to hospital emergency rooms. *Id.* As the Conference Report for the 1990 Amendments states, the purpose of § 7412(r) "is to prevent accidents like that which occurred at Bhopal and require preparation to mitigate the effects of those accidents that do occur." 136 Cong. Rec. S16,895, S16,926-27 (Oct. 27, 1990), 1990 WL 164490; *see also* S. Rep. No. 101-228, at 134 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3519.

Recognizing the grave danger posed by certain chemicals used at facilities like these, Congress enacted § 7412(r) (sometimes called the "Bhopal Provision") and directed EPA to list particularly dangerous 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 (listing chemicals such as hydrogen fluoride). Section 7412(r) further provides authority and direction for 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, e.g.*, 42 U.S.C. § 7412(r)(7)(A) (authorizing a range of measures "to prevent accidental releases of regulated substances"); *id.* § 7412(r)(7)(B)(i) (requiring regulations that, among other things 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 prevention requirements of EPA's chemical Risk Management Program in over 20 years, adding significant protections for vulnerable communities. *See* 82 Fed. Reg. at 4599-600. There are about 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. 82 Fed. Reg. at 4596 tbl.1; *see also* RIA at 81 ex.6-2, 83 ex.6-3, 118 ex.7-9 (listing deaths and injuries from 10 years of chemical accidents at covered facilities).

The people most vulnerable to death, injury, and other harm from a chemical disaster are facility workers, first responders, and fenceline community members. *See* RIA at 9-10. Nationwide, one in three schoolchildren attends school in a chemical disaster vulnerability zone near an RMP-covered facility. Comments of Coal. to Prevent Chem. Disasters at 35 n.64, 41,

EPA-HQ-OEM-2015-0725-0172 (citing Ctr. For Eff. Gov't, *Kids in Danger Zones* (Sept. 2014), http://www.foreffectivegov.org/sites/default/files/kids-in-danger-zones-report.pdf.). Black, Latino, and low-income people face disproportionate threats because they are more likely to live within a danger or vulnerability zone. *Id.* at 34 (citing Envtl. Justice and Health Alliance for Chem. Policy Reform, *Who's In Danger*, EPA-HQ-OEM-2015-0725-0574, https://www.epa.gov/sites/production/files/2017-03/documents/rmp_final_rule_qs_and_as_3-13-17.pdf).

In view of these hazards, in 2012, a coalition of over fifty labor, environmental, health, and safety groups filed a petition urging EPA to require chemical facilities to recognize and adopt reasonably available inherently safer technologies. Pet'n to EPA to Exercise Its Authority Under Section 112(r) to Prevent Chemical Facility Disasters (July 25, 2012), EPA-HQ-OEM-2015-0725-0249 ("2012 Pet'n"). On March 14, 2012, the National Environmental Justice Advisory Council reiterated these concerns and recommended to the EPA Administrator that the agency act to strengthen chemical disaster protections, including through the use of inherently safer technologies. Letter from NEJAC Chair Elizabeth C. Yeampierre to Administrator Lisa P. Jackson (Mar. 14, 2012), https://www.epa.gov/environmentaljustice/recommendations-prevention-chemical-plant-disasters.pdf. Former EPA Administrator Christine Todd Whitman helped to bring attention to the need for action, and in August 2012, she acknowledged and applauded that EPA had begun the process to strengthen chemical disaster measures that could reduce harm from any kind of chemical incident, including a potential terrorist attack, and she called for support from the President for EPA action. Christine Todd Whitman, The Chemical Threat to America, NY Times (Aug. 29, 2012), http://www.nytimes.com/2012/08/30/opinion/the-epa-can-fix-the-chemical-flaw.html ("I am encouraged, because the E.P.A., under its current administrator, Lisa P. Jackson, is once again seriously considering addressing chemical facility security …. This is the right thing to do ….). Then, after a series of major releases at chemical facilities, President Obama signed an executive order in 2013 that directed federal agencies to consider changes to chemical safety regulations to prevent disasters. Exec. Order No. 13,650, Improving Chemical Facility Safety and Security, 78 Fed. Reg. 48,029 (Aug. 7, 2013). That began an interagency process to study the issues and resulted in a report on the need for action from various agencies.[2]

In 2014, EPA published a notice requesting information from stakeholders on potential revisions to the RMP regulations. 79 Fed. Reg. 44,604 (July 31, 2014). Based in part on over 100,000 comments received, and working in consultation with sister agencies (including the U.S. Chemical Safety Board; Occupational Safety and Health Administration; Department of Homeland Security; and Bureau of Alcohol, Tobacco, Firearms, and Explosives), EPA published a proposed rule to reduce the incidence of and harm from chemical disasters in March of 2016. 81 Fed. Reg. at 13,638, 13,644. EPA received over 61,000 comments on its proposed rule from a variety of stakeholders, including former EPA Administrator Christine Todd Whitman, in

[2] Exec. Order 13650: Actions to Improve Chemical Facility Safety and Security – A Shared Commitment, Report for the President (May 2014), https://www.osha.gov/chemicalexecutiveorder/final_chemical_eo_status_report.pdf.

support of stronger requirements. 82 Fed. Reg. at 4599; Comments of Christine Whitman, EPA-HQ-OEM-2015-0725-0518.

Finally, on December 21, 2016, EPA finalized and signed the Chemical Disaster Rule after concluding that under the prior RMP regulations, "major incidents" continue to occur and "highlight 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 4600. EPA's proposed rule highlighted a number of examples of chemical releases and disasters at oil refineries and chemical manufacturing facilities, among others, as evidence supporting 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.

81 Fed. Reg. at 13,644 (footnotes omitted).

In developing the Chemical Disaster Rule, EPA collected extensive data on hazardous releases and their consequences, finding that during a recent 10-year period (2004-2013), there were 2,291 incidents at covered facilities, including 1,517 where facilities reported on or off-site harm. RIA at 80; *see also* EPA, RMP Facility Accident Data, 2004-2013 (Feb. 2016), EPA-HQ-OEM-2015-0725-0002 ("RMP Data"). EPA found that these reportable accidents were responsible for 58 deaths; caused 17,099 people to be injured, hospitalized, or to seek medical treatment; required almost 500,000 people to evacuate or shelter-in-place; and resulted in over $2 billion in property damages. RIA at 87 ex.6-5. In total, EPA concluded, RMP-covered facility accidents cause about $274.7 million in quantified damages per year. 82 Fed. Reg. at 4683 tbl.17 (Summary of Quantified Damages); RIA at 10-11 & ex.C (finding that "[r]educing the probability of chemical accidents and the severity of their impacts, and improving information disclosure by chemical facilities … would provide benefits to potentially affected members of society."). In the Chemical Disaster Rule, EPA adopted measures designed to reduce the threat of the full range of chemical releases and threats documented in the rulemaking record.

B. The Chemical Disaster Rule Provides Common-Sense Updates To The Risk Management Program That Are Needed To Prevent And Mitigate Chemical Disasters.

EPA's Chemical Disaster 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. 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.

And, for the three industry sectors with the highest accident rates as shown in RMP data (*i.e.*, petroleum refineries, chemical manufacturers, and pulp and paper mills), the Rule requires facilities to assess "safer technology and alternative risk management measures applicable to eliminating or reducing risk from process hazards." *Id.* § 68.67(c)(8); 82 Fed. Reg. at 4632. Facilities must consider whether there is a safer way to use or store hazardous chemicals and determine whether such methods are practicable and can be implemented. *See* 81 Fed. Reg. at 13,663; 82 Fed. Reg. at 4629; 40 C.F.R. §§ 68.67(c)(8)(i)-(ii).

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 table top 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); *see also id.* §§ 68.90(b)(5), 68.93 (information coordination requirements), 68.96(b); 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.

Finally, so that vulnerable fenceline communities may more effectively participate in emergency preparedness exercises and be aware of the hazards and appropriate ways to respond for themselves and their families, the Rule also strengthens interactions between facilities and community members with safety concerns about covered facilities. *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 4668-69.

EPA's rulemaking record contains ample evidence of the need for improved coordination and information sharing with first responders and the public. A few of the examples provided by EPA follow:

> Poor 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. One example is the Bayer CropScience explosion that occurred in Institute, West Virginia, in 2008. According to the CSB,
>
> > *The Bayer fire brigade was at the scene in minutes, but Bayer management withheld information from the county emergency response agencies that were desperate for information about what happened, what chemicals were possibly involved ... The Bayer incident commander, inside the plant, recommended a shelter in place; but this was never communicated to 911 operators. After a few hours of being refused critical information, local authorities ordered a shelter in place, as a precaution.*
>
> Improper communication between the facility and the first responders during the accident led to a delay in implementing a public shelter-in-place order for the local community, and may have resulted in toxic exposure to on scene public emergency responders. After a release of [hydrogen fluoride] from the Citgo Refinery in Corpus Christi, Texas, in July 2009, nearby residents complained of headaches, nausea, and respiratory issues, though Citgo claimed that the toxic cloud stopped at the plant fence line. According to reports, neighbors could see the flames and smoke coming from the refinery, but they were unable to get information on the accident and potential risks to their community.

81 Fed. Reg. at 13,678 (quoting CSB, *CSB Issues Report on 2008 Bayer CropScience Explosion* (Jan. 20, 2011), http://www.csb.gov/csb-issues-report-on-2008-bayer-cropscience-explosion-finds-multiple-deficiencies-led-to-runaway-chemical-reaction-recommends-state-create-chemical-plant-oversight-regulation); *see also* 81 Fed. Reg. at 13,655 ("The CSB also found numerous auditing deficiencies following the January 2008 explosion at Bayer CropScience, LP, in Institute, West Virginia" (citing CSB, Investigation Report: Pesticide Chemical Runaway Reaction Pressure Vessel Explosion, Report No. 2008-08-I-WV (Jan. 2011), http://www.csb.gov/assets/1/19/Bayer_Report_Final.pdf)).

EPA's proposed delay will deny the public and first responders around the country access to information they need for their own safety and peace of mind to avoid and, if necessary, prepare to respond to chemical disasters. Delaying the Chemical Disaster Rule means all of the

problems identified by the agency, and to which the Final Rule tailors important new solutions, will remain unaddressed for nearly two more years, as chemical disasters likely continue to take lives and cost our country billions.

C. EPA Now Proposes To Delay The Chemical Disaster Rule By 20 Months Based On Reconsideration Petitions and a Reconsideration Proceeding.

EPA signed the Chemical Disaster Rule on December 21, 2016, and it was published in the Federal Register on January 13, 2017. 82 Fed. Reg. at 4696. After the Administration change, EPA first extended the effective date by 7 days, through March 21, 2017, based on the Memorandum from the Assistant to the President and Chief of Staff entitled "Regulatory Freeze Pending Review." 82 Fed. Reg. 8499, 8501 (Jan. 26, 2017) (signed by Acting Adm'r McCabe).

After serving eight years in the Oklahoma State Senate and then serving as Oklahoma Attorney General, on February 17, 2017, Administrator Scott Pruitt assumed office after the U.S. Senate confirmed him to become the Administrator of EPA.[3] On February 28, 2017, EPA received a petition for administrative reconsideration from "the RMP Coalition," which includes the American Chemistry Council, the American Forest & Paper Association, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chamber of Commerce, the National Association of Manufacturers, and the Utility Air Regulatory Group. RMP Coalition Petition for Reconsideration (Feb. 28, 2017), EPA-HQ-OEM-2015-0725-0759. Two weeks later, on March 13, 2017, the "Chemical Safety Advocacy Group," which includes oil and gas, refining, chemical, and other companies, submitted a reconsideration petition. CSAG Petition for Reconsideration (Mar. 13, 2017), EPA-HQ-OEM-2015-0725-0766.

That same day, EPA granted reconsideration, sending a letter to that effect. Letter from Adm'r Pruitt to RMP Coalition (Mar. 13, 2017), EPA-HQ-OEM-2015-0725-0763 ("Response to RMP Coalition"). EPA also issued a final rule, without notice and comment, that delayed the effective date of the Rule for a period of three months, citing 42 U.S.C. § 7607(d)(7)(B) as its authority to do so. 82 Fed. Reg. 13,968, 13,969 (Mar. 16, 2017) (signed by Adm'r Pruitt, Mar. 13, 2017) ("The Administrator may stay the effective date of the rule for up to three months during such reconsideration."). On March 14, 2017, eleven states, including the State of Oklahoma, submitted a third reconsideration petition to the agency seeking reconsideration, stating that they "support" the decision to "convene proceedings to reconsider the rule." States' Petition for Reconsideration at 1 (Mar. 14, 2017), EPA-HQ-OEM-2015-0725-0762.

Now, having just completed a multi-year, rigorous rulemaking process to evaluate and address the pressing problem of chemical safety in this country, EPA ignores the problems it identified, contradicts the findings it reached, and proposes to delay its improvements to the Risk Management Program by 20 months. 82 Fed. Reg. at 16,146, 16,149 (signed by Adm'r Pruitt, Mar. 29, 2017).

The agency's sole basis for the proposed rule delay is the reconsideration proceeding that it has convened, and the three reconsideration petitions filed. *Id.* at 16,148 (citing three

[3] https://www.epa.gov/aboutepa/epas-administrator.

reconsideration petitions). EPA gives no other justification for extending the three-month delay that it already finalized pursuant to § 7607(d)(7)(B). EPA states that the "additional extension" will enable the agency "to take comment on issues that are in question and complete any revisions of the rule that become necessary as a result of the reconsideration process." *Id.* EPA "expect[s] to take comment on a broad range of legal and policy issues as part of the Risk Management Program Amendments reconsideration, and" is already "in the process of preparing the necessary comment solicitation to help focus commenters on issues of central relevance to our decision-making." *Id.* EPA asserts that the reconsideration issues "may be difficult and time consuming to evaluate, and given the expected high level of interest from stakeholders in commenting on these issues" the agency wants to "allow additional time to open these issues for review and comment." *Id.*

EPA further states that the 20-month period of delay would "allow the EPA time to evaluate the objections raised by the various petitions for reconsideration of the Risk Management Program Amendments, consider other issues that may benefit from additional comment, and take further regulatory action." *Id.* at 16,148-49. In particular, EPA says this schedule "allows time for developing and publishing any notices that focus comment on specific issues to be reconsidered as well as other issues for which additional comment may be appropriate." *Id.* at 16,149. EPA further states that this delay "provides a sufficient opportunity for public comment on the reconsideration in accordance with the requirements of [Clean Air Act] section 307(d)," and gives EPA "an opportunity to evaluate and respond to such comments, and take any possible regulatory actions, which could include proposing and finalizing a rule to revise the Risk Management Program amendments, as appropriate." *Id.* Finally, EPA states that the agency "may require less time to complete the reconsideration and any possible regulatory actions," but reiterates its conclusion that "extending the effective date to February 19, 2019 is reasonable and prudent." *Id.*

No additional explanation is given for any of the agency's conclusory assertions, particularly in view of the rulemaking history, which already provided multiple rounds of public comment and public hearings which grounded EPA's Chemical Disaster Rule.

D. Delaying The Chemical Disaster Rule Endangers Fenceline Communities, Workers, And First Responders, And Creates A Serious Threat To National Security.

Delaying the Chemical Disaster Rule's protections means the problem EPA identified and set out to fix with its Chemical Disaster Rule will remain unaddressed for nearly two more years. According to EPA's own data, an average of 229 accidents will continue to happen each year, over 150 of which can be expected to cause reportable harm. RIA at 80. The Interagency Working Group established by Executive Order 13650 and co-chaired by the Secretary of Homeland Security, Administrator of EPA, and Secretary of Labor recommended increasing coordination, information, and the use of safer technologies and alternatives as ways to increases chemical facility safety and security.[4] The Chemical Disaster Rule is expected to both reduce the

[4] Exec. Order 13650: Actions to Improve Chemical Facility Safety and Security – A Shared Commitment, Report for the President at 57, *supra* n.2; *see also id.* at 43 ("Although chemical

number of accidents involving dangerous chemicals and also reduce the amount of harm from those that do occur. As EPA explained, benefits of the Chemical Disaster Rule include:

> reductions in the number of people killed, injured, and evacuated or otherwise inconvenienced by sheltering in place; reductions in the damage caused to property on-site and off-site including product, equipment, and buildings; reductions in damages to the environment and ecosystems; and reductions in resources diverted to extinguish fires and clean up affected areas. The final rule also provides other benefits, such as increased public information, which in addition to helping to minimize the impacts of accidents on the offsite public, may also lead to more efficient property markets in areas near RMP facilities.

82 Fed. Reg. at 4684-85. Delaying the Chemical Disaster Rule means delaying these benefits to the affected public. It also means that millions of people will continue to face a serious threat of injury or death due to chemical disasters that could otherwise be prevented or have their impacts reduced through the planning and prevention measures in the Chemical Disaster Rule.

1. A Chemical Disaster Threatens Severe Health Impacts.

A chemical disaster can cause both serious short- and long-term harm to public health and the environment due to exposure to hazardous substances released.[5] In addition to immediate death, injury, and illness, the World Health Organization ("WHO") has found that chemical incidents can also cause delayed health effects, like cancer, birth defects, genetic harm, and lasting trauma or mental health impacts. Additional harm is also likely, such as economic impacts due to disruption of agriculture, loss of jobs, long-term evacuation of the area, costs for health care, litigation, rehabilitation, and lasting environmental damage.[6]

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facilities' owners and operators have incentives to reduce risks, they may lack sufficient information, underestimate the risks, or overestimate the costs to apply safer technologies and practices. Investigation of several significant chemical incidents by the U.S. CSB indicates that the use of safer alternatives could have reduced the potential of those incidents to occur."); 82 Fed. Reg. at 4599 (discussing Working Group).

[5] C.R. Krishna Murti, *Biological Effects of Chemical Disasters, Human Victims*, Methods for Assessing and Reducing Injury from Chemical Accidents at 117-19 (1989), https://dge.carnegiescience.edu/SCOPE/SCOPE_40/SCOPE_40_2.3_Krishna_Murti_115-126.pdf; *see also* Mary Anne Duncan, *et al.*, *Persons Injured During Acute Chemical Incidents-Hazardous Substances Emergency Events Surveillance, Nine States, 1999-2008*, Centers for Disease Control and Prevention (Apr. 10, 2015), https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6402a3.htm.

[6] WHO, Manual for the Public Health Management of Chemical Incidents at 3 (2009), http://apps.who.int/iris/bitstream/10665/44127/1/9789241598149_eng.pdf.

Evidence available 20 years after the 1984 Bhopal tragedy at Union Carbide showed that the harm it caused has continued to increase. By the end of October 2003, according to the Bhopal Gas Tragedy Relief and Rehabilitation Department, compensation had been awarded to 554,895 people for injuries received and 15,310 survivors of those killed.[7] Data now suggest that an estimated 15,000 to 20,000 people have died prematurely as a result of exposure to the Bhopal release.[8] In addition to early impacts including premature death and illness, longer term impacts from the Bhopal disaster have included: harm to the eyes; respiratory disease and decreased lung function; reproductive harm such as increased pregnancy loss, increased infant mortality, and decreased placental/fetal weight; genetic harm such as increased chromosomal abnormalities; and neurobehavioral harm such as impaired associate learning, motor speed, and precision. There are also lasting concerns about health impacts from toxic contamination of the environment in which people are living.[9] Since the tragedy and the closure of the factory, for 33 years, about 336 tons of hazardous waste have been left uncontained at the site of the Union Carbide India Limited factory, and research shows contamination of local soil and water.[10]

The WHO has recognized that different groups can experience health impacts resulting from different kinds of exposure. Employees and other on-site persons usually face more than one exposure pathway, often including inhalation of vapor and skin contact from splashing and clean-up. Emergency services personnel and first responders are usually required to get close to the emergency and are involved in rescue, containment of chemicals, and putting out fires. Primary and secondary contamination of fire officers, ambulance officers, and other emergency staff occurs. Medical staff and other hospital patients also face secondary contamination from incomplete decontamination of causalities. Additionally, the public is exposed to released chemicals and other hazards deriving from the event via air, water, food, soil, and other pathways.[11] Knowledge of these risks and ongoing anxiety about the threat of a chemical disaster are additional impacts faced by those who live or work near a chemical facility. Furthermore, some exposed people may be additionally vulnerable due to factors such as: inherent genetic variability, age, gender, pre-existing disease (*e.g.*, diabetes, asthma), inadequate diet, occupational, environmental or lifestyle factors (*e.g.*, smoking), stress and inadequate access to health care.[12] Vulnerability can be reduced by, among other things, strengthening access to information and strengthening emergency coordination and response.[13]

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[7] Edward Broughton, *The Bhopal disaster and its aftermath: a review*, 4 Environmental Health at 3 (May 10, 2005), https://ehjournal.biomedcentral.com/articles/10.1186/1476-069X-4-6.

[8] *Id.* at 2.

[9] Neeta Lal, *Bhopal Gas Tragedy Still Haunts India*, The Diplomat (Apr. 19, 2017), http://thediplomat.com/2017/04/bhopal-gas-tragedy-still-haunts-india/.

[10] *Id.*

[11] WHO, Technical Hazard Sheet - Technological Disaster Profiles, http://www.who.int/hac/techguidance/ems/chemical_insidents/en/ (last viewed May 17, 2017).

[12] *Id.*

[13] *Id.*

2. Delaying the Chemical Disaster Rule Endangers Fenceline Communities

People in communities just outside the fenceline of chemical facilities face continuous threats and are some of the first to experience harm from chemical accidents that occur near their homes, schools, and workplaces. Some communities, like Wilmington and Torrance, California, and the Manchester/Harrisburg neighborhoods of Houston and the nearby city of Galena Park, Texas, are surrounded by refineries and chemical plants and live in constant fear of accidents and health threats from these facilities.[14] In the rulemaking record, EPA collected data on over two thousand chemical accidents at covered facilities from 2004-2013. *See* RMP Data. The Chevron Richmond Refinery fire in 2012 is an illustration of the impact potential. A pipe ruptured, releasing highly flammable gas oil which partially vaporized, and two minutes later, a fire ignited, injuring workers. Three cities were placed under shelter-in-place and community warning system alerts for a period of over 4 hours.[15] Following this event, 15,000 people in nearby communities sought medical attention as a result of the event for ailments including breathing problems, chest pain, shortness of breath, sore throat, and headaches, and about 20 of these people were admitted to local hospitals as inpatients for treatment.[16]

As another set of examples supplementing EPA's accident data, the Coalition to Prevent Chemical Disasters compiled data on an additional 54 reported accidents that occurred at RMP-covered facilities between August 2013 and July 2015, including at oil refineries and chemical manufacturing plants.[17] These incidents included evidence of even more deaths, injuries, evacuation orders, and other harms during that time.

Accident reports from Chemical Safety Board investigations similarly provide evidence of incidents where community members have faced grave threats and harm from chemical releases in recent years. For example, in February 2015, the ExxonMobil Refinery in Torrance, California had an explosion near a tank holding modified hydrofluoric acid. Four workers were injured, serious on-site property damage occurred, and debris and "catalyst dust" was dispersed for a mile into the nearby community.[18] As the CSB described during the investigation: "had the

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[14] Union of Concerned Scientists & Texas Environmental Justice Advocacy Services, Double Jeopardy in Houston at 3 (2016), http://www.ucsusa.org/sites/default/files/attach/2016/10/ucs-double-jeopardy-in-houston-full-report-2016.pdf.

[15] CSB, Final Investigation Report: Chevron Richmond Refinery Pipe Rupture and Fire at 1-2, Report No. 2012-03-I-CA (Jan. 2015), http://www.csb.gov/assets/1/19/Chevron_Final_Investigation_Report_2015-01-28.pdf.

[16] *Id.* at 2.

[17] Coal. to Prevent Chemical Disasters, Chemical Incident Counter - RMP Facilities (sorted by date) (Aug. 2015), http://preventchemicaldisasters.org/wp-content/uploads/2015/08/chemical-incident-counter-rmp-facilities-sorted-by-date-3.pdf.

[18] CSB, Investigation Report: ExxonMobil Torrance Refinery Electrostatic Precipitator Explosion at 23, Report No. 2015-02-I-CA (May 2017), http://www.csb.gov/assets/1/19/ExxonMobil_Report_FOR_PUBLIC_RELEASE.pdf.

debris struck the tank, a rupture could have been possible, resulting in a potentially catastrophic release of extremely toxic modified [hydrofluoric acid] into the neighboring community" with potential to cause serious harm to the "333,000 residents, 71 schools, and eight hospitals" within a three-mile radius.[19] Since that incident, the Torrance refinery was sold to PBF Holdings Company, and the refinery has experienced multiple additional safety incidents.[20] In releasing the final investigation report on May 3, 2017, CSB Chairperson Vanessa Allen Sutherland said: "This explosion and near miss should not have happened, and likely would not have happened, had a more robust process safety management system been in place."[21] A recent report by the Center for Public Integrity found that 50 U.S. refineries currently use hydrofluoric acid, putting 16 million people near those refineries at risk of a serious chemical disaster.[22]

In October of last year, over 140 community members and employees had to seek medical attention while thousands were directed to shelter in place due to a chemical release at MGPI Processing Plant in Atchison, Kansas.[23] In preliminary findings on this event, CSB Chairperson Vanessa Allen Sutherland said,

> This type of accident is preventable. Our investigation demonstrates all too clearly that complacency with routine practices and procedures can result in severe consequences. A reaction that produced thousands of pounds of a hazardous chemical had the potential [to] be much more serious – the CSB's aim is to issue clear safety

[19] CSB, U.S. Chemical Safety Board Finds Multiple Safety Deficiencies Led to February 2015 Explosion and Serious Near Miss at the Exxon Mobil Refinery in Torrance, California (Jan. 13, 2016), http://www.csb.gov/us-chemical-safety-board-finds-multiple-safety-deficiencies-led-to-february-2015-explosion-and-serious-near-miss-at-the-exxon-mobil-refinery-in-torrance-california/.

[20] South Coast Air Qual. Mgmt. Dist., *News Release, SCAQMD Conducts Hearing on PBF Refinery in Torrance* (Apr. 1, 2017), http://www.aqmd.gov/docs/default-source/news-archive/2017/pbf-refinery-april-1-2017.pdf; Nick Green, *Why Torrance Has Come Full Circle In Its Battle Over Refinery Safety*, Daily Breeze (Feb. 26, 2017), http://www.dailybreeze.com/general-news/20170226/why-torrance-has-come-full-circle-in-its-battle-over-refinery-safety.

[21] CSB, CSB Releases Final Report into 2015 Explosion at ExxonMobil Refinery in Torrance, California (May 3, 2017), http://www.csb.gov/csb-releases-final-report-into-2015-explosion-at-exxonmobil-refinery-in-torrance-california/.

[22] Jim Morris, *Regulatory flaws, repeated violations put oil refinery workers at risk*, Ctr. for Pub. Integrity (Feb. 28, 2011), https://www.publicintegrity.org/2011/02/28/2111/regulatory-flaws-repeated-violations-put-oil-refinery-workers-risk.

[23] CSB, MGPI Processing, Inc. Toxic Chemical Release, http://www.csb.gov/mgpi-processing-inc-toxic-chemical-release-/ (last visited May 17, 2017).

> improvements which can be made to similar facilities across the country.[24]

These are just a handful of incidents that were detrimental to fenceline community members in recent years. Even accidents that may be reported as having only on-site impacts can cause disruption, fear, and harm in the surrounding communities because of smoke, increased emissions releases, and lack of communication to residents about the risks they are being exposed to. There can also be economic impacts to the community because of lost work days, time spent sheltering-in-place or evacuating, emergency response costs, and general disruption. A delay of implementation of the Chemical Disaster Rule for an additional twenty months places more residents at risk of hazardous chemical exposure within their homes, and prolongs the exposure of communities to the many harmful impacts of chemical disasters that EPA identified.

Additionally, a further delay in implementation limits the ability of these communities to respond and protect themselves in the event of disasters. The Chemical Disaster Rule would help minimize the impact of accidents by providing communities with easier access to existing emergency planning information, requiring public meetings after disasters, and requiring increased planning and coordination in advance of accidents so that their impacts can be effectively mitigated.

3. Delaying the Chemical Disaster Rule Endangers Workers.

Workers are often the first to be exposed during chemical disasters and are the most likely to die as a result of a severe incident.[25] Flames engulfed 19 refinery workers during the disaster at the Chevron Refinery in Richmond, California in 2012.[26] On February 8, 2017, three contractors died and seven were injured in an explosion at Packaging Corporation of America in DeRidder, Louisiana.[27] On November 22, 2016, six workers were injured when isobutane was released and caused an explosion at an oil refinery in Baton Rouge, Louisiana.[28] On August 12,

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[24] CSB, CSB Releases Preliminary Findings into Chemical Release at MGPI Industries; Investigators Note Insufficient Safety Design Features and Shortcomings in Emergency Shutdown Devices (Apr. 12, 2017), http://www.csb.gov/csb-releases-preliminary-findings-into-chemical-release-at-mgpi-industries-investigators-note-insufficient-safety-design-features-and-shortcomings-in-emergency-shutdown-devices/.

[25] *See, e.g.*, Regulatory flaws, repeated violations put oil refinery workers at risk, *supra* n.22.

[26] Jessica Eckdish, *The Missing Voices at EPA's Hearing on Chemical Safety Rules*, Daily Kos (Apr. 18, 2017), http://www.dailykos.com/story/2017/4/18/1654005/-The-Missing-Voices-at-EPA-s-Hearing-on-Chemical-Safety-Rules.

[27] CSB, Packaging Corporation of America Hot Work Explosion, http://www.csb.gov/packaging-corporation-of-america-hot-work-explosion-/ (last visited May 17, 2017).

[28] CSB, Exxon Mobile Refinery Chemical Release and Fire, http://www.csb.gov/exxon-mobile-refinery-chemical-release-and-fire/ (last visited May 17, 2017).

2016, a flash fire injured seven workers in Nederland, Texas while working at Sunoco Logistics Partners.[29] Again, in February 2015, two Exxon Mobil Refinery workers in California were injured as a result of a workplace explosion at the Torrance Refinery.[30] In their investigation of the accident, the Chemical Safety Board found that ExxonMobil did not have safety instruments that would have detected the flammable hydrocarbons.[31] One of the most notorious examples of worker fatalities is the disaster that occurred at the BP Texas City refinery in 2005, which killed 15 workers and injured 180 others.[32]

The CSB has ruled many accidents preventable. For example, when a worker was injured at the Delaware City Refinery on November 29, 2015, the CSB investigated and found that safety steps, including hazard analysis, could be implemented to prevent accidents and protect health, and on May 18, 2017, the CSB released a Safety Bulletin to prevent similar accidents.[33] There is significant evidence showing that inherently safer technologies, practices, and chemicals are available to reduce threats from oil refineries and other facilities, ranging from alternatives to HF (as discussed *infra*), to the use of methods like back-up power or anonymous worker reporting.[34]

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[29] CSB, Sunoco Logistics Partners Flash Fire, http://www.csb.gov/sunoco-logistics-partners-flash-fire/ (last visited May 17, 2017).

[30] CSB, ExxonMobil Refinery Explosion, http://www.csb.gov/exxonmobil-refinery-explosion-/ (last visited May 17, 2017).

[31] Investigation Report: ExxonMobil Torrance Refinery at 6, *supra* n.16.

[32] 81 Fed. Reg. at 13,649.

[33] CSB, CSB Releases Safety Bulletin into 2015 Chemical Release and Flash Fire at the Delaware City Refining Company (May 18, 2017), http://www.csb.gov/csb-releases-safety-bulletin-into-2015-chemical-release-and-flash-fire-at-the-delaware-city-refining-company/; CSB, Safety Bulletin, Key Lessons for Preventing Incidents When Preparing Process Equipment for Maintenance, Flash Fire at the Delaware City Refinery, Incident Date: Nov. 29, 2015 (pub. May 2017), http://www.csb.gov/assets/1/19/Final_DCRC_Bulletin1.pdf.

[34] *See, e.g.*, Hydrocarbon Publishing Co., Refinery Power Outage Mitigations (2014); USPIRG, Needless Risk 2005); *see also* Center for Chemical Process Safety (The American Institute of Chemical Engineers), Final Report: Definition for

Inherently Safer Technology in Production, Transportation, Storage, and Use at Exec-1 (2010), https://www.aiche.org/sites/default/files/docs/embedded-pdf/ist_final_definition_report.pdf; Amyotte *et al.*, *An Analysis of CSB Investigation Reports for Inherent Safety Learnings*, 7th Global Congress on Process Safety. Additionally, anonymous near-miss reporting for workers at covered facilities is a best practice could help prevent serious problems, just as it has in the aviation industry and for firefighter safety generally. *See, e.g.*, Aviation Safety Reporting System, https://asrs.arc.nasa.gov/index.html; NASA, Aviation Safety Reporting System Program Briefing (2016), https://asrs.arc.nasa.gov/docs/ASRS_ProgramBriefing2016.pdf; Near Miss, http://www.firefighternearmiss.com/About; Elsevier Public Safety, Nat'l Fire Fighter Near-Miss Reporting System, Annual Report 2008 (2009) (sponsored by Int'l Ass'n of Fire Chiefs),

The Chemical Disaster Rule would require refineries and chemical plants to consider the practicability of implementing safer technologies that would prevent these types of accidents. Furthermore, it would require better emergency planning and coordination with first responders that could save workers' lives, and more information sharing and transparency that will benefit people on the front-lines of a chemical disaster, and help workers advocate more effectively for their safety. Many recent chemical disasters have been ruled preventable. Delaying implementation of the new rule for twenty months would place industrial workers at continued risk of death or serious injury and will likely lead to more preventable deaths and injuries.

4. Delaying the Chemical Disaster Rule Endangers First Responders.

The Chemical Disaster Rule would also ensure that first responders, like firefighters and emergency medical personnel, are better protected and are prepared to deal with disasters that do occur by requiring coordination and information sharing. Properly equipped and informed first responders can make the difference in whether a small accident turns into a major disaster. Furthermore, a lack of coordination and information not only impairs first responders' ability to do their jobs, it also puts their lives at risk. Delaying protections that would decrease the magnitude and severity of chemical disasters means that first responders will be put into harm's way more often and will face increased danger during disasters.

First responders need more information about chemicals and hazards at facilities where they are responding to emergency calls. A recent report by the *Houston Chronicle* documented this need in a major city.[35] Many first responders have died or faced injury responding to accidents that involve dangerous chemicals, and they are one of the most exposed groups to harm from chemical disasters according to the Agency for Toxic Substances and Disease Registry.[36] For example, lack of coordination between on-site responders and public first responders can result in these groups operating on different radio frequencies and being unable to communicate with one another during a disaster.[37] The International Association of Firefighters indicates that in addition to fires, serious risks at chemical accident sites can include extremely high or low temperatures; large, boiling liquid expanding vapor explosions or large unconfined vapor

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http://firereports.nationalnearmiss.org/DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=29&Command=Core_Download&language=en-US&PortalId=2&TabId=348.

[35] Mark Collette & Matt Dempsey, *A Dangerous Job Made More Dangerous*, Houston Chronicle (2017), http://www.houstonchronicle.com/chemical-breakdown/6/.

[36] Duncan *et al.*, *Persons Injured During Acute Chemical Incidents*, *supra* n.5.

[37] Michael P. Wilson, *Refinery Safety in California: Labor, Community, and Fire Agency Views*, Center for Occupational and Environmental Health Labor Occupational Health Program at 9 (June 4, 2013), http://lohp.org/wp-content/uploads/2013/11/LOHP_Refinery_SafetyReport_2nd_Issue.pdf.

explosions; and large concentrations of hazardous materials among other risks.[38] First responders may also encounter widely-scattered debris or shrapnel; leaks of both toxic and corrosive materials; and chemicals that are incompatible, unstable, and that may potentially polymerize.[39]

Twelve of those who died at West, Texas were first responders, and the CSB's investigation concluded that many of these deaths were likely preventable, even when taking into account the possibility of arson as a source of the disaster. *See generally* CSB, Investigation Report: West Fertilizer Company Fire and Explosion, Report No. 2013-02-I-TX (Jan. 28, 2016), http://www.csb.gov/assets/1/19/West_Fertilizer_FINAL_Report_for_website_0223161.pdf. Among other things, the CSB specifically identified the lack of pre-incident planning at the facility as a contributing factor to the deaths of several first responders. *Id.* at 117; *see also id.* at 107-19 (discussing how general lack of coordination between the facility and the first responder agency contributed to the deaths that occurred). As another example, the December 2004 oil and chemical tank explosion in Houston, Texas caused injuries to two firefighters who responded after a blast that was felt for up to 20 miles from the plant site.[40] Delaying the Chemical Disaster Rule hinders first responders' ability to respond effectively in the event of an emergency and puts their lives, along with the lives of workers and community members, at risk.

5. Delaying the Chemical Disaster Rule Is a Threat to National Security.

Delaying this rule is a serious threat to national security. Protections in the Chemical Disaster Rule that prevent and reduce the consequences of chemical disasters do so irrespective of a disaster's cause. For example, one of the safer alternatives that refineries would need to assess is the possibility of phasing out the use of hydrofluoric acid, which has been proposed in California's South Coast Air Quality Management District.[41] Removing hydrofluoric acid from a refinery would dramatically reduce the harm if that refinery had a fire or explosion, regardless of what caused the incident.[42] Over 1.6 million people in the Salt Lake City area where multiple

[38] International Ass'n of Fire Fighters, *Emergency Response to Chemical Process Industries* at 12, OSHA, https://www.osha.gov/dte/grant_materials/fy10/sh-20994-10/CPI_Instructor_Guide.pdf.

[39] *Id.*

[40] CSB, Marcus Oil & Chemical Tank Explosion, http://www.csb.gov/marcus-oil-and-chemical-tank-explosion/ (last visited May 17, 2017).

[41] Nick Green, *AQMD proposes ban on toxic hydrofluoric acid at South Bay Refineries*, Daily Breeze (Jan 17, 2017), http://www.dailybreeze.com/government-and-politics/20170117/aqmd-proposes-ban-on-toxic-hydrofluoric-acid-at-south-bay-refineries.

[42] *See, e.g.*, United Steelworkers, *A Risk Too Great: Hydrofluoric Acid in U.S. Refineries* (Apr. 2013), http://assets.usw.org/resources/hse/pdf/A-Risk-Too-Great.pdf; Jim Morris, *Use of toxic acid puts millions at risk*, Center for Public Integrity (Feb. 24, 2011), https://www.publicintegrity.org/2011/02/24/2118/use-toxic-acid-puts-millions-risk; EPA, HF Report, http://www.epa.gov/oem/docs/chem/hydro.pdf.

refineries currently use hydrofluoric are in a danger zone from a release of this highly toxic chemical right now.[43]

EPA's Chemical Disaster Rule would apply to numerous chemical facilities around the country that pose a similar threat to the lives of civilians, workers, and first responders. Protections in the Rule requiring consideration of safer alternatives in chemical use and management at some of the most dangerous industries will help prevent or reduce harm in the event of a release, regardless of cause. The same is true for the improved coordination and emergency response provisions in the Rule, which will all help reduce harm in the event a release occurs. The rule would ensure first responders are prepared to address possible incidents at covered facilities, to reduce the number of casualties, and to minimize the other consequences of disasters. If communities and first responders are not prepared to address such incidents, the potential impact can be orders of magnitude greater.

6. Prevention and Coordination Provisions Are Likely to Reduce Harm.

EPA extensively documented the need for and value of the Final Rule's measures to prevent chemical releases and reduce the consequences they can cause in the preambles to the Proposed and Final Rule, the Regulatory Impact Analysis, and the supporting materials in the docket. There is overwhelming evidence in support of EPA's findings that the Rule is needed to protect people from the harm chemical disasters can cause. For example, over and over again, chemical accidents and near misses happen and investigations show that they could have been prevented through the use of safer measures or by applying the result of root cause analyses, such as those the Rule will require.

Overall, the CSB has found that the type of Safer Technology and Alternatives Analysis ("STAA") requirement included in the Final Rule is critical to prevent chemical disasters, stating that: "the CSB has investigated numerous major process safety incidents over the years, including the Chevron and Tesoro incidents, where the implementation of inherently safer design and materials of construction could have prevented the incident."[44]

The CSB has identified "preventive maintenance" as a "Driver of Critical Chemical Safety Change," finding that: "[n]on-existent or poor preventive maintenance programs has been a recurring root cause in CSB investigations."[45] Examples of these primary root causes include:

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[43] *Id.* at C-2 tbl.C2; Cristina Flores, *Report says 1.6 million Utahns at risk in potential hydrofluoric acid leak*, KUTV.com (Oct. 3, 2015), http://kutv.com/news/local/state-not-sure-whether-utah-refineries-use-hydrofluoric-acid.

[44] CSB, Investigation Report: Catastrophic Rupture Of Heat Exchanger at 113, Report No. 2010-08-I-WA (May 1, 2014), http://www.csb.gov/file.aspx?DocumentId=600.

[45] CSB, Preventative Maintenance, http://www.csb.gov/recommendations/preventive-maintenance-/ (last updated Feb. 6, 2017).

inadequate mechanical integrity programs; delayed or deferred preventive maintenance; and ageing infrastructure of equipment at chemical facilities."[46]

Recent CSB Investigations and Recommendations Involving Preventive Maintenance:

2012 – Chevron Refinery Fire
2011 – Carbide Industries Fire and Explosion
2011 – Hoeganaes Corporation Fatal Flash Fire
2010 – Tesoro Refinery Fatal Explosion and Fire
2009 – Silver Eagle Refinery Flash Fire and Explosion and Catastrophic Pipe Explosion
2008 – Allied Terminals Fertilizer Tank Collapse
2008 – DuPont Corporation Toxic Chemical Releases (Belle)
2007 – Valero Refinery Propane Fire
2005 – BP America Refinery Explosion
2002 – DPC Enterprises Festus Chlorine Release
2001 – Marcus Oil and Chemical Tank Explosion
2001 – Motiva Enterprises Sulfuric Acid Tank Explosion.[47]

For example, an investigation of the Chevron fire showed that for 10 years prior to the incident, Chevron workers had "recommended on several occasions" that inspections or upgrades occur on the very piping that failed on August 6, 2012, after those recommendations "were not implemented effectively."[48] For years before the April 2010 Tesoro refinery fire that killed seven workers, equipment "frequently leaked flammable hydrocarbons during startup, sometimes resulting in fires. Tesoro management had been complacent about these hazardous leaks and did not always investigate the cause of the leaks."[49]

The CSB has also evaluated and found that there are safer methods to engage in "hot work practices" that can both save workers' lives and prevent incidents that "have the potential to result in a major catastrophic accident."[50]

CSB Investigations and Deployments involving Hot Work:

2016 – Sunoco Logistics Partners
2014 – Omega Protein
2012 – Long Brothers Oil Company
2009 – ConAgra Foods

[46] *Id.*

[47] *Id.*

[48] CSB, Final Investigation Report: Chevron Richmond Refinery at 7-8, *supra* n.16.

[49] CSB, Investigation Report: Catastrophic Rupture Of Heat Exchanger at 6, *supra* n.44.

[50] CSB, Safe Hot Work Practices, http://www.csb.gov/recommendations/hot-work/ (last visited May 17, 2017).

2009 – TEPPCO Partners
2009 – A.V. Thomas Produce
2009 – E.I. DuPont de Nemours & Co Inc. Fatal Hot Work Explosion
2008 – MAR Oil
2008 – EMC Used Oil
2008 – Packaging Corporation of America (PCA)
2006 – Bethune Point Wastewater Plant Explosion
2006 – Partridge Raleigh Oilfield Explosion and Fire
2001 – Motiva Enterprises Sulfuric Acid Tank Explosion.[51]

Additionally, the CSB has found that "[i]nadequate or poor emergency planning or response has been a recurring finding in the [CSB's] investigations."[52] There are 14 CSB investigations that have found deficiencies in a community's, facility's, or emergency responder's response to an incident at a chemical facility, and "information sharing between facilities, emergency responders and the community" is one of the key recommendations the CSB made to address this.[53]

CSB Investigations and Recommendations involving emergency response and planning:

2013 – West Fertilizer Explosion and Fire
2011 – Hoeganaes Corporation Fatal Flash Fires
2009 – CITGO Refinery Hydrofluoric Acid Release and Fire
2008 – Bayer CropScience Pesticide Waste Tank Explosion
2007 – Little Propane General Store
2006 – EQ Hazardous Waste Plant
2006 – Universal Form Clamp Co. Explosion and Fire
2004 – MFG Chemical Inc. Toxic Gas Release
2003 – Honeywell Chemical Incidents
2003 – DPC Enterprises Glendale Chlorine Release
2002 – Georgia-Pacific Corp. Hydrogen Sulfide Poisoning
2002 – DPC Enterprises Festus Chlorine Release
2002 – First Chemical Cops. Reactive Chemical Explosion
1998 – Herrig Brothers Farm Propane Tank Explosion.[54]

EPA's Rule includes common-sense measures that would address the kinds of problems that have caused death, injury, property damage, and other harms in communities for years. It is time for these protections to take effect. EPA cannot ignore the record evidence showing the need for protections the Rule contains, and it must not finalize the proposed delay of the Rule.

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[51] *Id.*

[52] CSB, Emergency Planning & Response, http://www.csb.gov/recommendations/emergency-response-/ (last updated Feb. 6, 2017).

[53] *Id.*

[54] *Id.*

II. EPA'S PROPOSED DELAY VIOLATES THE CLEAN AIR ACT

A. The Proposal Violates The Act's Time Limitation On A Delay For Reconsideration.

After a rule is finalized, the Clean Air Act includes a requirement that judicial review be limited to objections raised during the public comment period for a rule to ensure that there is a proper record for such review. 42 U.S.C. § 7607(d)(7)(B). Reconsideration of a Clean Air Act rule, which allows for a limited, three-month administrative delay of the rule, is a special procedure designed for certain narrow circumstances. In any other situations where EPA wants to revisit a rule, it must initiate a new rulemaking and follow all applicable legal and procedural requirements.

The reconsideration provision of the Act supplements the judicial review provision and applies to any "objection [that] is of central relevance to the outcome of the rule" where the test for reconsideration is met. *Id.* In particular, when "the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within" the public comment period "or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review)," reconsideration lets the Administrator take comment on those narrow issues without restarting the entire rulemaking process. *Id.* If the reconsideration test is met, then the Administrator "shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." *Id.*

The Act is clear that "[s]uch reconsideration shall not postpone the effectiveness of the rule." *Id.* The only exception to this prohibition is that: "[t]he effectiveness of the rule may be stayed during reconsideration, however, by the Administrator or the court for a period not to exceed three months." *Id.* (emphasis added).

The Clean Air Act is thus unambiguous that "reconsideration shall not postpone the effectiveness of the rule," and provides only one, clearly delineated exception to this prohibition, allowing such a delay for only "a period not to exceed three months." *Id.* That prohibition applies to both EPA and to the courts. *Id.* The D.C. Circuit has recognized this clear limit for any Clean Air Act reconsideration delay, finding that 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." *Lead Indus. Ass'n v. EPA*, 647 F.2d 1184, 1186 (D.C. Cir. 1980); *see also Natural Res. Def. Council v. Reilly*, 976 F.2d 36, 39, 41 (D.C. Cir. 1992).

As the Supreme Court has held repeatedly, "[w]here 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). EPA itself has acknowledged that a three-month stay for reconsideration is the sole exception to what is otherwise a bright-line rule. In the proposed rule, EPA admits this, just as it did in granting a three-month effective date delay earlier this year. 82 Fed. Reg. at 16,148; *see also* 82 Fed. Reg. at 13,969 ("The Administrator may stay the effective date of the rule for up to three months during such reconsideration."). EPA has similarly admitted this in prior litigation,

stating, for example, that "section 307(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." 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).[55]

Furthermore, the D.C. Circuit has ruled that EPA's general rulemaking authorities cannot be used to delay a rule beyond this three-month limit. *Reilly*, 976 F.2d at 40-41. In that rulemaking, EPA cited the Administrative Procedure Act and "the authority inherent to EPA's general rulemaking authority under Clean Air Act section 301(a), 42 U.S.C. 7601(a)" to delay the effective date of a final rule beyond three months using a rulemaking like the present one. 55 Fed. Reg. 38,057, 38,057 (Sept. 17, 1990). The court held unequivocally that "prior to the enactment of the 1990 Amendments, the EPA had no authority to stay the effectiveness of a promulgated standard except for the single, three-month period authorized by section 307(d)(7)(B)," and it found "the 1990 Amendments equally unambiguous" in this respect. *Reilly*, 976 F.2d at 41; *see also* 1 A Legislative History of the Clean Air Act Amendments of 1990, 731, 946 (Congress did not want "the filing of a petition for reconsideration" to "postpone the effectiveness of such rule or action."). In response to EPA's argument that its general rulemaking authority under § 7601 of the Clean Air Act allowed it to delay a rule beyond three months, the court refused to "allow[] the general grant of rulemaking power embodied in section 301 to trump the specific provisions of the Act." *Reilly*, 976 F.2d at 41.

Despite all of this, and flouting the Act's plain limit on its authority, EPA is proposing to delay the Chemical Disaster Rule for 20 months based on a pending reconsideration proceeding. 82 Fed. Reg. at 16,148 (citing § 7607(d)(7)(B)); *see also id.* at 13,969 (relying on § 7607(d)(7)(B) to promulgate a three-month delay). The proposed delay for reconsideration is longer than the 3-month limit allowed and is therefore expressly foreclosed by the Clean Air Act.

B. EPA Has Provided No Valid Authority For The Proposed Rule.

EPA does not provide any valid authority for this proposed delay. EPA cites Clean Air Act § 7607(d), and claims that its proposed delay "is consistent with [EPA's] rulemaking authority under [Clean Air Act §] 307(d), which generally allows the EPA to set effective dates as appropriate unless other provisions of the [Clean Air Act] control." 82 Fed. Reg. at 16,148. But, as discussed above, the 3-month limit on a reconsideration-based delay, provided in that very provision, *i.e.*, 42 U.S.C. § 7607(d)(7)(B), controls here. The agency's proposal even admits that "the Administrator's authority to administratively stay the effectiveness of a Clean Air Act rule pending reconsideration is limited to three months." 82 Fed. Reg. at 16,148. EPA asserts, however, without any further explanation, that "[o]n occasion" it has "found three months to be insufficient to complete the necessary steps in the reconsideration process," and that it has "often" been the agency's practice in these situations "to also propose an additional extension of the stay of effectiveness through a rulemaking process." *Id.*

[55] *See also Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 22 (D.D.C. 2012) ("EPA concludes that … [s]ection 307(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.").

Even if an explicit time limit were not included in the very provision on which EPA attempts to rely here, EPA cites no rulemaking authority in § 7607(d) that might otherwise authorize the proposed delay. That provision does not grant any such authority. It simply lists a number of additional procedural requirements – intended to protect the public from arbitrary and capricious rules like this one – that are applicable to rulemakings conducted under the authority of enumerated provisions of the Clean Air Act. *See, e.g.*, 42 U.S.C. § 7607(d)(2) (requiring dockets); *id.* § 7607(d)(3) (requiring notice and publication; statement of basis and purpose); *id.* § 7607(d)(4) (availability of docket materials; types of materials to include); *id.* § 7607(d)(5) (comments); *id.* § 7607(d)(6) (statement of basis and purpose in final rule; explanation of changes; response to comments). None of these procedural requirements, several of which EPA flouts here, gives it rulemaking authority to amend the effective date of the Chemical Disaster Rule as it proposes.

Even if § 7607(d) provided any supplementary rulemaking authority, which it does not, the D.C. Circuit has held that general rulemaking authorities do not displace the express limitation in § 7607(d)(7)(B). *Reilly*, 936 F.2d at 41; *see also Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) ("EPA's authority to issue ancillary regulations is not open-ended, particularly when there is statutory language on point."). It is unclear what rulemaking authority EPA is referring to when it cites § 7607(d), but plainly this provision is no less general than the rulemaking authority under § 7601 that the court addressed in *Reilly*. EPA has no authority to create new exceptions to the clear statutory constraint on its power to delay a rule based on reconsideration that exists in § 7607(d)(7)(B). With no authority for this action, EPA's proposed delay is *ultra vires*.

C. Delaying The Chemical Disaster Rule Violates Section 7412(r) Of The Clean Air Act, The "Bhopal Provision."

Even if the Act might otherwise authorize a delay of the rule's effective date, which it does not, *see supra*, EPA would also have to satisfy § 7412(r)(7), and the proposed rule does not. EPA promulgated the Chemical Disaster Rule under this provision, and any amendments to the Rule must be consistent with the rule's statutory basis. 82 Fed. Reg. at 4600; 81 Fed. Reg. at 13,646 (citing 42 U.S.C. § 7412(r)(7)); Response to Comments at 17, EPA-HQ-OEM-2015-0725-0729 (explaining that the Rule relies on "all of paragraph (7) as authority," including subparagraphs (A) and (B)). EPA does not even address the required statutory factors, much less show how EPA's proposed effective date comports with the requirements of § 7412(r), and in particular, of § 7412(r)(7)(A) and (B).

The statutory provisions governing the Rule establish that prevention of accidental releases and minimization of consequences to public health and the environment are required statutory factors for EPA action affecting the Rule. For example, § 7412(r) directs as follows: "[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 of any substance listed pursuant to paragraph (3) or any other extremely hazardous substance." 42 U.S.C. § 7412(r)(1). Section 7412(r)(7)(A) provides the guiding objective as: "to prevent accidental releases of regulated substances." *Id.* § 7412(r)(7)(A). Similarly, § 7412(r)(7)(B) 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 proposed rule to delay the Chemical Disaster Rule's effective date does not even consider or address these factors, much less show, as required, how delaying the Rule's effective date could be consistent with these factors. In fact, delaying the Rule's effective date by 20 months would hinder the statute's objectives and runs contrary to each of these statutory factors. EPA's proposed amendment to the Chemical Disaster will weaken protections for nearly two years by putting on hold requirements that would help detect and prevent accidental releases or provide for responses to such releases by the owners and operators of covered facilities, and the steps facilities should start taking in the near term to ensure full compliance with those requirements.

Furthermore, EPA has not met the test for action under § 7412(r)(7)(A) or (B). EPA has not shown that a delay of 20 months provides to "the greatest extent practicable" for prevention, detection, and response. *Id.* § 7412(r)(7)(B). In fact, EPA already determined it was practicable to implement these regulations to a greater extent (*i.e.*, in a shorter time frame) than what is now proposed. *See, e.g.*, 82 Fed. Reg. at 4675-80 (discussing compliance dates). As discussed further below, EPA does not even acknowledge this change in position, much less explain or justify it, rendering the proposal arbitrary and capricious. *See, e.g.*, *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *USPS v. Postal Regulatory Comm'n*, 842 F.3d 1271, 1273-74 (D.C. Cir. 2016).

Additionally, the "emergency coordination and exercises provisions in" the Chemical Disaster Rule "modify existing provisions that provide for 'response to such release by the owners or operators of the sources of such releases' ([Clean Air Act] section 112(r)(7)(B)(i))." 82 Fed. Reg. at 4600. Specifically, § 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." 42 U.S.C. § 7412(r)(7)(B)(i). EPA does not show how its proposal for delay meets this requirement. Moreover, EPA already determined that its pre-existing regulations were failing to protect human health and the environment. *See, e.g.*, 82 Fed. Reg. at 4599 ("a number of ... incidents have demonstrated a significant risk to the safety of American workers and communities."). An amended Chemical Disaster Rule that delays the effective date of the Rule's protections for 20 months will fail to "protect human health and the environment" from the risks EPA identified, and thus contravenes the plain requirements of § 7412(r)(7)(B).

The Chemical Disaster Rule, and EPA's proposed delay of the Rule, amends regulations EPA promulgated subject to a statutory deadline that expired 24 years ago, in 1993. 82 Fed. Reg. at 4600 (citing § 7412(r)(7) generally, and § 7412(r)(7)(B) specifically); *see* 42 U.S.C. § 7412(r)(7)(B)(i) (providing statutory deadline for EPA's regulations). Having determined the prior regulations are insufficient, EPA must bring its amendments into effect as quickly as possible to fulfill Congress's directive to protect Americans from accidental releases. *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 (listing examples of disasters prior rule failed to prevent), 13,655-56 (same), 13,671 (same), 13,674-75 (same), 13,678 (same).

Furthermore and in addition, such regulations under this provision "shall be applicable to a stationary source 3 years after the date of promulgation." 42 U.S.C. § 7412(r)(7)(B)(i). Extending the effective date by 20 months will inevitably result in pushing some or all of the

compliance deadlines far beyond three years, and such delay would thus flout the Act's directive – and Congress's express intent – that such regulations become effective promptly. *See* 82 Fed. Reg. at 4678 tbl.6 (listing compliance dates).

Finally, the proposed rule also fails to meet the requirements for action pursuant to § 7412(r)(7)(A), which governs the Chemical Disaster Rule and this action. *Id.* at 4600; *see also* Response to Comments at 17 (explaining that the Rule relies on "all of paragraph (7) as authority," including subparagraph (A)). That provision requires that any such regulations "shall have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable." 42 U.S.C. § 7412(r)(7)(A); *see* 82 Fed. Reg. at 4600 (citing § 7412(r)(7) generally). EPA has failed to show how the proposed delay meets this statutory test. Indeed, it cannot do so. EPA has not provided any evidence showing that the proposed 20-month delay is "as expeditiously as practicable." And, having already found it practicable for the Chemical Disaster Rule's provisions to be brought into effect more quickly, EPA's proposed delay contradicts its prior findings on this requirement as well. *See* 82 Fed. Reg. at 4675-80 (discussing compliance dates). Here, too, EPA fails to acknowledge or explain its change of position, as discussed below.

III. EPA'S PROPOSED DELAY IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, IN EXCESS OF AUTHORITY, AND CONTRARY TO LAW.

To satisfy the Act's requirement for reasoned decisionmaking, EPA must provide a rational explanation of its proposal and must reconcile its proposal with the facts in the rulemaking record and meet the Act's test for rulemaking requirements. 42 U.S.C. § 7607(d)(9). As the Supreme Court has explained, "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars*, 136 S. Ct. at 2125. EPA has not done so here. Accordingly, even if EPA's proposal was not flatly precluded as discussed above, it would be arbitrary and unlawful for reasons further detailed below.

A. EPA Fails To Justify Its Change Of Position And Fails To Reconcile This Proposal With Its Own Rulemaking Record.

To change the effective date of the Chemical Disaster Rule, EPA must "provide a reasoned explanation for the change." *Encino Motorcars*, 136 S. Ct. at 2125; *see also Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (internal quotation marks 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. *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). For example, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television Stations*, 556 U.S. at 515-16).

A 20-month delay represents a significant change in agency policy regarding the importance of this rule, and is inconsistent with the agency's prior factual determinations. In promulgating the Chemical Disaster Rule, EPA 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. Considering its data, EPA also found that "revisions could further protect human health and the environment from chemical hazards through advancement of process safety management based on lessons learned." *Id.* at 4595. For example, EPA stated that "during facility inspections, EPA has often found that facilities either are not included in the community emergency plan or have not properly coordinated response actions with local authorities." 81 Fed. Reg. at 13,671. "EPA's findings" also "indicate[d] that many regulated sources have not provided for an adequate emergency response." 81 Fed. Reg. at 13,673. With the Chemical Disaster Rule, EPA revised its RMP framework to address these and other identified problems. *See also, e.g.*, 81 Fed. Reg. at 13,648, 13,655, 13,663, 13,675, 13,677-78. EPA's decision to delay the Chemical Disaster Rule by 20 months contradicts these and many other findings in the record, completely ignoring the dangers identified by the agency and the regulatory flaws this Rule was designed to fix. *See* 81 Fed. Reg. at 13,648-49 (listing examples of disasters prior rule failed to prevent), 13,655-56 (same), 13,671 (same), 13,674-75 (same), 13,678 (same).

Additionally, EPA's delay renders substantive parts of the final rule obsolete and may well necessitate changes to the text of the rule. *See, e.g.*, 82 Fed. Reg. at 4675-80. EPA cannot ignore these obvious consequences of its delay; rather, it intends to cause these consequences through delaying the effective date. For example, the calculations the agency made when assigning compliance dates will be significantly affected, and the agency admits in its new proposal that it "plans to amend the compliance dates as necessary when considering future regulatory action." 82 Fed. Reg. at 16,149 If it waits until the proposed delay has already occurred to reconsider the effective dates, it will be too late to give these changes the "reasoned" consideration the law requires. The changes, and the likely harm resulting from these changes, will already effectively be done. EPA must provide the requisite explanation for its change in position with respect to these compliance dates <u>now</u>, in addition to its change in position with respect to the need for the Chemical Disaster Rule's many protective updates. EPA may not silently modify substantive parts of the Rule through an effective date delay without justifying those changes as the Act requires.

Furthermore, a substantial delay like this one – where the agency has provided no basis other than its reconsideration process, and which, under EPA's conclusory logic could be repeated to cause an indefinite delay – serves as a constructive repeal of the Rule without following the Act's requirements. EPA has had protracted proceedings for reconsideration that have extended for years.[56] Suspending a rule pending a new notice and comment process, "is a

[56] *See, e.g.*, Respondent's Motion to Continue Holding Petitions in Abeyance at 1-2, American Petroleum Institute v. EPA, No. 12-1405 (D.C. Cir. Jan. 11, 2017); Response of Environmental Petitioners to EPA's Motion to Continue Abeyance and Extend Deadline to File Motions to Govern Further Proceedings at 1, Ass'n of Battery Recyclers v. EPA, No. 12-1373 (D.C. Cir. May 8, 2017).

paradigm of a revocation" and represents "a 180 degree reversal of [the agency's] 'former views as to the proper course.'" *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (quoting *State Farm*, 463 U.S. at 41)); *see also Natural Res. Def. Council v. EPA*, 683 F.2d 752, 763 n.23 ("[A]n indefinite postponement which is never terminated is tantamount to a revocation."); *Public Citizen v. HHS*, 671 F.2d 518, 520 (D.C. Cir. 1981) (Edwards, J., dissenting) ("Certainly a decision to suspend indefinitely regulations that are the product of exhaustive study and comprehensive rulemaking, in order to allow a wholesale reevaluation of a major regulatory program, cannot be viewed as a temporary measure for preserving the status quo."). EPA has not justified the protracted delay, which puts the Rule in limbo and represents a *de facto* repeal of the Rule, and cannot do so based on the strong record supporting it.

The 20-month delay of the entire Chemical Disaster Rule that EPA proposes contradicts the entire factual basis for that Rule. EPA identified a "significant risk to the safety of American workers and communities" in its final rule. 82 Fed. Reg. at 4599. Implementation of the Rule was intended to protect communities and workers, as well as first responders, from serious harm, as documented from over 1,500 harmful accidents in the analyzed 10-year period. RIA at 31 ex.3-8. EPA cannot pretend that its proposed delay is without effect or that it does not represent a significant change in the agency's position. Where EPA proposes to amend a final rule, it must adhere to the requirements of "reasoned decisionmaking." *State Farm*, 463 U.S. at 52. And when the proposed amendment represents a 180-degree reversal on key factual determinations, the agency must justify such a change clearly and compellingly, rather than ignoring those determinations and suggesting they can simply be brushed aside as if they had not been made at the final point of a notice-and-comment rulemaking. *See, e.g.*, *Encino Motorcars*, 136 S. Ct. at 2125-26; *USPS*, 842 F.3d at 1273-74; *Fox Television Stations*, 556 U.S. at 515-16.

B. EPA Fails To Identify A Valid or Reasonable Basis For Delaying The Chemical Disaster Rule.

EPA's proposed delay is also arbitrary and capricious because the reconsideration process the agency claims justifies this delay does not meet the statutory test for such a process or for EPA's use of its authority to extend a Rule's effective date pending reconsideration. This is one more in a series of unlawful delays EPA is seeking to implement since January as *de facto* rescissions of important health and environmental rules.[57] As described above, the Clean Air Act

[57] *See, e.g.*, OSHA, Memorandum re: Delay of Enforcement of the Crystalline Silica Standard for Construction under 29 CFR 1926.1153 (Apr. 6, 2017), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=31082 (delaying enforcement until Sept. 23, 2017); Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (delay pending judicial review); Pesticides; Certification of Pesticide Applicators Rule; Extension of Effective Date, 82 Fed. Reg. 22,294 (May 15, 2017) (delaying until May 22, 2018); National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program, 82 Fed. Reg. 22,879 (May 19, 2017) (indefinite delay).

includes a specific test for when EPA may initiate reconsideration proceedings. EPA never met that test here. The agency's desire to delay a Rule so that it may perform a reconsideration proceeding that does not fit the Clean Air Act criteria for such a process provides no justification for the agency's proposed delay, and EPA has not proposed any other justifications.

EPA and the petitioners for reconsideration failed to identify objections that either "arose after the period for public comment" or were "impracticable" to raise during this period. 42 U.S.C. § 7607(d)(7)(B). Most of the objections that were raised by petitioners were simply recycled from the comment period. The remainder address issues that cannot possibly be considered "of central relevance" to the Chemical Disaster Rule. *Id.* These petitions do not satisfy the requirements of § 7607(d) for reconsideration and cannot be used to delay the Chemical Disaster Rule.

EPA's letter granting reconsideration reflects the agency's inability to pinpoint any valid bases for reconsidering the final rule. While EPA's letter states opaquely the agency's determination "that at least some final rule provisions may have lacked notice and would benefit from additional comment and response," EPA fails to explain this conclusion or even to identify any particular provisions of the rule to which it refers. Response to RMP Coalition at 2. In fact, EPA's letter identifies only a single objection with particularity that it has determined meets the test in § 7607(d)(7)(B): the timing of the ATF finding that the fire that caused the West, Texas incident may have been intentionally set.[58] EPA alleges that the timing of this announcement "made it impracticable for many commenters to meaningfully address the significance of this finding in their comments on this multi-faceted rule." *Id.* at 1-2. EPA further asserts that "[p]rior to this finding, many parties had assumed that the cause of the incident was accidental," and that "the prominence of the incident in the policy decisions underlying the rule makes the [ATF] finding regarding the cause of the incident of central relevance to the Risk Management Program Amendments." *Id.* These statements have no basis in the record.

[58] ATF Announces $50,000 Reward in West, Texas Fatality Fire (May 11, 2016), https://www.atf.gov/news/pr/atf-announces-50000-reward-west-texas-fatality-fire. The ATF's announcement states that "[a]ll viable accidental and natural fire scenarios were hypothesized, tested, and eliminated." *Id.* It does not actually cite any affirmative evidence of arson, instead seeking information to try to find any "person or persons responsible." *Id.* In other words, the announcement meant that commenters on the proposed Chemical Disaster Rule went from having no information as to West's cause to still having no affirmative information as to West's cause other than ATF's belief that it had ruled out any explanation other than arson. It appears that ATF relied on a process of elimination called "negative corpus" to project a conclusion without evidence. Recent editions of the National Fire Protection Association ("NFPA") Guide for Fire and Explosion Investigation reject "negative corpus" as no longer permissible and a violation of scientific methods for determining ignition sources, however. NFPA 921 § 18.6.5 (2011 ed.); *see also* NFPA 921 § 19.6.5 (2014 ed.). Courts have also viewed "negative corpus" as "unreliable" in arson cases. *See, e.g., Russ v. Safeco Insurance*, No. 2:11CV195-KS-MTP, 2013 WL 1310501 *24-25 (S.D. Miss. 2013).

Nothing in the rulemaking record suggests that EPA tailored its "policy decisions underlying the rule" solely to address the event in West, Texas or its particular cause. As explained previously, the rule was based on a string of disasters and the West incident was the most recent, but otherwise was one among many terrible and fatal incidents that EPA evaluated. 81 Fed. Reg. at 13,644. EPA, in fact, gathered data on thousands of incidents, and the regulations it developed are based on this vast set of data and not on any single incident or set of incidents in isolation.

Based on the thousands of incidents EPA evaluated in the record, the Chemical Disaster Rule contains revisions to the pre-existing RMP program meant to better address the consequences of unanticipated chemical releases,[59] primarily by enhancing collaboration with local first responders and the public and improving risk management procedures, compliance auditing, and incident investigation procedures. EPA did not seek to address any particular cause, and specifically left it to facilities themselves to identify the causes of incidents and how to best address them. *See, e.g.*, 40 C.F.R. §§ 68.60, 68.81 (incident investigations). The rule does not contain prescriptive requirements meant to address only one single event or type of disaster.

Regardless, EPA's attempt to rest its proposed delay on a change regarding the potential cause of the West, Texas incident fails utterly because the findings of the ATF were announced during the comment period and received broad media attention. As a result, a number of parties did comment on these very findings during the rulemaking, and EPA itself was well aware of ATF's announcement while deciding what action to take. The findings were publicized two days before the end of the comment period, on May 13, 2016.[60] At least 8 separate groups included this announcement in their comments,[61] and EPA responded to these comments and found that "it would be inappropriate to suspend the rulemaking based on outcomes of the incident investigation of the West Fertilizer explosion." Response to Comments at 248–49. EPA cannot

[59] The Clean Air Act defines "accidental release" as "an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source." 42 U.S.C. § 7412(r)(2)(A).

[60] ATF, SFMO Announce Origin and Cause in West, Texas Fatality Fire (May 9, 2016), https://www.atf.gov/houston-field-division/pr/atf-sfmo-announce-origin-and-cause-west-texas-fatality-fire.

[61] *See, e.g.*, Comments of SOCMA at 3 (May 13, 2016), EPA-HQ-OEM-2015-0725-0555; Comments of the Fertilizer Inst. at 4 n.5 (May 13, 2016), EPA-HQ-OEM-2015-0725-0598; Comments of American Forest & Paper Association at 3 (May 13, 2016), EPA-HQ-OEM-2015-0725-0551; Comments of National Oilseed Processors Ass'n & Corn Refiners Ass'n at 2-3 (May 13, 2016), EPA-HQ-OEM-2015-0725-0550; Comments of Enter. Products at 2 (May 13, 2016), EPA-HQ-OEM-2015-0725-0492; Comments of C. DeMott at 1 (May 13, 2016), EPA-HQ-OEM-2015-0725-0590; Comments of the Chem. Indus. Council at 1 (May 13, 2016), EPA-HQ-OEM-2015-0725-0491; Comments of Chem. Safety Advisory Grp. at 4 (May 13, 2016), EPA-HQ-OEM-2015-0725-0594.

find that it was impracticable to raise this issue during the comment period when so many groups did just that.

EPA has not offered any legitimate reason to reconsider the Chemical Disaster Rule within the meaning of § 7607(d)(7)(B), or within the framework of the governing provisions, as described above. The proposed delay rule is as vague as EPA's letter and states only that the "Administrator determined that the criteria for reconsideration have been met for at least one of the objections" raised by petitioners. 82 Fed. Reg. at 16,148. Such conclusory and ill-founded allegations cannot be used as a pretext to delay by nearly two years important health and safety protections that are needed to implement the requirements of § 7412(r) and prevent the numerous disasters likely to occur as a result of the delay. EPA's reconsideration proceeding is invalid, does not meet the requirements of § 7607(d)(7)(B), and it is arbitrary and capricious to use this artificially created proceeding as the basis for delaying the Chemical Disaster Rule. It is especially unlawful and arbitrary to do so where EPA's own record establishes that an average of 225 accidents with the potential to trigger a chemical disaster like Bhopal can be expected during each year the Chemical Disaster Rule is delayed, and over 150 of these incidents can be expected to cause reportable harm themselves, including death or serious injury.

C. EPA Has Failed To Explain Why Its Reconsideration Of The Chemical Disaster Rule Warrants Such A Lengthy Delay.

Although EPA has no authority to delay a rule for more than 3 months based on reconsideration, even if it did, it would have to justify the proposed delay as a matter of reasoned decisionmaking. The agency fails to do so here. Engaging in reconsideration is not a reasoned basis for delay of the rule (even if it were lawful, which it is not, as discussed above).

The agency asserts it has "often" been the agency's practice to significantly delay a rule's effective date in situations where it finds three months "insufficient to complete the necessary steps." *Id.* at 16,148. But EPA cites no prior examples, nor explains how even if it has done this in the past this could justify its action here, without statutory authority or a rational basis that comports with the applicable Clean Air Act requirements. *See, e.g., New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("previous statutory violations cannot excuse the one now before the court"); *Judulang v. Holder*, 565 U.S. 42, 61 (2011) ("Arbitrary agency action becomes no less so by simple dint of repetition. ... And longstanding capriciousness receives no special exemption from the [Administrative Procedure Act]."). The one potential example Commenters found included no valid explanation of EPA's authority, nor could a prior example of action make an unlawful or arbitrary action here any less unlawful or arbitrary. EPA's proposed delay is *ultra vires*.

EPA's asserted rationales for its proposal to delay this rule are so generic they could arguably be applied to virtually <u>any</u> EPA rulemaking or reconsideration proceeding, illustrating further that the agency is acting outside of its authority in proposing to delay the Rule. Even if there are any past examples that might be lawful or relevant in some way, EPA fails to offer any explanation of why <u>this</u> rule merits this unusual treatment. Moreover, EPA appears to pick the duration it proposes – 20 months – out of a hat. No explanation for this number is provided, nor is any justification. *Judulang*, 565 U.S. at 61 (it is always arbitrary for an agency to choose an outcome by "flipping coins"). Even if EPA could extend beyond the statutory time limit of three

months for reconsideration, that language in the statute at least shows Congressional intent that rules not be delayed significantly as a result of reconsideration. Indeed, that three-month limit fits with the intent in § 7607 to expeditiously resolve the status of regulations, instead of leaving them in limbo for long periods. *Alabama Power Co. v. Costle*, 636 F.2d 323, 344 (D.C. Cir. 1979) ("The judicial review provisions as well as other features of the Clean Air Act Amendments set a tone for expedition of the administrative process that effectuates the congressional purpose to protect and enhance an invaluable national resource, our clean air."). Yet, EPA proposes to delay the Rule by more than 6 times as long as the § 7607(d)(7)(B) statutory timeframe.

When a "notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals." *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982). A proposal this vague denies interested parties a meaningful opportunity to comment on the proposed rule and thus violates the procedural requirements of the Clean Air Act, as well as being arbitrary and capricious.

D. Administrator Pruitt's Involvement In This Rulemaking Renders It Arbitrary, Capricious, An Abuse Of Discretion, And Unconstitutional.

Decision makers undermine the integrity of the agency rulemaking process and even "violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd*., 663 F.3d 476, 487 (D.C. Cir. 2011). In Administrator Pruitt's prior position as Oklahoma Attorney General, he articulated conclusions on some of the very factual and legal issues at issue in this rulemaking and the reconsideration proceeding. He also has ethical obligations to his former client, the State of Oklahoma, which has been at odds with EPA throughout this rulemaking. These factors prevent him from impartially considering the public interest in this matter. At minimum, his prior attacks on the Rule before it was finalized create an appearance that he lacks any semblance of impartiality in this matter; no one can trust that the process or outcome of this new rulemaking will be fair or objective in any way when the Administrator previously advocated for a specific policy position directly contrary to the Rule. *See* 5 C.F.R. § 2635.101(14) ("Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part."); 57 Fed. Reg. 35,006 (1992) ("Employees have long been required by the standards of conduct to avoid even an appearance of loss of impartiality.").

Administrator Pruitt worked on this rulemaking previously during his tenure as Attorney General of Oklahoma, himself signing comments opposing the Chemical Disaster Rule, which ultimately formed the basis for the reconsideration proceeding that, in turn, ostensibly justifies EPA's proposed rule delay. Comment submitted by Scott Pruitt, Office of Attorney General, State of Oklahoma et al., EPA-HQ-OEM-2015-0725-0624 (July 27, 2016).[62] His former client

[62] All three petitioners for reconsideration cited to these comments and referenced Administrator Pruitt's participation and position with respect to the rule. Pet. on behalf of the States of La., Ariz., Ark., Fla., Kans., Tex., Okla., S. C., Wis., W. Va., and Ky. at 1 (Apr. 3, 2017), EPA-HQ-

(the State of Oklahoma) filed one of the reconsideration petitions cited by the proposed rule that is part of the reconsideration proceeding EPA has convened. EPA-HQ-OEM-2015-0725-0762. Although filed after Administrator Pruitt took office, the arguments for reconsideration follow up on arguments he included in his prior comments. Administrator Pruitt's advocacy against this rule leaves no doubt as to his intention here to delay and ultimately rescind the Chemical Disaster Rule, without regard for the extensive rulemaking record his agency previously compiled.

Mr. Pruitt's participation in granting the reconsideration petitions and his participation in the current rulemaking are at odds with the commitment he made in his letter of January 3, 2017 to EPA's designated ethics official, in which he indicated that for one year after his resignation as Oklahoma Attorney General, he would not participate personally and substantially in particular matters involving specific parties in which he knows Oklahoma is a party, unless he first seeks authorization from the ethics officer under 5 C.F.R. §2635.502(d). To the extent Mr. Pruitt has not sought and received such authorization, he is precluded from participating in this rulemaking and any further reconsideration proceedings responsive to Oklahoma's petition. No such authorization is currently included in the rulemaking docket.

Furthermore, Administrator Pruitt remains ethically bound to protect the interests of his previous client, Oklahoma. The Oklahoma rules encompass a "principle of loyalty" to former clients. *See* Ok. R. Professional Conduct § 1.9 comment [4]. The Rules effectuate this principle, in Administrator Pruitt's case, by prohibiting a lawyer now working for the federal government from participating in a matter he previously worked on. Under the Oklahoma Rules of Professional Conduct, "a lawyer currently serving as a public officer or employee … shall not … participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing." *Id.* § 1.11(d). The official comments to those rules interpret this requirement as *also* applying when a lawyer "has been employed by one government agency and then moves to a second government agency, …. as when a lawyer is employed by a city and subsequently is employed by a federal agency." *Id.* comment [5]. While such a lawyer need not be broadly screened from the matter, as in a law firm, the lawyer still "shall not … participate" unless a waiver is obtained. To the extent Mr. Pruitt has not obtained a waiver from his former client, he is disqualified from participation in this rulemaking. Nor does it appear that he has taken any other measures to ensure an impartial decisionmaking process here. Instead, Administrator Pruitt moved directly from personally signing legal comments opposing the Chemical Disaster Rule to personally signing EPA's proposed delay of that Rule.

Most importantly, Administrator Pruitt's actions demonstrate his single-minded determination to continue acting in step with his former client, rather than following the prior determinations made by his new agency in regard to the Chemical Disaster Rule. Administrator

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OEM-2015-0725-0762; Pet. of Chemical Safety Advocacy Grp. at 7 (Mar. 13, 2017), EPA-HQ-OEM-2015-0725-0766; Pet. of RMP Coalition at 18 n.55 (Feb. 28, 2017), EPA-HQ-OEM-2015-0725-0764.

Pruitt's lack of impartiality prevents this proceeding from having any of the trappings of reasoned decisionmaking.

This renders the agency's proposed delay not only arbitrary and capricious, but an abuse of the Administrator's discretion not to recuse himself, and also an unconstitutional violation of the Due Process Clause for all members of the affected public who petitioned for updated chemical safety regulations, filed comments on the request for information or the proposed Chemical Disaster Rule, gave testimony at public hearings, or are relying on the final rule to protect their health and safety. Administrator Pruitt's participation taints the entire process of reconsideration of the Rule, the proposed rule delay, as well as any future action that EPA may take to delay or weaken the Rule. This concern is heightened where the Administrator so blatantly flouts the requirements of the Clean Air Act to achieve his objectives.

CONCLUSION

For these reasons, the above-listed Commenters respectfully request that EPA not finalize the unlawful and arbitrary proposed delay of the Chemical Disaster Rule's effective date. Doing so threatens the lives, livelihoods, safety, and peace of mind of millions of Americans at risk of a chemical disaster like the one that occurred in Bhopal, where health consequences continue to occur decades later. It would be irresponsible and a betrayal of the public trust for EPA to delay the common-sense protections of the Chemical Disaster Rule.

Sources cited are provided in an Appendix to these comments. Please contact us if EPA would like additional information.

Sincerely,

Gordon Sommers
Associate Attorney
gsommers@earthjustice.org
(202) 797-5257

Emma Cheuse
Staff Attorney
echeuse@earthjustice.org
(202) 745-5220

Earthjustice
Washington, D.C.

LIST OF APPENDIX DOCUMENTS

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