ORAL ARGUMENT SCHEDULED FOR MARCH 16, 2018

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

No. 17-1155
(and consolidated case No. 17-1181)

AIR ALLIANCE HOUSTON, *et al.*,
Petitioners,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

PETITION FOR REVIEW OF FINAL ADMINISTRATIVE ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FINAL OPENING BRIEF OF COMMUNITY PETITIONERS AIR ALLIANCE HOUSTON *ET AL.* AND PETITIONER-INTERVENOR UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION

DATED: January 31, 2018

Susan J. Eckert
Joseph M. Santarella Jr.
Santarella & Eckert, LLC
7050 Puma Trail
Littleton, CO 80125
Telephone: (303) 932-7610
susaneckert.sellc@comcast.net
jmsantarella.sellc@comcast.net

Gordon E. Sommers
Emma C. Cheuse
Earthjustice
1625 Massachusetts Ave., N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500
gsommers@earthjustice.org
echeuse@earthjustice.org

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

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

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, and Utah Physicians for a Healthy Environment (collectively, "Community Petitioners") and Petitioner-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service and Workers International Union, AFL-CIO/CLC ("Steelworkers") submit this certificate as to parties, rulings, and related cases.

(A) Parties and *Amici*

(i) Parties, Intervenors, and *Amici* Who Appeared in the District Court

This case involves petitions for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioners:

17-1155: Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo

Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, and Utah Physicians for a Healthy Environment.

17-1181: States of New York, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, and Washington ("State Petitioners).

Respondents:

Respondents in the above-captioned case are the United States Environmental Protection Agency and Scott Pruitt, in his official capacity as Administrator of the EPA (collectively "EPA").

Intervenors:

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service and Workers International Union, AFL-CIO/CLC ("Steelworkers") is an Intervenor in support of Petitioners in No. 17-1155.

The American Chemistry Council, American Petroleum Institute, American Fuel & Petrochemical Manufacturers, and Chamber of Commerce of the United States of America ("RMP Coalition") have been granted leave to intervene in support of Respondents in No. 17-1155.

The Chemical Safety Advocacy Group ("CSAG") has been granted leave to intervene in support of Respondents in No. 17-1155.

The States of Louisiana, Arizona, Arkansas, Florida, Kansas, the Commonwealth of Kentucky by and through Governor Bevin, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin ("State Intervenors") have been granted leave to intervene in support of Respondents in No. 17-1155.

(iii) *Amici* in This Case

Former regulatory officials Beth Rosenberg, David Michaels, and Jordan Barab; and the Institute for Policy Integrity at New York University School of Law have been granted leave to participate as amici.

(iv) Circuit Rule 26.1 Disclosures

See disclosure form filed with the Opening Brief.

(B) Rulings Under Review

Petitioners seek review of the final action taken by EPA at 82 FR 27,133 (June 14, 2017) and entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date," described herein as the "Delay Rule."

(C) Related Cases

Petitioners are aware of the following related cases pending before this Court:

17-1181 New York *et al.* v. EPA (State Petitioners' case, consolidated with this case).

In addition, the following set of cases has been consolidated as No. 17-1085:

17-1085 American Chemistry Council v. EPA

17-1087 Chemical Safety Advocacy Group v. EPA

17-1088 Utility Air Regulatory Group v. EPA

Those cases seek judicial review of EPA's final rule amending the Risk Management Program regulations, 82 FR 4594 (Jan. 13, 2017) ("Chemical Disaster Rule"). The action at issue in the above-captioned case, the Delay Rule, has postponed the effective date of the Chemical Disaster Rule until February 19, 2019. Petitioners Air Alliance Houston *et al.* and Petitioner-Intervenor Steelworkers in the above-captioned case have filed motions to intervene as respondent-intervenors in No. 17-1085 (and consolidated cases).

/s/ Gordon E. Sommers

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1) and D.C. Circuit Rules 26.1 and 28(a)(1)(A), Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, and Utah Physicians for a Healthy Environment (collectively, "Community Petitioners") and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("Steelworkers") make the following disclosures:

Air Alliance Houston

Non-Governmental Corporate Party to this Action: Air Alliance Houston.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Air Alliance Houston, a corporation organized and existing under the laws of the State of Texas, is a nonprofit organization working to reduce air pollution in the Houston region to protect

public health and environmental integrity through research, education, and advocacy.

California Communities Against Toxics

Non-Governmental Corporate Party to this Action: California Communities Against Toxics ("CCAT").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: California Communities Against Toxics is a non-profit organization that is a project of a non-profit corporation (Del Amo Action Committee) that is organized and existing under the laws of the State of California. It is an environmental justice network that aims to reduce exposure to pollution, to expand knowledge about the effects of toxic chemicals on human health and the environment, and to protect the most vulnerable people from harm.

Clean Air Council

Non-Governmental Corporate Party to this Action: Clean Air Council ("CAC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CAC is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. CAC is a not-for-profit organization focused on protection of public health and the environment.

Coalition For A Safe Environment

Non-Governmental Party to this Action: Coalition For A Safe Environment ("CFASE").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CFASE is a not-for-profit organization based in Wilmington, California dedicated to improving the environment, public health, public safety, and socio-economic justice through advocacy, community organizing, research, and public education.

Community In-Power & Development Association

Non-Governmental Party to this Action: Community In-Power & Development Association ("CIDA").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CIDA is a nonprofit organization that empowers and assists residents of the low-income Port Arthur, Texas communities to promote and advocate for socially responsible industrial operations and the reduction of pollution, including toxic air releases.

Del Amo Action Committee

Non-Governmental Party to this Action: Del Amo Action Committee.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Del Amo Action Committee is a not-for-profit organization based in Torrance, California whose mission is to develop and support policy changes and promote environmental justice to create a healthy and safe community.

Environmental Integrity Project

Non-Governmental Corporate Party to this Action: Environmental Integrity Project ("EIP").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: EIP, a corporation organized and existing under the laws of the District of Columbia, is a national nonprofit organization that advocates for more effective enforcement of environmental laws.

Louisiana Bucket Brigade

Non-Governmental Party to this Action: Louisiana Bucket Brigade ("LABB").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: The Louisiana Bucket Brigade is a non-profit environmental health and justice organization organized and existing under the

laws of the state of Louisiana. LABB works with communities that neighbor Louisiana's oil refineries and chemical plants and uses grassroots action to create an informed, healthy society with a culture that holds the petrochemical industry and government accountable for the true costs of pollution to create a healthy, prosperous, pollution-free, and just state where people and the environment are valued over profit.

Ohio Valley Environmental Coalition

Non-Governmental Corporate Party to this Action: Ohio Valley Environmental Coalition ("OVEC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: OVEC, a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in West Virginia, is a nonprofit organization dedicated to the improvement and preservation of the environment.

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Texas Environmental Justice Advocacy Services

Non-Governmental Party to this Action: Texas Environmental Justice Advocacy Services ("TEJAS").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: TEJAS is a non-profit corporation organized and existing under the laws of the state of Texas. TEJAS promotes environmental protection through education, policy development, community awareness, and legal action to ensure that everyone, regardless of race or income, is entitled to live in a clean environment.

Union of Concerned Scientists

Non-Governmental Party to this Action: Union of Concerned Scientists.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: The Union of Concerned Scientists ("UCS") is a non-profit organization that puts rigorous, independent science to work to solve our planet's most pressing problems.

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

Non-Governmental Party to this Action: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("Steelworkers").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: The Steelworkers is a labor organization within the meaning of section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, and is an unincorporated association whose members have no ownership interests. The Steelworkers is the largest private-sector union in North America, representing 850,000 workers employed in metals, mining, rubber, paper and forestry, energy, chemicals transportation, health care, security, hotels, and municipal governments. Significantly, the Steelworkers represents the majority of organized workers in the petrochemical industry. Approximately 25,000 members work in 350 U.S. chemical plants. The Steelworkers-represented oil refineries account for almost two-thirds of U.S. production.

Utah Physicians for a Healthy Environment

Non-Governmental Party to this Action: Utah Physicians for a Healthy Environment ("UPHE").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Utah Physicians for a Healthy Environment is a not-for-profit civic organization of health care professionals, including physicians, biologists, toxicologists, engineers, air quality specialists and members of the public concerned about pollution. Utah Physicians for a Healthy Environment is dedicated to protecting the health and well-being of the citizens of Utah by promoting science-based education and interventions that result in progressive, measurable improvements to the environment.

/s/ Susan J. Eckert (by permission) */s/ Gordon E. Sommers*

TABLE OF CONTENTS

DECLARATIONS
STATUTES AND REGULATIONS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

** Authorities upon which we chiefly rely are marked with an asterisk.*

STATUTES

LEGISLATIVE HISTORY

REGULATIONS

FEDERAL REGISTER NOTICES

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Accident Data	RMP Facility Accident Data, 2004-2013 (Feb. 2016) (EPA-HQ-OEM-2015-0725-0002), JA0321
Act	Clean Air Act
Bureau	Bureau of Alcohol, Tobacco, Firearms, and Explosives
Chemical Disaster Rule	Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Final Rule, 82 FR 4594 (Jan. 13, 2017), JA0093
Community Petitioners	Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, and Utah Physicians for a Healthy Environment
CSAG	Respondent-Intervenor Chemical Safety Advocacy Group
CSB	U.S. Chemical Safety Board
Decl.	Declaration
Delay Rule	Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, Final Rule, 82 FR 27,133 (June 14, 2017), JA0005
EPA	Respondents U.S. Environmental Protection Agency and Scott Pruitt, Administrator
FR	Federal Register
JA	Joint Appendix
RMP	Risk Management Program

RMP Coalition	Respondent-Intervenors American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Chamber of Commerce of the United States
RIA	EPA, Regulatory Impact Analysis, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7) (Dec. 16, 2016) (accompanying Chemical Disaster Rule), EPA-HQ-OEM-2015-0725-0734, JA1100
RTC-1	EPA, Response to Comments on Chemical Disaster Rule (Dec. 19, 2016), EPA-HQ-OEM-2015-0725-0729, JA0841
RTC-2	EPA, Response to Comments on Delay Rule (June 8, 2017), EPA-HQ-OEM-2015-0725-0881, JA1636
State Intervenors	Respondent-Intervenors Louisiana, Arizona, Arkansas, Florida, Kansas, Kentucky, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin
State Petitioners	New York, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, and Washington
Steelworkers or USW	Petitioner-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review final action taken by Respondents U.S. Environmental Protection Agency and Administrator Scott Pruitt ("EPA"), 82 FR 27,133 (June 14, 2017), JA0005, entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of the Effective Date" ("Delay Rule"). 42 U.S.C § 7607(b)(1). That action postponed the effective date of the Clean Air Act § 7412(r)(7) rule promulgated at 82 FR 4594 (Jan. 13, 2017), JA0093, entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act" ("Chemical Disaster Rule").

On June 15, 2017, Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, and Utah Physicians for a Healthy Environment ("Community Petitioners") filed a timely petition for review of the Delay Rule, which was consolidated with the petition filed by New York *et al*. ("State Petitioners"). DN1679956. On June 27, 2017, this Court granted the motion of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service

Workers International Union, AFL-CIO/CLC ("Steelworkers") to intervene as petitioner. DN1681504. On August 30, 2017, this Court denied Petitioners' request for a stay or summary vacatur, but granted expedited review. DN1690788.

STATUTES AND REGULATIONS

See Addendum.

STATEMENT OF ISSUES

1. Whether EPA's postponement of a final rule for twenty months based on reconsideration is *ultra vires* and not in accordance with law because it violates the Clean Air Act's directive that "reconsideration shall not postpone the effectiveness" of a final rule for longer than three months, 42 U.S.C. § 7607(d)(7)(B).
2. Whether EPA's delay of the Chemical Disaster Rule's effective date is unlawful because it contravenes the constraints on EPA's regulatory authority for chemical accident prevention in § 7412(r)(7), by both violating the Act's plain requirement that EPA must set an "effective date … assuring compliance as expeditiously as practicable" for such regulations, and contradicting the statutory objectives for such regulations.
3. Whether the Delay Rule is arbitrary and capricious, or unlawful because:
    a. EPA has failed to provide a reasoned explanation for the extraordinary twenty-month delay, much less to provide the more detailed justification

required to disregard its own findings of the need for the Chemical Disaster Rule to prevent and reduce chemical accidents and resulting death, injury, and other harm to workers, first responders, and neighboring community members.

b. EPA suspends wholesale a final rule, expected to save lives, based on speculation, objections EPA previously considered and rejected, and the possibility that EPA might eventually change it, rather than any reasoned conclusion that the final rule is not good policy.

STATEMENT OF THE CASE

I. INTRODUCTION

Chemical disasters kill or injure people in the United States nearly every week due to inadequate prevention and safety measures. This case challenges EPA's abrupt delay of the final rule the agency issued after years of study and public input to prevent and reduce harm from such accidents at 12,500 chemical facilities nationwide.

Just as communities and workers were about to receive this vital new relief, EPA reversed course and postponed the effectiveness of the safety updates. EPA made clear that no facility needs to comply, or even take steps to prepare to comply, with the Chemical Disaster Rule for twenty months, *i.e.*, before February 19, 2019. EPA issued the delay not based on any merits conclusion and not because it found that rule is a bad policy, but because EPA had begun reconsideration and *might* eventually change the rule. EPA's action violates the plain language of the Clean Air Act and its requirements for reasoned decision making. Community Petitioners and Steelworkers seek an order to vacate EPA's unlawful delay so chemical disaster prevention measures take full effect to save lives and prevent injury, and to bring EPA back within the bounds of its authority.

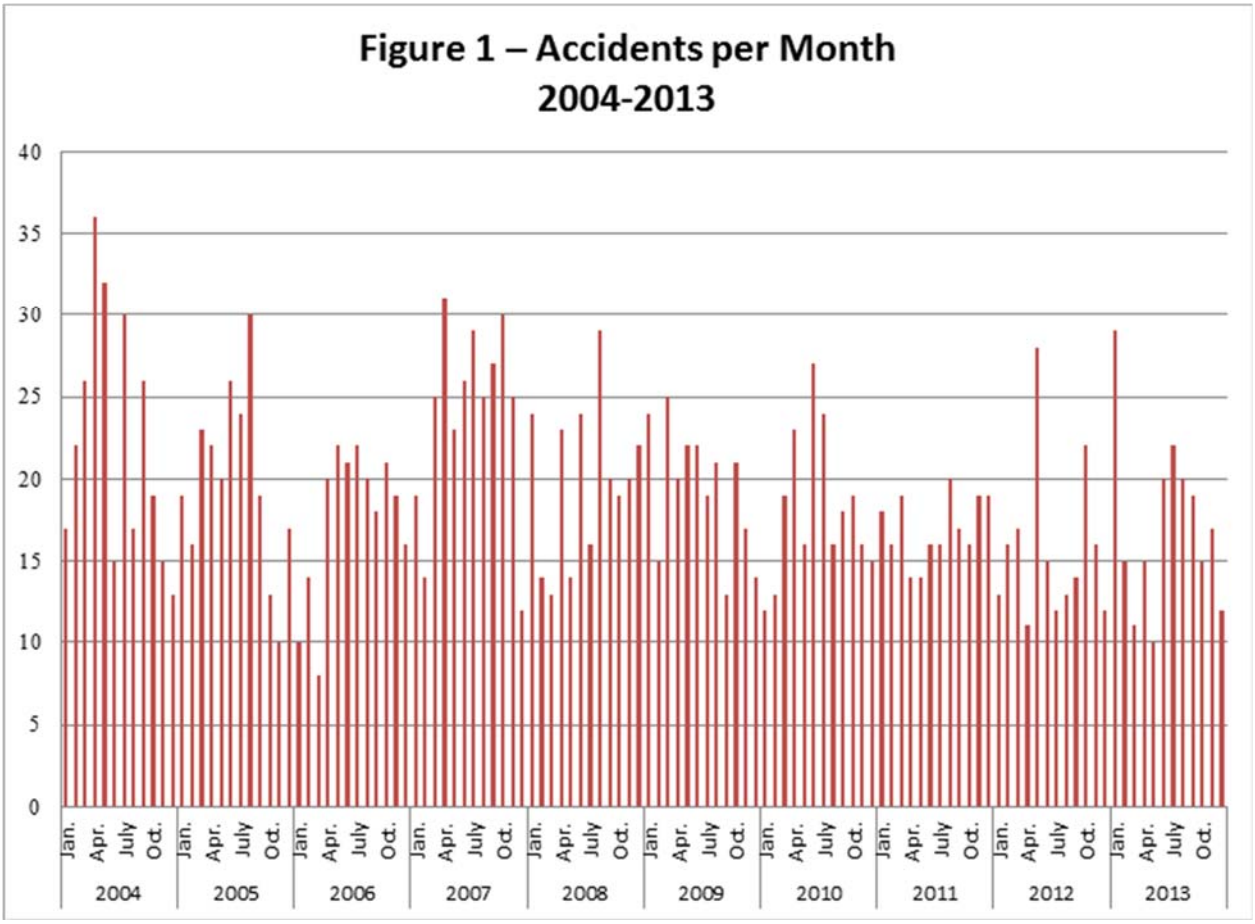
II. FACTUAL BACKGROUND

EPA data from 2004 to 2013 show that chemical accidents happen like clockwork, on average every other day. RMP Facility Accident Data, 2004-2013

(Feb. 2016), EPA-HQ-OEM-2015-0725-0002 ("Accident Data"), JA0321; 82 FR 4594, 4683, JA0093, JA0182. There were on average 200 reported incidents every year, 2,291 total during this timeframe. JA0321, JA1179. These accidents killed 59 people, and caused injuries, hospitalizations, or medical treatment for over 17,000 people, as well as exposure to toxic chemicals, smoke and related health threats. Regulatory Impact Analysis ("RIA"), EPA-HQ-OEM-2015-0725-0734, 87 ex.6-5, JA1186. Over 450,000 people experienced evacuations or shelter-in place orders due to chemical accidents, causing serious daily life disruption and other harm during the studied timeframe. RIA 83, JA1182; Petrs' 2017 Comments, EPA-HQ-OEM-2015-0725-0861, 12-14, JA1505-07. No one-month period passed without at least 8 accidents. *See infra* Fig.1 (summarizing Accident Data).

A staggering 177 million Americans live in the "worst-case scenario zones" for chemical disasters at facilities like oil refineries, chemical manufacturers, and other facilities that use, store and manage hazardous chemicals. RIA 94, JA1193. One in three schoolchildren go to school in vulnerable areas near such facilities. EPA-HQ-OEM-2015-0725-0172, 35 n.64, 41, JA0526, JA0532 (JA1531). A person – most often a worker, first responder, or local community resident – is injured by a chemical accident every 4 days on average. Accident Data, JA0321; *see also, e.g.*, RIA 9-10, 124-25, JA1108-09, 1223-24; 82 FR 4597, JA0096; RIA 87 ex.6-5, JA1186. Communities with oil refineries or chemical manufacturers

face the highest regular threats. *See, e.g.*, 82 FR 4631-32, 4683, JA0130-31, JA0182. Since EPA's record closed, dangerous accidents continue to happen around the United States. *See, e.g.*, Carman Decl. ¶ 16; Kothari Decl. ¶ 14 & Attach.; Petr's 2017 Comments 14-18 & n.17 (attachment), EPA-HQ-OEM-2015-0725-0861, JA1507-11.[1]



[1] *See also* U.S. Chemical Safety Board, http://www.csb.gov/ ("Chemical Accidents in the News").

III. STATUTORY BACKGROUND

Section 112(r) of the Clean Air Act, 42 U.S.C. § 7412(r), entitled "Prevention of Accidental Releases," directs EPA to regulate facilities that use or store extremely dangerous chemical substances to prevent explosions, fires, plumes of poisonous gases, and other "accidental releases" that can cause catastrophic harm to human health and the environment. *Id.* § 7412(r).

Congress enacted § 7412(r) as part of the 1990 Clean Air Act Amendments "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." 81 FR 13,638, 13,645 (Mar. 14, 2016), JA0018, JA0025. Congress aimed to prevent the type of "catastrophic failure" and "tragedy, of unimaginable dimension" that occurred when a chemical facility released a cloud of methyl isocyanate into Bhopal, India in 1984, killing and injuring thousands of people. S. Rep. No. 101-228, at 134 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3519, JA1684 (also citing accidental release at Union Carbide in West Virginia that sent hundreds of workers and residents to seek medical care). As the Conference Report states, "[t]he 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. S16,985, S16,926-27 (Oct. 27, 1990), 1990 WL 164490, JA1727; *see also* S. Rep. No. 101-

228, at 143, 1990 U.S.C.C.A.N. 3528, JA1688 ("Sudden, catastrophic events that result in the release of extremely hazardous substances are a significant (and perhaps, increasing) threat to public health and safety in the United States.").

Section 7412(r) establishes that "[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). Accidental release means "an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source." *Id.* § 7412(r)(2)(A).

This provision lists certain substances and directs EPA to add 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); *id.* § 7412(r)(5) (describing regulation of chemicals by threshold quantity); *see* 40 C.F.R. § 68.130 (current list, including, *e.g.*, methyl isocyanate, chlorine, anhydrous ammonia, hydrogen fluoride, hydrogen cyanide, hydrogen sulfide).

The Act requires EPA to promulgate regulations that provide, "to the greatest extent practicable, for the prevention and detection of accidental releases … and for response to such releases" and assure compliance within three years. 42

U.S.C. § 7412(r)(7)(B). Section 7412(r) also authorizes and directs EPA to set regulatory requirements to prevent, detect, correct, and respond to accidental releases of hazardous substances and avoid and reduce harm to public health and the environment. *Id.* § 7412(r)(7)(A). Such regulations must have an effective date "assuring compliance as expeditiously as practicable." *Id.* The Act also creates an independent U.S. Chemical Safety Board ("CSB") and directs EPA to respond to its regulatory recommendations within 180 days. *Id.* § 7412(r)(6)(I).

IV. REGULATORY BACKGROUND

A. Chemical Disaster Rule

EPA first promulgated regulations in 1996 to establish its Risk Management Program pursuant to § 7412(r)(7). 61 FR 31,668 (June 20, 1996), JA0560. This program regulates facilities that use, store, and manage highly hazardous chemicals capable of causing death, injury, or other serious adverse effects upon release. 82 FR 4596 tbl.1, JA0095.

As serious accidents continued to happen frequently, some with catastrophic impacts, under that program in 2012 workers and nonprofit community, environmental, and health and safety groups petitioned EPA for action to prevent chemical disasters. EPA-HQ-OEM-2015-0725-0249, JA0640. In the meantime, a series of extreme fires and explosions around the United States brought renewed public attention to the need for stronger chemical accident prevention. Testimony

of Rafael Moure-Eraso, Chairperson, CSB (June 27, 2013), EPA-HQ-OEM-2015-0725-0272, JA0722 (discussing fatal April 2013 West, TX fertilizer plant explosion and June 2013 Olefins plant fire in Geismar, LA); CSB Final Investigation Report-Chevron Richmond Refinery Pipe Rupture and Fire, Aug. 6, 2012, JA1567 (att. - EPA-HQ-OEM-2015-0725-0861); *see also* Pres. Obama, Improving Chemical Facility Safety & Security, Exec. Order No. 13,650, 78 FR 48,029 (Aug. 7, 2013), JA0632.

In 2014, EPA requested information from the public on whether to update chemical facility safety regulations, ultimately evaluating data from over 100,000 submissions. 79 FR 44,604 (July 31, 2014), EPA-HQ-OEM-2014-0328-0001, JA0205 (as incorporated into this docket, EPA-HQ-OEM-2015-0725-0873, JA1635). The CSB submitted a 50-page letter containing recommendations to strengthen safety measures at chemical facilities. CSB Letter (Oct. 29, 2014), EPA-HQ-OEM-2014-0328-0689, JA0290.

In March 2016, based on that input and consultation with the CSB, Occupational Safety and Health Administration, Department of Homeland Security, and Bureau of Alcohol, Tobacco, Firearms, and Explosives ("Bureau"), EPA published proposed regulatory amendments whose purpose is "to improve safety." 81 FR 13,640, 13,646, JA0020, JA0026. The CSB, Steelworkers and Community Petitioners, fire fighters, and many additional nonprofit commenters

urged EPA to strengthen protections without delay. CSB, EPA-HQ-OEM-2015-0725-0428, JA0737; JA0849-59; JA0755; JA0767; RIA 125-26, JA1224-25 (discussing eight public hearings).

On December 21, 2016, EPA signed the Chemical Disaster Rule, amending the Risk Management Program. 82 FR 4594, 4696, JA0093, JA0195. As its rationale, EPA explained its conclusion that "major incidents" that continue to occur under that program demonstrate "the importance of reviewing and evaluating current practices and regulatory requirements, and applying lessons learned from other incident investigations to advance process safety." 82 FR 4600, JA0099; *see also* Accident Data, JA0321. EPA determined that the long, ongoing pattern of chemical disasters shows a "regulatory need" to update its regulations. RIA 17, JA1116.

EPA found: "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." 82 FR 4599, JA0098. For example:

> On March 23, 2005, explosions at the BP Refinery in Texas City, Texas, killed 15 people and injured more than 170 people. On April 2, 2010, an explosion and fire at the Tesoro Refinery in Anacortes, Washington, killed seven people. On August 6, 2012, at the Chevron Refinery in Richmond, California, a fire involving flammable fluids endangered 19 Chevron employees and created a large plume of highly hazardous chemicals that traveled across the Richmond, California, area. Nearly 15,000 residents sought medical treatment due to the

> release. On June 13, 2013, a fire and explosion at Williams Olefins in Geismar, Louisiana, killed two people and injured many more.

Id. (footnotes omitted), JA0098; 81 FR 13,644, JA0024; Response to Comments 248 (Dec. 19, 2016), EPA-HQ-OEM-2015-0725-0729 ("RTC-1"), JA1093. EPA found: "[L]ooking across the United States and universe of regulated facilities, these accidents occur with sufficient frequency to warrant regulation." RIA 16-17, JA1115-16.

EPA issued the Chemical Disaster Rule pursuant to its § 7412(r)(7) authority to reduce "the frequency and magnitude" of chemical accidents and the deaths, injuries, and other severe harm they cause and to provide benefits including "prevention of major catastrophes." 82 FR 4597-98 tbl.4, 4600, 4683-84, JA0096-97, JA0099, JA0182-83 (listing as benefits: reduced fatalities, reduced injuries, reduced property damage, fewer people sheltered in place, fewer evacuations, avoided lost productivity, avoided property value impacts, avoided environmental impacts, and avoided costs due to "accident prevention and mitigation"); RTC-1 at 17-18, JA0862-83; 81 FR 13,640-43, JA0020-23. EPA identified a number of shortcomings in the pre-existing regulatory framework, and promulgated the updates in the Chemical Disaster Rule to fix them. *See, e.g.*, 81 FR 13,648-49, 13,655-56, 13,663, 13,671-75, 13,677-78, JA0028-29, JA0035-36, JA0043, JA0051-0055, JA0057-58 (listing examples where prior regulations had failed to

prevent accidents or minimize their consequences). Through strengthening safety measures at regulated facilities and addressing and reducing "near miss" or nearly catastrophic releases, EPA also determined the rule would result in "accident prevention and mitigation" for releases of non-RMP chemicals at covered facilities. 82 FR 4598 tbl.4, JA0097; RIA 10-11, 74-76 & ex.6-1, JA1109-10, 1173-75.

1. Prevention

To end repetitive patterns of similar accidents, EPA expanded incident investigation requirements to cover any incident which "could reasonably have resulted in a catastrophic release" (*i.e.*, near misses), to include an underlying "root cause" analysis, required a team to be formed which includes personnel with knowledge of the particular process, set a 1-year report deadline, and required facilities to consider these results in its Process Hazard Analysis. 40 C.F.R. § 68.3; § 68.60(a), (c), (d), (d)(7); § 68.81(a), (d); § 68.50(a)(2); § 68.67(c)(2); *see also* 81 FR 13,646-54, JA0026-34 (explaining need).

EPA also expanded the compliance auditing requirements to ensure facilities audit and certify compliance for "each covered process." 40 C.F.R. § 68.58(a), 68.79(a). EPA also strengthened certain requirements, adding a third-party audit provision and adding recordkeeping requirements, to improve compliance and enforcement of the program. *Id.* §§ 68.58, 68.79, 68.200; 82 FR 4675, JA0174;

RTC-1 at 246, JA1091. EPA found this necessary because, despite prior self-auditing requirements, "[i]ncident investigations often reveal that these facilities have deficiencies in some prevention program requirements." 81 FR 13,654-62, JA0034-42 (providing examples and noting "CSB identified a lack of rigorous compliance audits as a contributing factor behind the March 23, 2005[,] explosion and fire at the BP Texas City Refinery").

EPA expanded safety training requirements to apply to all employees "involved" in operating a hazardous process, and to include supervisors. 40 C.F.R. § 68.54, § 68.71(d); 82 FR 4675, JA0174; RTC-1 at 214, JA1059 (training to include process engineers and maintenance technicians). EPA added a requirement to keep process safety information up to date. 40 C.F.R. § 68.65(a); 82 FR 4675, JA0174; 81 FR 13,686, JA0066 (explaining updates are needed to help facilities "to better comply" and because "necessary" for process hazard analysis).

For industry sectors with the highest accident rates – petroleum refineries, chemical manufacturers, and pulp and paper mills – the Chemical Disaster Rule requires facilities to evaluate "safer technology and alternative risk management measures applicable to eliminating or reducing risk from process hazards" that are practicable and determine whether to implement them. 40 C.F.R. § 68.67(c)(8); 82 FR 4632, JA0131. EPA found "there is a benefit in requiring that some facilities evaluate whether they can improve risk management of current hazards

through potential implementation of [inherently safer technologies] or risk management measures that are more robust and reliable." 81 FR 13,663-68, JA0043-48; *see also* 82 FR 4629, JA0128; RTC-1 at 132-33, JA0977-98 (describing National Academy of Sciences' finding after examining the 2008 BayerCropScience accident in West Virginia "that inherently safer process assessments can be valuable").

2. Emergency Response

The Chemical Disaster Rule adds requirements for covered facilities to coordinate annually with local first responders and emergency planning committees to strengthen preparation to protect communities in the event of releases and ensure first responders have information they deem "relevant" to protect public safety. 40 C.F.R. § 68.93. 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 FR 4596, JA0095; *see also* 81 FR 13,640-41, 13,671-80, JA0020-21, JA0051-60 (listing examples of poor coordination and finding "recent feedback … indicate that many regulated sources have not provided for an adequate emergency response"); *id.* 13,678, JA0058 (finding "[p]oor communication between facility personnel and first responders, as

well as poor communication between facility personnel and communities, has been shown to contribute to the severity of chemical accidents").

The Chemical Disaster Rule expanded emergency response program requirements to include core safety requirements for public notification and equipment testing, medical treatment and training, and to require annual updates based on lessons learned from incident investigations and emergency response coordination. 40 C.F.R. § 68.95. The Chemical Disaster Rule added requirements for a facility to implement regular table-top and field exercises, and annual public notification exercises to boost safety preparation for emergencies. 82 FR 4678-79, JA0177-78; 40 C.F.R. §§ 68.90(b)(5), 68.96; 82 FR 4595, JA0094; 81 FR 13,641, JA0021; RTC-1 at 163, JA1008.

3. Community Information Access

The Chemical Disaster Rule also requires facilities to provide chemical hazard, emergency response, and safety information to interested community members, and to hold a public meeting within 90 days of an accident. *See, e.g.*, 40 C.F.R. §§ 68.210(b), (e); 82 FR 4596, JA0095. 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 FR 13,680-82, JA0060-62; 82 FR 4668-70, JA0167-69.

4. Compliance Timeframe

EPA set an effective date of 60 days after promulgation – March 14, 2017 – and set compliance deadlines for each provision based on the time it found necessary for facilities to come into compliance once the rule was effective. *See* 82 FR 4594, JA0093; *id.* 4676-78 & tbl.6, JA0175-77 (setting compliance dates based on what EPA found practicable).

For certain requirements, *e.g.*, expanded training, process safety information, compliance audits for each covered process, investigations of near misses, and improved process hazard analysis and incident investigation and reporting requirements, the Chemical Disaster Rule would have assured immediate compliance upon effectiveness of the rule. 40 C.F.R. § 68.10(a)(4) (requiring compliance no later than "the effective date of the final rule that revises this part" for any revisions); *see, e.g.*, *id.* §§ 68.54, 68.71(d), 68.65(a), 68.60(a), (c), (d)(1)-(6), (8), (g), § 68.81(a), (d)(1)-(6), (8), § 68.50(a)(2), § 68.67(c)(2), § 68.58(a), § 68.79(a), § 68.200.

For the expanded emergency response coordination requirements, EPA found compliance was practicable within one year and set a deadline of March 14, 2018 for 40 C.F.R. § 68.93; *id.* § 68.10(b). EPA determined that more time was necessary to achieve full compliance with the remaining requirements, and so set a three-year deadline for developing an emergency response program in accordance

with § 68.95, and four-year deadlines for the third-party audit, root cause analysis, safer technology and alternatives analysis, and informational provisions. *Id.* § 68.10(c), (d)(1)-(5); 82 FR 4676-78 & tbl.6, JA0175-77 (also requiring updated Risk Management Plans within five years).

B. The Delay Rule's Postponement of the Chemical Disaster Rule

In spring 2017, EPA received petitions for administrative reconsideration from industry groups, including oil and gas, refining, chemical, and other companies, and some states. 82 FR 16,146, 16,148 (Apr. 3, 2017), JA0001, JA0003. These petitions raised objections EPA had previously considered and rejected, including the fact that the Bureau had released its West, Texas statement two days before the comment period closed for the Chemical Disaster Rule. *Cf.* RTC-1 at 247-48, JA1092-93.

Nevertheless, Administrator Pruitt convened a reconsideration proceeding pursuant to 42 U.S.C. § 7607(d)(7)(B) based on the determination that the Bureau's finding and other unspecified issues warranted another round of public comment. 82 FR 27,134, JA0006; Letter, EPA-HQ-OEM-2015-0725-0763, JA1260. EPA simultaneously delayed the effective date of the Chemical Disaster

Rule for a period of three months based on reconsideration, citing § 7607(d)(7)(B). 82 FR 13,968, 13,969 (Mar. 16, 2017), JA1258, JA1259.[2]

During the next three months, EPA proposed and finalized an additional twenty-month delay of the Chemical Disaster Rule, through February 19, 2019. EPA issued the additional delay to assure that "[c]ompliance with all of the [Chemical Disaster Rule's] provisions is not required" during reconsideration. 82 FR 27,142, JA0014; Response to Comments on Delay Rule 35-36 (June 8, 2017), EPA-HQ-OEM-2015-0725-0881 ("RTC-2"), JA1673-74. Although EPA said it was "not proposing any action on any compliance dates," 82 FR 16,149, JA0004, EPA conceded its delay would "impact" those dates "triggered prior to February 2019." 82 FR 27,137, JA0009. EPA made no new finding, nor explained any new policy, though EPA conceded the delay has an "effect" on all the requirements in the Chemical Disaster Rule. *Id.* 27,140, JA0012; *see also id.* 27,136, 27,139-40, 27,143-44 & n.23, JA0008, JA0011-12, JA0015-16; RTC-2 at 21, JA1659. EPA did not decide that any reconsideration petitioners' allegations regarding the Chemical Disaster Rule have merit, or that any substantive defect exists in the delayed rule. 82 FR 27,133, 27,135, 27,139-42, JA0005, JA0007, JA0011-14.

[2] That date had initially been extended by one week, citing the presidential transition. 82 FR 8499, 8499 (Jan. 26, 2017), JA1255.

The purpose of the Delay Rule is "to conduct a reconsideration on the issues identified in [EPA's] letter" and "to solicit comment on any other matter that will benefit from additional comment." 82 FR 27,136, JA0008. EPA delayed the rule because EPA might decide later to change it. 82 FR 27,140, JA0012. The length of the delay is an estimate of how long EPA will need to complete this reconsideration process, "consider other issues that may benefit from additional comment," and "take further regulatory action" that may or may not be required. *Id.* JA0012 (quoting 82 FR 16,148-49, JA0003-04); *see also* RTC-2 at 17-18, 28, JA1655-56, 1666. EPA therefore issued the Delay Rule to remove any need to "prepare to comply with, or … immediately comply with, rule provisions that *might* be changed during the subsequent reconsideration." 82 FR 27,139, JA0011 (emphasis added).

SUMMARY OF ARGUMENT

The Clean Air Act safeguards the finality of promulgated regulations by providing an intricate framework for judicial review. A central feature is the repeated direction that reconsideration may not postpone the effectiveness of a final rule. The Act contains one narrow exception. EPA may stay the effectiveness of a final rule for up to three months based on such reconsideration.

Flouting that clear limit on its authority, EPA has postponed the effective date of the Chemical Disaster Rule for twenty months, until February 2019,

seeking to delay this rule based on reconsideration for a longer period than the statute allows. Yet EPA has no more authority than the law delegates. However EPA labels its process, and whatever general provisions on which it attempts to rely, postponing the Chemical Disaster Rule due to reconsideration for longer than three months contravenes § 7607(d)(7)(B) of the Act. EPA may not use delay of an effective date as a shortcut to undo a rule promulgated under the Clean Air Act. EPA's authority to reconsider and revise a final rule does not encompass the authority to delay that rule for twenty months based on such reconsideration.

Even if § 7607(d)(7)(B) did not exist, EPA's new effective date independently violates § 7412(r)(7) because February 19, 2019, is not an "effective date ... assuring compliance as expeditiously as practicable." 42 U.S.C. § 7412(r)(7)(A). EPA's postponement of accident prevention and emergency response measures contradicts the statutory objectives applicable to § 7412(r)(7) regulations.

Finally, EPA's action is arbitrary and capricious because the ability to change policy does not include putting a final rule into purgatory based on the abstract possibility that agency policy *might* change. Speculation about how EPA might decide to change a rule in the future provides no foundation for changing it in advance. EPA has not justified disregarding its own fact-findings on the strong need for regulatory updates to save lives and prevent injury. EPA has failed to

provide relevant reasons based on the record for reversing its conclusion that the original effective date assured the most expeditious practicable compliance. In light of EPA's clear violations of the Clean Air Act and requirements for reasoned decision making, and the grave harm caused by postponing the Chemical Disaster Rule, this Court should vacate the Delay Rule.

STANDARD OF REVIEW

This Court reviews EPA's action to determine if it was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A), (C).

This Court rejects agency statutory interpretations that are contrary to the "unambiguously expressed intent of Congress," which "is the end of the matter," or "impermissible." *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984).

Agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

If EPA changes course, it "is obligated to supply a reasoned analysis for the change." *Id.* at 42. When EPA's "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must provide "a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

STANDING

Community Petitioners are local and national nonprofits, including fenceline community groups, whose members and constituents live and take care of their families in close proximity to refineries, pulp and paper mills, and other regulated chemical facilities. 81 FR 13,668, JA0048; *see Declarations*; *e.g.*, Kelley Decl. ¶¶ 2-4, 7-10; Marquez Decl. ¶¶ 2-3, 6-7; Medina Decl. ¶¶ 2-3; Moench Decl. ¶¶ 3, 10-12; Nelson Decl. ¶ 2; Nixon Decl. ¶¶ 1, 3; Parras, J. Decl. ¶¶ 2-3, 8-9; *see also, e.g.*, Carman Decl. ¶¶ 12, 15-16. The Steelworkers have over 850,000 members, including approximately 25,000 members in 350 chemical plants and the majority of organized workers in the petrochemical industry, including many who work in and live near RMP-covered facilities. Nibarger Decl. ¶¶ 2, 6; Lilienfeld Decl. ¶¶ 5-6 (nearly 10,000 members work at refineries throughout Texas, Oklahoma, Arkansas, and Louisiana).

Delaying the Chemical Disaster Rule's accident prevention, emergency response, and informational access protections causes Community Petitioners' and

Steelworkers' members serious harm and threats of the very kind the Chemical Disaster Rule was intended to prevent and reduce: injury, chemical and pollution exposure, economic and environmental harms, and death to workers and community residents at and near covered facilities. 82 FR 4598, JA0097; RIA 73-75, JA1172-74. The Delay Rule postpones all requirements with immediate or pre-2019 compliance deadlines until February 19, 2019, and delays "necessary" preparation to comply with all requirements. 82 FR 27,142, JA0014 ("[c]ompliance with all of the rule provisions is not required"); *id.* 27,139, JA0011 (rule intended to avoid "requiring [regulated] parties to prepare to comply with, or in some cases, immediately comply with" rule provisions); 82 FR 4676, JA0175.[3]

Members of Steelworkers and Community Petitioners have experienced and continue to experience chemical accidents, the threat of chemical exposure, and resulting harm first-hand, and have worked and regularly work to try to prevent or respond to such accidents within the workplace or their communities, and EPA's delay is prolonging and increasing their exposure and harm. *E.g.*, Kelley Decl. ¶¶ 3-6, 12-16; Lilienfeld Decl. ¶¶ 9-11, 14-22; Marquez Decl. ¶¶ 4-5, 8-17;

[3] Respondent-intervenors have highlighted that, absent the delay, they would be required "immediately to comply with certain aspects of the … Amendments," and to "begin implementing [its] requirements well before the deadlines." RMP Coal. Mot. 3, DN1682346; CSAG Opp. 14-15, 20, DN1683392; State Intvs. Opp. 8, DN1683406 (noting "significant effort" will be required "as an immediate matter … to ensure compliance upon the effective date").

Nibarger Decl. ¶¶ 1-3, 14-18, 28, 35, 56; Nixon Decl. ¶¶ 5-6, 11-12; Parras, J. Decl. ¶¶ 13-15. Steelworkers' members are often hurt "first and worst" during chemical disasters and face a substantial ongoing threat of death and injury due to EPA's delay. *E.g.*, Lilienfeld Decl. ¶¶ 3, 8-9; Nibarger Decl. ¶¶ 13-20; *see Action on Smoking & Health v. DOL*, 100 F.3d 991, 992 (D.C. Cir. 1996) (organization had standing to represent member exposed to workplace smoke). Community Petitioners' members' harm includes prolonged and increased exposure to toxic chemicals and a threat of death and serious injury, as well as harm to their recreational and aesthetic interests, and life disruption such as due to shelter-in-place orders. *E.g.*, Fontenot Decl. ¶¶ 4-8; 11-12; Franklin Decl. ¶¶ 5-9; Land Decl. ¶¶ 6-14; Kelley Decl. ¶¶ 13-16, 18-22, 33; Marquez Decl. ¶¶ 8-17, 20; Moench ¶¶ 14-15; Nixon Decl. ¶¶ 7-12, 15; Parras, B. Decl. ¶¶ 4-9; Parras, J. Decl. ¶¶ 12-15; Toohey Decl. ¶¶ 8-15; *see also* Carman Decl. ¶¶ 12-16. Individuals who "aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity" show concrete and particularized injury. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000); *see also NRDC v. EPA*, 489 F.3d 1364, 1371 (D.C. Cir. 2007) (finding standing where pollution threatened to diminish members' enjoyment of certain activities near covered sources).

EPA's Delay Rule increases these harms by delaying both immediate and impending requirements that would prevent and mitigate these accidents. Chemical accidents have occurred around the United States on average nearly every other day under existing regulations and continue to occur. *See, e.g.*, 82 FR 4631-32, 4683, JA0130-31, JA0182; Accident Data, JA0321; Carman Decl. ¶¶ 15-16; Kothari ¶ 14 (citing data). Steelworkers' and Community Petitioners' members work at or are exposed to releases from chemical facilities with the highest accident rates. *E.g.*, Carman Decl. ¶ 12; Fontenot Decl. ¶¶ 4-5; Franklin Decl. ¶¶ 4-6; Kelley Decl. ¶¶ 2, 12-17; Land Decl. ¶¶ 2-10; Lilienfeld Decl. ¶¶ 2, 6-8; Marquez Decl. ¶¶ 6-17; Medina Decl. ¶¶ 3, 5-6; Moench Decl. ¶¶ 5, 10-12; Nelson Decl. ¶ 2; Nixon Decl. ¶¶ 1, 8-12; Parras, B. Decl. ¶¶ 3-6; Parras, J. Decl. ¶¶ 8, 11-15; Toohey Decl. ¶¶ 8-13; Wright Decl. ¶¶ 2, 6-7, 11. Their members are, therefore, particularly likely to continue to experience further and increased harm because of EPA's delay. *See, e.g.*, *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (finding harm where evidence shows it has "occurred in the past and is likely to occur again").

Indeed, some of Steelworkers' and Community Petitioners' members have already experienced such harm as EPA has delayed protections this year, at facilities around the country, and particularly as chemical facilities in Texas experienced accidental releases connected to inadequate hurricane preparation.

See, e.g., Carman Decl. ¶ 16; Garcia Decl. ¶¶ 4-7; Kelley Decl. ¶¶ 32-34; Lilienfeld Decl. ¶¶ 12-20; Marquez Decl. ¶ 9; Nelson Decl. ¶ 10; Parras, B. Decl. ¶¶ 5-6; Parras, J. Decl. ¶ 15; Rolfes Decl. ¶ 18; Toohey Decl. ¶ 8. There is at least "a 'substantial probability' that local conditions will be adversely affected, and thus will harm members'" even more due to EPA's delay of protections. *See Sierra Club v. EPA*, 755 F.3d 968, 973-74 (D.C. Cir. 2014) (finding standing where members were near facilities likely to employ a hazardous gasification process that would release pollution into their environment); *see also, e.g.*, *Ctr. for Energy & Econ. Dev. v. EPA*, 398 F.3d 653, 658 (D.C. Cir. 2005) (holding an EPA "regulatory scheme is at least a substantial factor motivating [third parties]' actions and the Center alleges an injury … that is 'fairly traceable' to that scheme") (quotation omitted). In communities surrounded by refineries and chemical facilities, where accidents are repeatedly and frequently causing injury, "[p]rotections delayed are protections denied" to Steelworkers' and Community Petitioners' members. Moench Decl.¶ 30; *see also* Kelley Decl. ¶ 41; Lilienfeld Decl. ¶¶ 21-22; Nibarger Decl. ¶¶ 28-77; Nixon Decl. ¶ 28; Wright Decl. ¶¶ 22-51; *State v. BLM*, No. 17-cv-03804, 2017 WL 4416409 at *4, *8 (N.D. Cal. Oct. 4, 2017) (delaying post-effective compliance dates causes harm by removing "lead-up time to achieve compliance").

Steelworkers', Community Petitioners', and their members' access to information is also delayed and denied due to postponement of the informational provisions. *See, e.g.*, Carman Decl. ¶¶ 9-10, 21; Kelley Decl. ¶ 40; Nibarger Decl. ¶¶ 64-74; Nixon Decl. ¶ 24; Schaeffer Decl. ¶ 13; Kothari ¶ 16; *see, e.g.*, *FEC v. Akins*, 524 U.S. 11, 21 (1998); *see* 82 FR 4596, JA0095.

Because, as shown above, the harm from delaying the Chemical Disaster Rule is particularized and concrete, actual and imminent for Community Petitioners' and the Steelworkers' members, and as protecting their interests is germane to these organizations' purposes, and the individuals need not participate in this case to receive relief, these petitioners have associational standing. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Absent EPA's Delay Rule, the Chemical Disaster Rule would now be preventing and reducing the very harms Community Petitioners and Steelworkers are facing to their health, safety, recreational, economic, and aesthetic interests, and would thus be giving them health and safety benefits, as summarized *supra*. *See also*, *e.g.*, Nibarger Decl. ¶¶ 28-79; Wright Decl. ¶¶ 22-52. Therefore, they have standing to oppose the delay and seek reinstatement of those benefits to prevent and reduce their injuries from chemical accidents. *See, e.g.*, *Crossroads Grassroots Policy Strat. v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015) (regulatory beneficiary has standing to

protect rule's benefits). This Court may redress the loss of these protections and prevent and reduce their injuries by vacating the Delay Rule.

ARGUMENT

I. THE DELAY RULE CONTRAVENES THE CLEAN AIR ACT.

A. Section 7607(d)(7)(B) Prohibits Delay of a Final Rule Based on Reconsideration For Longer Than Three Months.

1. The Act Is Clear That Longer Delays Are Not Authorized.

EPA's authority to reconsider a final Clean Air Act rule does not allow EPA to delay it based on reconsideration. Rather, "it is 'axiomatic' that 'administrative agencies may act only pursuant to authority delegated to them by Congress.'" *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (citation omitted). Recognizing the importance of final rules being final unless and until duly changed, Congress authorized reconsideration-based delays in only one instance. Congress created a procedure for seeking reconsideration of rules, established factors for when EPA must convene reconsideration, and directed that "[t]he effectiveness of the rule may be stayed during such reconsideration … by the Administrator or the court for a period not to exceed three months." 42 U.S.C. § 7607(d)(7)(B).

Nowhere else does the Act grant EPA such power. Instead, the Act ensures finality of Clean Air Act rules by repeatedly prohibiting reconsideration from delaying a final rule. First, the Act broadly states:

> The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action *shall not* affect the finality of such rule or action for purposes of judicial review *nor extend the time* within which a petition for judicial review of such rule or action under this section may be filed, and *shall not postpone the effectiveness* of such rule or action.

Id. § 7607(b)(1) (emphasis added). Second, in the provision that governs reconsideration proceedings, the Act reiterates its broad prohibition on delay of a final rule based on reconsideration, stating: "Such reconsideration shall not postpone the effectiveness of the rule." *Id.* § 7607(d)(7)(B); 82 FR 13,968-69, JA1258-59 (citing § 7607(d)(7)(B)); 82 FR 27,135, JA0007 (same).

This Court has squarely held that § 7607(d)(7)(B) limits EPA's authority to postpone a rule based on reconsideration to only three months. *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) ("prior to … 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 "we find the 1990 Amendments equally unambiguous" (emphasis added)); *see also Lead Indus. Ass'n v. EPA*, 647 F.2d 1184, 1186 (D.C. Cir. 1980) ("Section 307(d)(7)(B) of the Act … states that even 'new information' reconsideration by EPA does not automatically postpone the effectiveness of the rule, and it limits any stay that may be issued by EPA or a court during such reconsideration to a period of no longer than three months.").

The Delay Rule is indisputably based on reconsideration petitions and a proceeding EPA convened pursuant to § 7607(d)(7)(B), the very provision that prohibits any further delay. 82 FR 13,969, JA1259; *see also* Letter, JA1260. EPA admitted it issued the Delay Rule because "EPA believe[s] that three months was insufficient to complete the necessary steps in the reconsideration process." 82 FR 27,135, JA0007. This Court should reject EPA's attempt to ignore clear legislative intent and this Court's precedent which bar what EPA has done here. Because the Act plainly limits EPA's authority to delay a final rule for reconsideration to three months, that is "the end of the matter." *See Chevron*, 467 U.S. at 842-43.

a. Notice-and-Comment Does Not Avoid the Limit on EPA's Delay Authority.

EPA attempts to justify its action by contending that the words of § 7607(d)(7)(B), although clear, do not apply. EPA contends that the phrase "shall not postpone" a final rule means merely that initiating a reconsideration proceeding does not alone postpone a final rule, but that EPA may do so through a number of different ways, including: its admittedly limited authority for a three-month stay in § 7607(d)(7)(B), or through "using a notice and comment procedure or any means other than [§ 7607(d)(7)(B)]." 82 FR 27,136, JA0008. But the Act does not say that, and the agency may not "substitut[e] EPA's desires for the plain text" of the Act." *New Jersey v. EPA*, 517 F.3d 574, 582-83 (D.C. Cir. 2008) (holding Clean

Air Act "limit[ed] EPA's discretion" to deregulate). The Act establishes a plain prohibition with only one exception: the § 7607(d)(7)(B) three-month allowance.

Furthermore, EPA's interpretation is at odds with the statutory scheme. *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). The Act repeats the broad directive against delay twice, to protect the finality of Clean Air Act rules whether EPA takes action or not. The statute thus makes clear that its prohibition applies *both* to the filing of a reconsideration petition and to EPA's action on, *i.e.*, the granting of, such a petition, and then provides authority for only a three-month delay. 42 U.S.C. § 7607(b)(1); *id.* § 7607(d)(7)(B). EPA's argument that "a notice and comment procedure" authorizes a delay longer than the limit in § 7607(d)(7)(B) has no basis in the text or this Court's precedent. 82 FR 27,136, JA0008.

This Court previously held that taking notice-and-comment does not cure EPA's violation of § 7607(d)(7)(B) or authorize delay of a Clean Air Act rule based on reconsideration for longer than three months. *Reilly*, 976 F.2d at 41 (vacating EPA stay of a Clean Air Act rule issued through notice-and-comment). Cases from other circuits upon which EPA relies did not hold otherwise and did not concern the Clean Air Act; they similarly determined that notice-and-comment

was a necessary (not sufficient) step. 82 FR 27,136, JA0008 (citing *NRDC v. Abraham*, 355 F.3d 179, 203 (2d Cir. 2004); *NRDC v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982)); *see also EDF v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983) (explaining that finding delay of a rule unlawful due to a notice-and-comment violation does not decide "the further question whether even with notice and an opportunity for comment, EPA could lawfully have postponed the effective date of the regulations").

b. The Limit on EPA's Authority to Delay Based on Reconsideration Applies However EPA Labels the Underlying Process.

EPA's alternative contention that it may delay a rule because it is considering changes not required by the Act also fails; the term "such reconsideration" in § 7607(d)(7)(B) does not mean its three-month limit applies only to mandatory reconsideration. 82 FR 27,136, JA0008. Even if it were correct, this argument would not help EPA because it has relied on § 7607(d)(7)(B) for the reconsideration proceeding on which it based the Delay Rule. 82 FR 27,135, JA0007.

Regardless, EPA cannot evade the Act's statutory limitation on reconsideration-based delay by tacking on the assertion that part of the underlying proceeding is not required by § 7607(d)(7)(B). 82 FR 27,140, JA0012 (citing 82 FR 16,148-49, JA0003-04). However EPA labels the underlying

reconsideration (mandatory, discretionary, or as a hybrid), the Act provides no authority for a delay beyond the three months allowed in § 7607(d)(7)(B). Thus, if EPA wishes to convene a type of reconsideration not contemplated by that provision, it still may not delay a final rule based on the fact of reconsideration. Beyond the narrow authority in § 7607(d)(7)(B), EPA has no authority for delays based on reconsideration at all. Where Congress provided one exception to a broad prohibition, "additional exceptions are not to be implied." *TRW v. Andrews*, 534 U.S. 19, 28 (2001); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("When the words of a statute are unambiguous, … 'judicial inquiry is complete.'") (citations omitted).

That EPA can revise its rules (assuming it follows applicable requirements to do so) does not authorize EPA to delay them *because it is considering revising them*. Not only did Congress not provide such authority, it specifically considered the question whether EPA may stay final rules pending reconsideration and limited any such authority to three months. The Act's plain restriction on delay would be null if EPA could evade it simply by labelling its justification for delay a proceeding to decide whether to revise a final rule based on "other issues." 82 FR 27,140, JA0012. EPA's interpretation would also have the backward result of limiting EPA more during situations where Congress decided a defect *required* reconsideration, and less if no such defect exists and EPA merely wishes to

reconsider a final rule. *But see id.* 27,138, JA0010 (stating EPA has not found "errors" in Chemical Disaster Rule).

c. Other Authorities Neither Authorize Delay Nor Supersede § 7607(d)(7)(B).

The "other" authorities on which EPA attempts to rely, *i.e.*, § 7607(d) and § 7412(r)(7), 82 FR 27,135, JA0007, do not supersede the plain limit on reconsideration-based delays in § 7607(d)(7)(B). First, their terms include no authority for EPA to delay a final rule based on reconsideration. § 7412(r)(7), 7607(d). Section 7607(d)(7)(B) is the only specific authority in the Act that "defines the relevant functions of EPA in [the] particular area" of an effective date postponement based on reconsideration. *API v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (holding EPA may not use general authority to override specific statutory constraint).

As this Court held in binding precedent, § 7607(d)(7)(B) does not allow a reconsideration-based delay of a § 7412 rule for longer than three months. *Reilly*, 976 F.2d at 40-41. A "grant of regulatory authority" to EPA does not supersede § 7607(d)(7)(B)'s specific limit on delay based on reconsideration. *Id.* *Reilly*'s logic applies to any general authority EPA tries to use to evade § 7607(d)(7)(B). The Court did not limit its holding to § 7412 standards at issue there, but "decline[d] to read [the] open-ended power" to extend EPA's authority past defined limits or "trump the specific provisions of the Act" into EPA's rulemaking

authority under § 7601. 976 F.2d at 40-41 (holding that § 7607(d)(7)(B) is "unambiguous"). This Court should similarly decline to read "such open-ended power" into other provisions, including § 7412(r), because "EPA's construction of the statute is condemned by the general rule that when a statute lists several specific exceptions to the general purpose, others should not be implied." *Id.* (citation omitted); *Nat'l Mining Ass'n v. Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997) ("*NMA*") (same).

EPA attempts to distinguish *Reilly* based on the lack of a statutory deadline for revised standards in § 7412(r)(7), but the statutory framework of § 7412(r)(7) does not differ significantly from "the 'highly circumscribed schedule' analyzed by the [*Reilly*] court." RTC-2 at 11, JA1649. Instead, like other § 7412 provisions, § 7412(r)(7) contains many "highly circumscribed" timing components showing an intention for EPA to act with urgency, not delay, when regulations are needed, as EPA originally found. *See, e.g.*, § 7412(r)(7)(A) (requiring an effective date "assuring compliance as expeditiously as practicable"); *id.* § 7412(r)(7)(B) (including multiple deadlines indicating urgency); *see also id.* § 7412(r)(6)(I) (requiring response to CSB recommendations); S. Rep. 101-228 at 3622, JA1712 (describing legislative intent for "timely regulatory response" by EPA to "high priority" problems and objective to "overcome … regulatory inertia"). Thus, even

if EPA's new effective date could otherwise satisfy § 7412(r)(7), which it cannot, as discussed *infra*, EPA cannot rely on § 7412(r)(7) to override § 7607(d)(7)(B).

EPA's reliance, in the alternative, on § 7607(d) also fails. That provision grants no independent rulemaking authority. It adds special rulemaking requirements for certain Clean Air Act actions. *Contrast* 42 U.S.C. § 7601(a) ("[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out [EPA's] functions under this chapter"), *with id.* § 7607(d) (setting requirements that apply to rulemakings issued under other, enumerated parts of the Act that actually grant authority).[4] EPA cites § 7607(d)(1)(C) as allegedly authorizing its "revision," but that language just states that the procedural requirements in § 7607(d) apply to the revision of certain types of standards. *Id.* § 7607(d)(1)(C) (stating applicability to § 7412(d) standards); RTC-2 at 11, JA1649 (citing § 7412(r)(7)(E) (treating § 7412(r) regulations as § 7412(d) standards for certain purposes)). That § 7607(d)'s requirements indisputably apply

[4] 91 Stat. 685 § 305(a) (Aug. 7, 1977), JA1735-39 (enacting new § 7607(d)); H.R. Rep. No. 294, 1977 U.S.C.C.A.N. 1077, 1105, JA1731 ("This section establishes comprehensive procedures for most informal rulemaking under the Clean Air Act, which would apply in lieu of the Administrative Procedure Act."); 42 U.S.C. § 7607(d)(1) (same); *see, e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 391 (D.C. Cir. 1981) ("[t]his court's scope of review is delimited by the special procedural provisions of [§ 7607(d)]").

to § 7412(r) regulations does not mean § 7607(d) gives EPA authority to revise or delay those rules (much less to do so in violation of § 7607(d)(7)(B)).

Finally, as EPA has no statutory authority for a reconsideration-based delay longer than three months, it also has no "inherent authority" for this delay. 82 FR 27,139 n.15, JA0011; RTC-2 at 14 n.5, JA1652. "Inherent authority to reconsider," if any, would be derivative from and ancillary to statutory authority, and thus could not supersede § 7607(d)(7)(B) for the same reasons no statutory authority does. *See, e.g.*, *La. Pub. Serv. Comm'n v. FC*C, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"); *see also Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984) (refusing to find extra-statutory "inherent or implicit authority" to reconsider).

Thus, no authority allows EPA to ignore § 7607(d)(7)(B) or to delay an effective date based on reconsideration for longer than three months. "[T]he power to issue regulations is not the power to issue *any* regulations." *NMA*, 105 F.3d at 694 (quotation omitted).

2. EPA's Attempt to Evade § 7607(d)(7)(B) Is Impermissible.

EPA's distortion of the Act, if it contained any ambiguity, would also be impermissible under *Chevron* step two "because it is unreasonable in light of the statute's text, history, structure, and context." *Loving v. IRS*, 742 F.3d 1013, 1022

(D.C. Cir. 2014). EPA may not reduce § 7607(d)(7)(B) to an illusory constraint that it can bypass with magic words. The purpose of § 7607(d), including § 7607(d)(7)(B), is to limit EPA's authority and facilitate effective judicial review through assuring finality and creating an agency record. *See supra* note 4 (citing legislative history). If EPA could evade § 7607(d)(7)(B)'s limit on reconsideration-based delay by saying it is conducting a "revision" instead of a "reconsideration," or by saying it will also "consider other issues," it would render this constraint a nullity.

Moreover, EPA's interpretation of the statute is unreasonable because it has no stopping point. EPA may not undo a final Clean Air Act rule by delaying it for years without going through the statutorily-mandated process to change its requirements or facing judicial review of its decision to abandon the rule. That is not only an impermissible reading of § 7607(d)(7)(B), it also clashes with the Act's carefully designed scheme and timeframe for judicial review of final agency action. *See* § 7607(b)(1) (summarized *supra*, and also providing 60-day deadline for petitions for judicial review); *see also Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (agency interpretation impermissible if it "frustrate[s] the policy that Congress sought to implement").

Further, a "regulation [relying on an 'unexplained inconsistency' in agency policy] is itself unlawful and receives no *Chevron* deference." *Encino Motorcars*

v. Navarro, 136 S. Ct. 2117, 2126 (2016) (quotation omitted). EPA has long recognized that a three-month stay for reconsideration is the sole exception to what is otherwise a bright-line rule. 82 FR 16,148, JA0003; 82 FR 13,968-69, JA1258-59; EPA Mem. in Opp. to Sierra Club's Mot. for Summ. J. at 11, *Sierra Club v. Jackson*, No. 1:11-cv-01278-PLF (D.D.C. Aug. 25, 2011), JA1634 ("[§ 7607](d)(7)(B) establishes the only process by which EPA or the D.C. Circuit could stay the effectiveness of emission standards based on pending reconsideration."); *see also Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 22 (D.D.C. 2012) ("EPA concludes that … [§ 7607](d)(7)(B) of the Clean Air Act establishes the only process by which the agency can stay the effectiveness of emission standards pending reconsideration.").

EPA has not acknowledged or explained this reversal of its prior position, and EPA's about-face therefore deserves no deference (even if there were ambiguity). EPA's own confusing evolution in this rulemaking, from the proposal to the final rule, about the meaning of § 7607(d) and what authority EPA is attempting to rely on for its sudden delay of the Chemical Disaster Rule further illustrates that EPA's interpretation is just a "convenient litigating position" and owed no deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); *compare* 82 FR 16,148, JA0003 (citing § 7607(d)), *with* 82 FR 27,135, 27,139 n.15, JA0007, JA0011 (citing § 7412(r)(7) and "inherent authority").

B. The Delay Rule Independently Violates § 7412(r)(7).

1. EPA's New Effective Date Does Not "Assure Compliance as Expeditiously as Practicable."

EPA's action is also unlawful because it does not satisfy the requirements of § 7412(r)(7). Contrary to EPA's argument that this provision gives the agency "broad authority to determine what factors are relevant to establishing effective dates," § 7412(r)(7)(A) constrains EPA's action by requiring EPA to set "an effective date … assuring compliance as expeditiously as practicable" with promulgated regulations. 42 U.S.C. § 7412(r)(7)(A); 82 FR 27,136, JA0008 (quoting § 7412(r)(7)(A)); RTC-2 at 9-10, JA1647-48 (same). That provision does not authorize EPA to set or reset effective dates for any reason it likes. Any such date must assure compliance with promulgated regulations as expeditiously as practicable.

The Delay Rule fails to meet this test, first, because it does not have the purpose or effect of "assuring compliance" with EPA's accident prevention regulations at all; it enables *non*-compliance. EPA promulgated the Delay Rule precisely to remove the immediate obligations to achieve in full or to start achieving compliance with the Chemical Disaster Rule for twenty months. 82 FR 27,139, JA0011; RTC-2 at 19-21, JA1657-59. The Delay Rule authorizes facilities to ignore all such pre-2019 deadlines, including for emergency response coordination. 82 FR 27,142, 27,144 n.23, JA0014, JA0016.

A § 7412(r)(7) effective date is intended to provide a short window of notice before facilities are required to comply or prepare to comply. *See* § 7412(r)(7)(E) (describing § 7412(r) effective dates). EPA set the Chemical Disaster Rule's effective date in conjunction with the rule's compliance dates to give "necessary" time to achieve full compliance. 82 FR 4676, JA0175. Comparing that with the Delay Rule, which does not even purport to consider how much time is needed to comply, but is calculated instead to prevent compliance during reconsideration, plainly illustrates the difference between selecting an effective date to assure compliance and its antithesis. *Compare* 82 FR 4676, 4678 tbl.6, JA0175, JA0177 *with* 82 FR 16,149, JA0004; 82 FR 27,133, 27,142, JA0005, JA0014. An effective date "is an essential part of any rule … without an effective date a rule would be a nullity because it would never require adherence." *NRDC*, 683 F.2d at 762; *see also BLM*, 2017 WL 4416409 at *7-8 (reversing delay of final compliance date when statute allowed only delay of effective date, which triggers compliance); *Becerra v. Interior*, No. 17–cv–02376–EDL, 2017 WL 3891678 at *9 (N.D. Cal., Aug. 30, 2017) (same).

EPA's new date also fails to satisfy the test to assure compliance "as expeditiously as practicable." 42 U.S.C. § 7412(r)(7)(A). EPA's arguments on compliance are completely unrelated to what is "practicable" for sources. EPA's delay is due to the agency's unidentified, new "policy preferences" and the mere

fact of reconsideration; it has nothing to do with what is "practicable" for *facilities* to implement. 82 FR 27,136, JA0008. The statute does not include or allow EPA to consider such factors in determining an effective date.

Moreover, EPA already weighed the factors relevant to facilities' planning for compliance when setting the compliance deadlines. 82 FR 4676, JA0175. In the Delay Rule, EPA claimed not to change those findings or take any action with respect to those deadlines. *See* 82 FR 27,142, JA0014; 82 FR 16,149, JA0004 (declining comment on compliance dates). EPA cannot claim the Delay Rule is rethinking "the difficulties of compliance planning" while simultaneously claiming it is not revisiting the compliance dates or the rationale underlying them. 82 FR 27,137, JA0009; *but see id.* 27,144 n.23, JA0016.

By contrast with EPA's final, record-based determinations in setting the Chemical Disaster Rule's effective and compliance dates, none of the alleged "security risks" or other hypotheticals that EPA cites is an actual finding. 82 FR 27,141, JA0013. Accordingly, they provide no basis for EPA to revise its conclusions regarding what effective date would assure compliance as expeditiously as practicable. *See id.*, JA0013 ("EPA has not concluded [the Chemical Disaster Rule] would increase such risks"); *see also* RTC-1 at 195-96, 199-200, 247-48, JA1040-41, 1044-45, 1092-93 (rejecting security risk allegations); *cf. Becerra*, 2017 WL 3891678 at *10 (DOI's "argument that recent

questions and complaints raised new issues justifying the postponement does not justify acting outside of statutory authority"). Even if such speculations were relevant factors within the statutory test, EPA would have to reach a reasoned determination to change the date based on actual findings.

EPA also cannot show any ambiguity to justify adding illogical factors; this provision by its plain terms is about action not delay. EPA contends that the word "practicable" gives it broad discretion regarding the effective date because § 7412(r)(7)(A) does not state a maximum length for an effective date. 82 FR 27,136, JA0008; RTC-2 at 9-10, JA1647-48. The exclusion of such a date, however, does not show a lack of legislative urgency for effectiveness and compliance. Rather, Congress acknowledged different time might be needed for different regulatory requirements. *See supra* pp. 36-37 (discussing indicia of urgency within § 7412(r)); *see also e.g.*, S. Rep. 101-228, at 3618, 3629, JA1709, JA1717 (explaining safety procedures "can be implemented … almost immediately"; changes "which involve capital investment or the development of specialized programs may require more time to implement").

2. EPA Failed to Satisfy the Substantive Statutory Factors in § 7412(r)(7).

EPA also fails to meet the statutory factors applicable to § 7412(r)(7) regulations. EPA does not acknowledge or show in any way that it even considered the objectives within this provision, *i.e.*, "to prevent accidental

releases," to "minimize … consequences," to "protect human health and the environment," and to "include procedures and measures for emergency response after an accidental release." *Id.* § 7412(r)(7)(A), (B); *id.* § 7412(r)(1). The Delay Rule includes no measures that advance much less accomplish these goals. Instead, it delays the measures in the Chemical Disaster Rule that aimed to fulfill these objectives and which EPA determined would do so. *See supra* pp. 9-18; 82 FR 27,139-40, JA0011-12; *id.* 27,144 & n.23, JA0016. By delaying the effective date, EPA has delayed compliance, deleted the "lead-up time to achieve compliance" that EPA found necessary, and thus delayed life-saving protections. *See, e.g.*, *BLM*, 2017 WL 4416409 at *7-8 (recognizing purpose of effective date is to trigger obligations leading to compliance). All the delay does is undermine the statutory objectives of § 7412(r) and undo EPA's prior determination of the time needed to assure compliance as expeditiously as practicable. 82 FR 4676, JA0175.

EPA acknowledges only the statutory factor of providing safety protections "to the greatest extent practicable," in § 7412(r)(7)(B), but states this provision does not prohibit "weighing the difficulties of compliance planning and other implementation issues." 82 FR 27,137, JA0009; RTC-2 at 12, 21, JA1650, 1659. Any such difficulties, however, stem only from "confusion" EPA itself has caused with reconsideration, not any compliance concerns relevant to facilities' actual

implementation of the safety requirements. 82 FR 27,139, JA0011. EPA may not delay protections that serve the statute's objectives by citing only its own reconsideration and factors subsidiary to that process, which are not relevant to the Act's objectives.

Moreover, that the pre-existing Risk Management Program remains in effect during the delay period does not show the Delay Rule satisfies § 7412(r)(7). 82 FR 27,136, JA0008. EPA already found, and the record shows, that those regulations are insufficiently protective, and there is a need for the Chemical Disaster Rule to protect workers' and communities' safety, and to reduce fatalities, injuries, life disruption, and other harm. 82 FR 4599-600, 4683, JA0098-99, JA0182; *see supra* pp. 4-6, 9-18 (summarizing accidents and failures in pre-existing framework).

II. THE DELAY RULE IS A CASE STUDY OF ARBITRARY AND CAPRICIOUS AGENCY ACTION.

A. EPA Has Failed to Justify Delaying A Rule That Would Save Lives.

By "postponing the effective date" of the Chemical Disaster Rule, "EPA reversed its course of action up to the postponement," and must provide the requisite reasoned explanation based on facts found in the record for that change. *NRDC*, 683 F.2d at 760; *see also State Farm*, 463 U.S. at 41-42. Because the Delay Rule "disregard[s]" EPA's own prior fact-findings and the robust record

"that underlay" the Chemical Disaster Rule, EPA must provide a "more detailed justification" to change course. *Fox*, 556 U.S. at 515-16. It has failed to do so.

EPA originally determined that the Chemical Disaster Rule would prevent and reduce "the frequency and magnitude" of chemical accidents which have killed people, have caused injury or illness to thousands, and have caused hundreds of thousands of people to shelter-in-place. 82 FR 4683, JA0182; 81 FR 13,643 tbl.4, JA0023; RIA 87 ex.6-5, JA1186. EPA found a "significant risk … to workers and communities" under the pre-existing framework, and found the costs of the Chemical Disaster Rule "reasonable" compared to the benefits of "reductions in the number of people killed, injured, and evacuated," and other harm. 82 FR 4597-99, 4683-85, JA0096-98, JA0182-84; *see also* RIA 73-77, JA1172-76 (benefits); 82 FR 4604, 4607, 4616, 4656, 4665, JA0103, JA0106, JA0115, JA0155, JA0164 (describing new requirements as "needed" and "necessary"); 82 FR 4600, JA0099 (describing final rule as "advanc[ing] process safety where needed"). All of EPA's original findings remain facts before this Court. EPA did not even open these findings for comment in its delay rulemaking, much less disprove them. 82 FR 16,149, JA0004; *see also* 82 FR 27,138, JA0010 ("EPA does not now concede" it should make any particular changes).

EPA now describes the lives saved and people whom the Chemical Disaster Rule would have protected during the delay as "speculative but likely minimal,"

but cannot rationally support this statement based on its own record. 82 FR 27,139, JA0011. EPA's attempt to downplay the benefits shown in the record is irreconcilable with EPA's prior conclusions that the Rule was necessary and that it would indeed save lives and prevent serious injuries. 82 FR 4683-84 tbl.18, JA0182-83; RTC-1 246-47, JA1091-92. EPA suggests its lack of quantification undermines those benefits, but EPA may not disregard facts it found without showing them incorrect. 82 FR 27,139, JA0011. EPA found that the regulatory need was great enough to issue the Chemical Disaster Rule despite difficulty quantifying the precise benefits from accidents prevented and harm reduced. 82 FR 4684, JA0183; RIA 8-10, 83-84, JA1107-09, 1182-83 (summarizing benefits). EPA has not shown based on the record that the health and safety benefits it previously found are not significant enough to require a detailed justification for delaying them.

B. EPA's Practicability Determination For The 2019 Effective Date Is Irrational.

EPA also has not justified abandoning its prior finding that the previously-determined effective and compliance dates represented the most expeditious as practicable schedule to implement the Chemical Disaster Rule. 82 FR 4676, JA0175. None of the speculative allegations or other reconsideration-based factors on which EPA relies is relevant to, much less shows why February 19, 2019, instead of March 14, 2017, is the effective date assuring compliance as

expeditiously as practicable. *See supra* pp. 18-20 (summarizing EPA's rationale, which has no basis in facilities' ability to comply with safety measures). Instead, EPA "disregard[s]" its own findings "that underlay" the Chemical Disaster Rule's original effective date. *Fox*, 556 U.S. at 515-16; *Pub. Citizen v. Steed*, 733 F.2d 93, 100 (D.C. Cir. 1984) (agency could not overcome "presumption … *against* changes in current policy that are not justified by the rulemaking record" (emphasis original)). Further, by citing matters inextricable from its own reconsideration process, EPA "has relied on factors which Congress has not intended it to consider," and has failed to provide even the most basic reasoned explanation. *State Farm*, 463 U.S. at 43.

C. EPA Fails to Justify Delaying All Protections By Twenty Months.

Part of the justification required when "action involves a change in a settled course of agency behavior" is that "the [agency] consider reasonably obvious alternative[s] ... and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review," *Steed*, 733 F.2d at 99. Not only has EPA provided no such detail, it has failed to justify not applying any narrower or shorter alternative. EPA chose to delay for twenty months just because that is time EPA plans to use to "conduct a proceeding." 82 FR 27,140, JA0012. Throwing out a final rule in its entirety for such an extraordinary period based solely on the time EPA seeks to use to reconsider it is the definition of arbitrary.

Yet EPA has delayed the rule in its entirety, refusing to implement even the most common-sense requirement for safer technology alternatives analysis, to assess practicable ways to operate more safely. Alleged "security risks" could apply, if at all, only to a few provisions. *E.g.*, 82 FR 27,140-41, JA0012-13. EPA irrationally rejected even a specific request by emergency response officials to implement at least part of the new emergency response coordination requirements. Gablehouse, Hrg. Tr. 11 ll.1-5 & 13 ll.13-17 (Apr. 19, 2017), EPA-HQ-OEM-2015-0725-0798, JA1295, JA1297 (asking EPA to keep these in place to ensure "people com[e] home at night").

D. Hypothetical Concerns EPA Previously Rejected Are No Substitute for Reasoned Explanation Based on Facts Found.

Although EPA's stated basis for delay is the fact that it *may* change the rule one day, EPA invokes the specter of "security threats" and other "unanticipated harm" that petitioners for reconsideration "alleged may occur" as reasons for taking additional public comment on the Chemical Disaster Rule, before it takes effect. 82 FR 27,139-41, JA0011-13. EPA may not delay a final rule based on mere speculation. *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994) ("speculation is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis").

EPA has not yet reached any conclusion on whether or how it might change the rule in response to the West, Texas investigation. EPA "has not concluded that

[the Chemical Disaster Rule] would increase [security] risks." 82 FR 27,141, JA0013. Nor has EPA found any defect that justifies delaying the Chemical Disaster Rule. 82 FR 27,136, 27,140, JA0008, JA0012. EPA previously considered and rejected reconsideration petitioners' concerns. *See, e.g.*, RTC-1 195-96, 199-200, JA1040-41, 1044-45 (rejecting security risk allegations); RTC-1 246, JA1091 (rejecting idea that non-compliance was the only cause of accidents); RTC-1 247-48, JA1092-93 (rejecting idea that rulemaking should be suspended because of Bureau's report on the West, Texas explosion). Regulation based on hypothetical what-ifs is not reasoned decision making. *Steed*, 733 F.2d at 98 ("agency must cogently explain why it has exercised its discretion in a given manner").

E. It Is Capricious To Change a Final Rule Now Because EPA Might Decide Later That It Should Be Changed.

As the record shows, the Delay Rule suspends the Chemical Disaster Rule for twenty months even though EPA "has not concluded" there is anything wrong with that rule, or that any other policy is better. 82 FR 27,141, JA0013; *Steed*, 733 F.2d at 102 ("Without showing that the old policy is unreasonable, … to say that no policy is better than the old policy solely because a new policy *might* be put into place in the indefinite future is as silly as it sounds.").

EPA "does not now concede that it should make" any changes, but renders the Chemical Disaster Rule ineffective anyway because, EPA contends, "the

existence of such a large set of unresolved issues demonstrates the need for careful reconsideration and reexamination of the [Chemical Disaster Rule]." 82 FR 27,138, JA0010; *see also id.* 27,140, JA0012 ("Resolution of issues may require EPA to revise the amendments through a rulemaking"); *id.* 27,133, 27,135, 27,139-42, JA0005, JA0007, JA0011-14 (repeated use of "may"). EPA may well be considering further changes, but a twenty-month postponement is "tantamount to an amendment or rescission" and requires the agency to reach a reasoned conclusion for its current change. *Abraham*, 355 F.3d at 194. EPA cannot suspend now and give reasons later. EPA has failed to show why, when its justification for delay is that it intends to consider hypothetical changes, it could not instead let the rule take effect while considering whether to change it. EPA's reconsideration contentions are not a rational defense for its prolonged delay which effects a "paradigm of a revocation." *Steed*, 733 F.2d at 98 (rejecting agency conclusion that rule should be suspended rather than retained while agency considered improvements).

The fact of reconsideration and the mere possibility of change in the future cannot justify suspending a final rule that has robust record support showing it is necessary to prevent and reduce serious harm now, and that the benefits are well worth the effort to comply. 82 FR 4598-60, JA0097-99; *State Farm*, 463 U.S. at 42 ("the direction in which an agency chooses to move does not alter the standard

of judicial review established by law"). Otherwise, EPA could suspend any rule it wished, repeatedly, by the rationale that the agency might someday change it, without ever completing a regulatory change or facing merits review. *See, e.g.*, *Gorsuch*, 713 F.2d at 815 ("repeal of a rule requires a rulemaking proceeding, but the agency could (albeit indirectly) repeal a rule simply by eliminating (or indefinitely postponing) its effective date, thereby accomplishing without rulemaking something for which the statute requires a rulemaking proceeding." (citing *NRDC*, 683 F.2d at 762)); *cf. API v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990) ("If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely."). This Court should reject EPA's attempt to use delay of an effective date to turn its original rulemaking into a charade that can be undone with the stroke of a pen.

CONCLUSION

Therefore, this Court should vacate the Delay Rule and reinstate the health and safety protections promised in the Chemical Disaster Rule. *See, e.g.*, *New Jersey*, 517 F.3d at 583 (vacating rule that violated Clean Air Act's plain text and structure).

DATED: January 31, 2018

Respectfully submitted,

/s/ Susan J. Eckert (by permission)
Susan J. Eckert
Joseph M. Santarella Jr.
Attorneys for Petitioner-Intervenor USW
Santarella & Eckert, LLC
7050 Puma Trail
Littleton, CO 80125
Telephone: (303) 932-7610
susaneckert.sellc@comcast.net
jmsantarella.sellc@comcast.net

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

/s/ Gordon E. Sommers
Gordon E. Sommers
Emma C. Cheuse
Earthjustice
1625 Massachusetts Ave., N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500
gsommers@earthjustice.org
echeuse@earthjustice.org

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

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies that, in accordance with the Order Setting the Briefing Format and Schedule entered on September 26, 2017, the foregoing **Final Opening Brief of Community Petitioners Air Alliance Houston et al. and Petitioner-Intervenor United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union** contains 11,560 words, as counted by counsel's word processing system, and thus complies with the combined 22,000-word limit for Petitioners' and Petitioner-Intervenor's Opening Briefs combined established by the Court's order.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2016** using **size 14 Times New Roman** font.

DATED: January 31, 2018

/s/ Gordon E. Sommers
Gordon E. Sommers

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2018, I have served the foregoing **Final Opening Brief of Community Petitioners Air Alliance Houston et al. and Petitioner-Intervenor United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union**, including the Addendum thereto, on all registered counsel through the Court's electronic filing system (ECF).

/s/ Gordon E. Sommers
Gordon E. Sommers