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 REPLY 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

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Act	Clean Air Act
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
Cmty. Br.	Opening Brief of Community Petitioners
CSAG	Respondent-Intervenor Chemical Safety Advocacy Group
CSB	U.S. Chemical Safety Board
Decl.	Declaration provided in Community Petitioners' and Steelworkers Addendum, accompanying their Opening Brief
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
EPCRA	Emergency Planning and Community Right-to-Know Act
FR	Federal Register

Industry Intervenors	Respondent-Intervenors American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Chamber of Commerce of the United States, Chemical Safety Advocacy Group, RMP Coalition
JA	Joint Appendix
MSHA	Mine Safety and Health Administration
OSHA	Occupational Safety and Health Administration
RFI	EPA, Request for Information, 79 FR 44,604, 44,626 (July 31, 2014), JA0206
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
RMP	Risk Management Program
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
State Petrs' Reply	Reply Brief of State Petitioners, DN1715511.
Steelworkers or USW	Petitioner-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC

SUMMARY OF ARGUMENT

To protect the finality of final rules and the people who depend on them, the Clean Air Act limits EPA's authority to postpone a rule based on reconsideration to no longer than three months. Yet EPA's Delay Rule postpones for *twenty* months the final Chemical Disaster Rule, which EPA found was needed to protect communities and workers from an ongoing march of harmful chemical accidents occurring under pre-existing regulations. EPA has not changed its record conclusion that the Chemical Disaster Rule is good policy, nor found any error warranting revision, much less a twenty-month suspension.

EPA may not evade the Act's plain text, which specifically prohibits delaying a rule based on reconsideration. However EPA styles its reconsideration of the Chemical Disaster Rule, "[s]uch reconsideration shall not postpone the effectiveness of the rule" beyond a single, three-month period. 42 U.S.C. § 7607(d)(7)(B). The Delay Rule violates this provision, and EPA only has authority to the extent bestowed by law.

EPA cannot rely on rulemaking power in § 7412(r)(7), the sole provision it now cites, to authorize delay. That section neither supersedes the Act's specific prohibition on reconsideration-based delay nor adds authority for the agency to set reconsideration-based effective dates. Even absent § 7607(d)(7)(B), the Delay Rule is *ultra vires* because the 2019 effective date does not "assur[e] compliance as

expeditiously as practicable" as required in § 7412(r)(7)(A), and fails to meet requirements in § 7412(r)(7)(B) to prevent chemical releases and protect health. The factors EPA cites stem from the agency's preferred reconsideration timing, and disregard and frustrate the statute's objectives.

Suspension of the Chemical Disaster Rule in total, for twenty months, merely because EPA *might* decide to change it is the definition of arbitrary. EPA's attempts to run from its prior findings through focusing on agency convenience and speculation fail to provide the requisite detailed explanation for EPA's change in policy. EPA must reach reasoned conclusions *before* acting – it cannot base action on hypotheticals or *post-hoc* rationales that contradict the record.

Finally, this Court should reject EPA's attempt to evade merits review by contending no petitioner – not workers, community residents, or states – has standing to seek relief from EPA's twenty-month removal of regulations issued to protect them. EPA's original conclusions that the Chemical Disaster Rule is needed, and that preventative and response actions should and would start promptly upon the rule's effective date to achieve compliance belie EPA's claim that delay causes no injury. This Court should vacate the Delay Rule to restore all safety improvements immediately so they will reduce and mitigate the severity of chemical accidents, particularly before the next hurricane season.

ARGUMENT

I. COMMUNITY PETITIONERS AND STEELWORKERS HAVE STANDING.

Community Petitioners' members experience regular hazardous exposure, shelter-in-place and evacuation disruptions and other concrete and imminent injuries in their daily lives due to chemical accidents at covered facilities. Cmty. Br. 23-25; *e.g.*, Adler Decl. ¶¶7-9; Kelley Decl. ¶¶13-16, 28-34; Marquez Decl. ¶¶8-20; Oldham Decl. ¶¶4-5; Parras, J. Decl. ¶¶13-15; Schaaf Decl. ¶¶6-7; Toohey Decl. ¶8; Regulatory Impact Analysis ("RIA") at 122 (Dec. 2016), EPA-HQ-OEM-2015-0725-0734, JA1221. Steelworkers' members have been killed and injured, and continue to be hurt "first and worst" by accidents inside covered facilities. Cmty. Br. 23-25; Lilienfeld Decl. ¶¶3, 5-10, 12-22; Nibarger Decl. ¶¶7, 10-11, 13-19, 27-29, 35, 37, 40-41, 43, 45, 51, 54, 64-65, 68-69, 77-79; Wright Decl. ¶¶1, 11-13, 22, 32, 47, 49-52. Delay of the Chemical Disaster Rule increases and prolongs Petitioners' injuries, due to the immediate and impending loss of protections EPA found it would provide. This Court should reject EPA and Respondent-Intervenors' contentions that Petitioners may not receive judicial review of EPA's action postponing a rule issued to protect them from these very hazards. *See, e.g.*, *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183-84 (2000) (finding standing where members' "reasonable concerns" about pollution discharges lessened enjoyment); *NRDC v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014)

(finding standing where EPA action "would immunize certain emissions" and members would "suffer from those higher emissions"); *see also Crossroads Grassroots Policy Strat. v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015) (regulatory beneficiary has standing to protect benefits).

Because opposing parties cannot dispute the concrete harms Community Petitioners' and Steelworkers' members (collectively, "Petitioners' members") suffer from chemical accidents, they call injuries from delay "unsupported" or "speculative," and contend the Delay Rule, 82 FR 27,133 (June 14, 2017), JA0005, does not cause this harm due to its timing. *See* EPA Br. 18, 20; Indus. Intvs. Br. 12-18. But, the purpose and effect of the Delay Rule is to relieve facilities of the obligation "to immediately comply with" *and* "to prepare to comply with" all provisions of the Chemical Disaster Rule. 82 FR 27,136, 27,139, 27,142, JA0008, JA0011, JA0014; *see also* Cmty. Br. 42 (explaining importance of effective dates). EPA has not changed its findings that there is a "regulatory need" to prevent releases of both RMP and non-RMP chemicals at covered facilities, and the Chemical Disaster Rule would meet that need by reducing "the frequency and magnitude" of chemical accidents. 82 FR 27,138, JA0010; RIA at 16-17, JA1115-16; *see also* 82 FR 4594, 4597-98 (Jan. 13, 2017), JA0096-97 (finding costs are "reasonable" compared to significant benefits). EPA determined and the record shows that provisions of the Chemical Disaster Rule would benefit Petitioners'

members by reducing their harm from chemical accidents. *See, e.g.*, 82 FR 4597-98, JA0096-97; Cmty. Br. 11-16, 46-48.

Contrary to EPA's argument, harm from the delay of the Chemical Disaster Rule occurs even though the pre-existing requirements remain in place. EPA found over one hundred accidents have been causing reportable harm annually, including in recent years, due to gaps in the existing framework. EPA Br. 23, 31; RIA at 16, 80, JA1115, JA1179.[1] EPA cannot evade these findings with new charts from litigation counsel (Attachment A). EPA's new assertions should be disregarded as *post-hoc*; regardless, the charts contain no agency findings, conflict with the record, and make misleading generalizations. EPA Att.A; *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 522 (D.C. Cir. 2009) (refusing to consider position not "invoked by the agency" when it acted) (citing *SEC v. Chenery*, 332 U.S. 194 (1947)).

[1] The record supports EPA's original conclusions. Cmty. Br. 4-6, 9-18, 46-48; *see also, e.g.*, CSB, Investigation Report, 114 (May 2014) (recommending EPA adopt safer technologies analysis to prevent disasters), EPA-HQ-OEM-2014-0328-0090, JA0281; Comment of CSB Chairperson on RFI at 28, EPA-HQ-OEM-2014-0328-0689, JA0304 ("workers, emergency responders, and members of the community have been killed, injured, or at risk of physical harm because of insufficient pre-emergency planning and coordination"); 81 FR 13,638, 13,644 nn.6-10, 13,648-49 & nn.26-28, 13,654-55 & nn.70-73, 13,664-65 & nn.116-17, nn.123-24, 13,670-72 & n.165, n.167, nn.176-78, 13,674-75 & nn.181-82, nn.184-86, 13,678 & nn.200-201 (Mar. 14, 2016), JA0018, JA0024, JA0028-29, JA0034-35, JA0044-45, JA0050-52, JA0054-55, JA0058 (citing CSB findings supporting updates).

First, the record refutes EPA's attempt to minimize and ignore the harm from the loss of requirements with immediate deadlines. EPA Br. 20; Att.A tbl.2. The Delay Rule postpones: expanded employee training; expansion of compliance audits to "each covered process"; investigations of near misses; and improved process hazard analysis, incident investigations, and reporting requirements. Cmty. Br. 13-14. Contrary to EPA's Table 2 (characterizing immediate requirements as "minor"), the record shows these provisions are necessary and will prevent and mitigate accidents. EPA Response to Comments on Chemical Disaster Rule ("RTC-1") at 38-39, 55, 214 (Dec. 19, 2016), EPA-HQ-OEM-2015-0725-0729, JA0883-84, JA0900, JA1059; Nibarger Decl. ¶¶30-43; Wright Decl. ¶¶24-32, 48-49. EPA found "incident investigations will result in improved process safety," and determined prior versions of §§ 68.60 and 68.81 failed to ensure facilities investigated and learned from near misses. 81 FR 13,652, JA0032. Since "[o]nly legislative rules have the force and effect of law," codifying these requirements provides significant benefit whether in prior guidance or not. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (quotations omitted); EPA Att.A tbl.2 (including guidance repeatedly in "Current" column). Industry's protestations and the record confirm the improvements are "significant." *E.g.*, 81 FR 13,651, JA0031; 82 FR 4614, JA0113; CSAG Petition at 10, 13, 22

(Mar. 13, 2017), EPA-HQ-OEM-2015-0725-0766, JA1284-86 (calling immediately-effective provisions "dramatic," and "expansive" changes).

Second, EPA's postponement of the original March 14, 2018, compliance deadline harms Petitioners' members by delaying new emergency response coordination provisions, including through especially dangerous seasons. *See, e.g.*, Adler ¶¶12, 14-15; Fontenot Decl. ¶¶8, 12; Garcia Decl. ¶¶4-8; Kelley Decl. ¶¶23, 26, 28-34, 38; Kothari Decl. ¶15 & Att.; Lilienfeld Decl. ¶¶12-22; Moench Decl. ¶¶6, 26; Nibarger Decl. ¶¶32-65; Nixon Decl. ¶¶11, 21, 25-28; Oldham Decl. ¶10; Parras, J. Decl. ¶¶15, 18; Rolfes Decl. ¶¶18-19; Toohey Decl. ¶18; Wright Decl. ¶50.[2] EPA counsel's assertions in Table 1 of Attachment A are the very arguments EPA rejected in the record, finding pre-existing requirements *insufficient* to adequately inform first-responders or ensure coordination occurs. EPA Br. 21; EPA Att.A tbl.1; *compare* RTC-1 192-195, JA1037-40 *with* EPA Response to Comments on Delay Rule ("RTC-2") at 30 (June 8, 2017), EPA-HQ-OEM-2015-0725-0881, JA1668; 81 FR 13,671-72, JA0051-52 (finding "history of poor emergency response coordination during accidental releases," and CSB findings of inadequate coordination).

[2] Industry Intervenors' contention that Petitioners waived their ability to challenge the delay of emergency response coordination requirements is inaccurate, as their cited declarations and opening brief show. Cmty. Br. 15-17, 23-28.

Unlike pre-existing regulations, the Chemical Disaster Rule mandates covered facilities coordinate with emergency-responders (and document it) by March, 2018, and annually thereafter. 40 C.F.R. § 68.93. It also expands requirements to ensure emergency responders receive "any … information [they] identify as relevant to local emergency planning" for that facility. *Id.*; *compare* 42 U.S.C. § 11003(d) (covering only information "necessary" for a community's umbrella plan); EPA Att.A tbl.1 (conceding no existing requirement to document and ensure coordination). The record demonstrates the new requirements to share information with responders would "significantly improve emergency preparedness." 82 FR 4596, JA0095; RIA at 114-16, JA1213-15; Cmty. Br. 15; *see also* RIA at 76, JA1175 (would provide "[f]aster and better coordinated responses" to "reduce human health impacts"); RTC-1 at 195-96, JA1040-41; Nibarger Decl. ¶¶52-65. Accordingly, emergency response officials urged EPA not to delay these requirements, saying "[w]e want people coming home at night." Gablehouse, Hrg. Tr. 11 ll.1-14 & 13 ll.13-17 (Apr. 19, 2017), EPA-HQ-OEM-2015-0725-0798, JA1295, JA1297; Gablehouse (May 17, 2017), EPA-HQ-OEM-2015-0725-0830, JA1299-300; Int'l Ass'n of Firefighters (May 19, 2017), EPA-HQ-OEM-2015-0725-0834, JA1301. EPA, in its brief and Table 1, also fails to acknowledge that the Risk Management Program covers a different list of

chemicals than EPCRA, with different thresholds.[3] Further, certain facilities (mining facilities including cement and alumina) are not required to submit safety data sheets to OSHA and are thus not subject to EPCRA §§ 311 and 312, 42 U.S.C. §§ 11021 and 11022.[4]

Third, delay of the other impending requirements in the Chemical Disaster Rule immediately harms members by postponing provisions that would have begun to help reduce and mitigate serious harm from chemical accidents, including Safer Technologies and Alternatives Analyses, emergency exercises, root cause analyses, and community information requirements, as intended. Cmty. Br. 13-17; *see, e.g.*, EPA Att.A tbl.1 (admitting "no parallel requirement" for field and tabletop emergency response exercises).

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[3] *Compare* 40 C.F.R. § 68.130 (RMP substances list) *with* 40 C.F.R. Pt. 355 App'x A & B (listing EPCRA substances and thresholds for planning and release notifications) *and* 40 C.F.R.§ 372.65 (EPCRA toxic release reporting list).

[4] *See* 42 U.S.C. §§ 11021, 11022 (applying only to facilities required to submit data sheets to Occupational Safety and Health Administration ("OSHA"), *i.e.*, not those under jurisdiction of Mine Safety and Health Administration ("MSHA")); *see also* Interagency Agreement § B.6(a) (Mar. 1979) (Att.1), https://arlweb.msha.gov/MOU/1979mshaoshammu.HTM (dividing jurisdiction between MSHA and OSHA); EPA, Emergency Management: EPCRA Questions (Att.2) (confirming mining facilities exempt), https://emergencymanagement.zendesk.com/hc/en-us/articles/211416708-Are-mining-facilities-required-to-notify-under-Sections-311-and-312-; *see also* Wright Decl. ¶2 (describing Steelworkers' members at mining facilities).

Compliance with the Chemical Disaster Rule in full, and all benefits it creates, would not happen with the flip of a switch. EPA found the lead-up time between the effective date and compliance deadlines "necessary" to perform beneficial actions, such as training personnel. 82 FR 4676, JA0175. Failing to require facilities to take steps to prepare for compliance now both denies Petitioners immediate benefits from those steps and delays the benefits of eventual full compliance. Cmty. Br. 27, 45 (*citing State v. BLM*, No. 17-cv-03804-EDL, 2017 WL 4416409 at *4, *8 (N.D. Cal. Oct. 4, 2017), JA1758, 1761-62); 82 FR 4676, JA0175; RTC-1 at 214-18, JA1059-63; Wright Decl. ¶¶22-52. Thus, the harm that delaying these benefits causes to Petitioners is not "speculative" or "premature," EPA Br. 21-22, but follows directly from EPA's own record. *See, e.g.*, RTC-1 at 214-18, JA1059-63. Contradicting their argument, Industry Intervenors admit that they would need to take "immediate[]" steps to meet these deadlines. Indus. Intvs. Br. 15 n.2; Cmty. Br. 24 n.3 (citing intervenors' statements); Indus. Opp. to Mot. 20-21, DN1683358. Indeed, relieving industry from taking these immediate actions is precisely why EPA issued the Delay Rule. 82 FR 27,136, 27,142, JA0008, JA0014.

Further, while EPA downplays the significance of recent accidents during the delay, EPA Br. 24, these harmful accidents continue to occur and cause harm, just as EPA anticipated, at facilities that particularly affect Petitioners' members.

Cmty. Br. 14, 23; RIA at 16-17, JA1115-16; 82 FR 4597, 4632, JA0096, JA0131; 81 FR 13,669, JA0049. Members' declarations and the record show at least twenty recent accidents affecting Petitioners' members that the Chemical Disaster Rule would have begun to prevent and mitigate absent the Delay Rule. EPA Br. 22-23; RIA at 87, JA1186; Adler ¶¶8, 15; Kelley Decl. ¶¶14-16, 32-33; Lilienfeld ¶¶12-21; Marquez Decl. ¶¶8-17; Nibarger Decl. ¶¶47-50; Oldham Decl. ¶8; Toohey Decl. ¶¶8-9; Kothari Decl. ¶¶13-15 & Att.; Wright Decl. ¶50; Carman Decl. ¶¶15-16; *see also* Petrs' Comments, EPA-HQ-OEM-2015-0725-0861 at 14-22, 27-28, JA1507-15, JA1520-21.

EPA seeks to deflect attention from the August 31, 2017, Arkema explosions in Crosby, TX, but this incident reinforces the need for the Chemical Disaster Rule, as the Chemical Safety Board recently recognized. InsideEPA, Nov. 15, 2017, https://insideepa.com/daily-news/csb-backs-parts-obama-epa-rmp-rule-address-facility-flood-risks (Att.3) (CSB Chairperson stating Arkema "underscored the need for key prevention concepts included in the [Chemical Disaster Rule]"); *see also* Garcia Decl. ¶¶4-8; Parras, B. Decl. ¶¶5-6; Nelson Decl. ¶¶10-16; Wright ¶50. EPA does not dispute that Arkema is an RMP-covered facility, or that the Chemical Disaster Rule would have required an investigation of the Arkema explosions as a near miss for release of an RMP chemical. 40 C.F.R. § 68.60, 68.81; 82 FR 4606, JA0105; *see* 81 FR 13,651, JA0031 (describing explosion near

RMP process as near miss). New emergency response coordination and updates like expanded employee training would help prevent non-RMP releases at covered facilities like Arkema, too. RIA at 74, JA1173; 82 FR 4684 tbl.18, JA0183; Kothari Decl. ¶¶13-14 & Att.

Community Petitioners' and Steelworkers' declarations demonstrate actual and imminent injuries to their members, as well as sufficiently increased risk, caused by the Delay Rule, to ground standing. Indus. Intvs. Br. 17-20. As EPA found, the Chemical Disaster Rule is needed to reduce a "significant risk to the safety of American workers and communities," 82 FR 4599, JA0098, due to the "frequency" of harmful accidents. 82 FR 4596-97, JA0095-96; RIA at 16-17, JA1115-16 (danger "warrant[ed] regulation"). This Court has not required specific quantification to show standing. *See NRDC v. EPA*, 464 F.3d 1, 7 (D.C. Cir. 2006). Moreover, EPA concedes preventing "even one" disaster like Bhopal would have "dramatic" benefits, though difficult to quantify in advance. EPA Br. 50; RIA at 88, JA1187; *see also* Request for Information ("RFI"), 79 FR 44,604, 44,626 (July 31, 2014), JA0228 (describing "catastrophic" threat to workers and "downwind" communities). Lifting the Chemical Disaster Rule's protections causes concrete and imminent harm – and substantially increases risk of harm – particularized to Petitioners' members who are the groups most exposed to and most harmed by chemical accidents. EPA, Final Rule Questions & Answers, 1

(June 2017), JA1770; Nibarger Decl. ¶¶27-79; Parras, J. Decl. ¶¶16-23; Wright Decl. ¶¶21-52; Cmty. Br. 26 (citing record and declarations).

No further showing is required to challenge removal of a health and safety rule EPA determined would provide qualitative safety benefits and prevent severe harm. *Sierra Club v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014) ("petitioner need demonstrate only a substantial probability that local conditions will be adversely affected" (quotation omitted)); NYU Amicus Br. 12-14, DN1703086. Vacatur of the Delay Rule will restore needed safety measures, reduce severe threats, and redress concrete ongoing injuries to Petitioners' members. Cmty. Br. 23-29.

II. THE DELAY RULE VIOLATES § 7607(D)(7)(B) OF THE CLEAN AIR ACT.

The Clean Air Act authorizes only one type of reconsideration-based delay, capped at three months, otherwise prohibiting delay. 42 U.S.C. § 7607(d)(7)(B); Cmty. Br. 29-40. Through §§ 7607(b) and 7607(d)(7)(B), the Act implements Congress's intent that reconsideration shall not be used "as a delay tactic" for Clean Air Act rules. S. Rep. No. 101-228 at 372 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3755, JA1722-23. EPA already exercised its sole authority to delay the Chemical Disaster Rule based on reconsideration (for three months). 82 FR 27,133-34, JA0005-06; EPA Br. 29; *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017). EPA, however, delayed the Chemical Disaster Rule further,

citing reconsideration and potential revision of the rule. 82 FR 27,133, JA0005. This is precisely what the Act prohibits.

Rather than contend the Act is ambiguous, EPA argues the three-month authorization in § 7607(d)(7)(B) is just one "administrative option" to delay a final rule based on reconsideration, and that § 7607(d)(7)(B)'s direction that "such reconsideration shall not postpone the effectiveness of the rule" does not apply. EPA Br. 35, 38. The plain text, however, refutes EPA's ability to make optional this binding statutory constraint and arrogate to itself authority not granted by the Act. *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

EPA contends the words "such reconsideration" in § 7607(d)(7)(B) mean the three-month limitation applies only to delay for mandatory reconsideration. EPA Br. 38. But the Delay Rule *is* based on EPA's mandatory reconsideration proceeding under that section. 82 FR 27,133-35, JA0005-07. EPA attempts to avoid this text by saying that it is not just performing reconsideration, but might also revise the rule in other ways. No exemption exists for this delay however EPA characterizes it. The Act's clear prohibition on reconsideration-based delay, enacted through § 7607(d)(7)(B) and supported by § 7607(b)(1), does not provide any exemption other than the single three-month allowance. *See TRW v. Andrews*, 534 U.S. 19, 28 (2001) (holding where Congress provided one exception to a broad prohibition, "additional exceptions are not to be implied"); Cmty. Br. 33-34. EPA

has no response to the argument that it would be illogical to read the statute to allow unlimited delay where EPA revises voluntarily, but limit it when the Act requires reconsideration. Cmty. Br. 34-35.

EPA alternatively contends that § 7607(d)(7)(B) means just "*the convening of* a mandatory reconsideration does not itself *automatically* postpone the effectiveness of a rule." EPA Br. 38 (emphasis added). But § 7607(d)(7)(B) does not include those caveats, stating only "[s]uch reconsideration shall not postpone the effectiveness of the rule." This refers to the reconsideration proceeding, not just its "convening"; otherwise the limit could be ignored right after reconsideration begins. Adding the term "automatically" also makes no sense in context since nothing in the Act suggests reconsideration *would* automatically postpone a rule. *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) ("court must examine the meaning of … [statute's] words … in context."). Contrary to EPA's distortion of binding precedent (EPA Br. 38), this Court has recognized *both* that "[§ 7607(d)(7)(B)] states that *even* 'new information' reconsideration by EPA does not automatically postpone the effectiveness of the rule," *and* that "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." *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1184, 1186 (D.C. Cir. 1980) (emphasis added); *see also NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (Act allows only "single, three-month" delay).

EPA's interpretation of § 7607(d)(7)(B) also is unreasonable at *Chevron* step two. EPA concedes its interpretation has no stopping point, claiming the ability to issue unlimited "future extensions." EPA Br. 34. Suspension of final regulations for longer than three months, without revising merits conclusions, undermines the statutory framework, Cmty. Br. 29-30, 39, and is exactly what Congress sought to avoid – a rule on the books in name only, but actually in limbo during endless reconsideration.

Industry Intervenors' argument that § 7607(d)(7)(B) cannot mean what it says because that would put EPA into a "straightjacket," Indus. Intvs. Br. 29, disregards that the Act only limits EPA's *reconsideration-based* delay authority, not its ability to duly change a rule. Besides, the policy of finality embodied in § 7607(d)(7)(B)'s limitation on such delay incentivizes EPA to take care in promulgating final rules and to promptly revise them, if defective. That EPA may have ignored § 7607(d)(7)(B) through lengthy or repeated delays of other rules only illustrates the need to enforce the Act's requirements rather than allow EPA to usurp authority not granted.[5] EPA must follow the statute; the agency has "literally

[5] Notably, an example Industry Intervenors cite – the stay of 75 FR 27,643, 27,643 (May 18, 2010) – was actually under 5 U.S.C. § 705, on which EPA did not rely and is not at issue here. Indus. Intvs. Br. 31.

… no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

III. EPA CANNOT RELY ON § 7412(r)(7) RULEMAKING AUTHORITY FOR THE DELAY RULE.

A. The Prohibition on Reconsideration-based Delay in § 7607(d)(7)(B) Applies to § 7412(r)(7) Rules.

EPA argues § 7607(d)(7)(B) does not expressly negate § 7412(r) (or any other authority) with respect to delays, EPA Br. 39. But, § 7607(d)(7)(B) need not do so because § 7607(d)(7)(B) is the *only* provision that addresses or authorizes delay based on reconsideration and cannot be displaced by more general provisions. *Reilly*, 976 F.2d at 41; Cmty. Br. 29-33, 35-38. This Court should reject EPA's attempt to invert the specific and the general. Contrary to EPA's assertion, § 7412(r)(7), which governs accident prevention regulations generally and authorizes effective dates "assuring compliance as expeditiously as practicable," is not the more specific provision and cannot override § 7607(d)(7)(B)'s clear limits on delay based on reconsideration. EPA Br. 44; Indus. Intvs. Br. 26.

In *Reilly*, this Court refused to read such "open-ended power" to delay into another general rulemaking provision, § 7601. 976 F.2d at 41. Instead, this Court held it "unambiguous" that "EPA ha[s] no authority to stay the effectiveness of a promulgated standard except for the single, three-month period authorized by

[§ 7607(d)(7)(B)]." *Id*. The same principle applies to any other general rulemaking authority including § 7412(r)(7). Cmty Br. 29-39; Pt.III.B, *infra*. That *Reilly* also found problematic EPA's attempt to delay a rule issued pursuant to a "highly circumscribed schedule," 976 F.2d at 40-41, did not cabin *Reilly*'s statutory holding as EPA contends. If *Reilly*'s holding on § 7601 were grounded only in the delayed rule being subject to a deadline, the Court would have had no reason to hold § 7601 did not *authorize* such delays. *Id.* at 41. Instead, *Reilly* held § 7601 contains no reconsideration-based delay authority, in part because § 7607(d)(7)(B) is the sole such authority (limited to three months). *Id.* That holding applies equally here.

To harmonize these sections, § 7412(r)(7) must be read as written, not as authorizing what § 7607(d)(7)(B) prohibits: delays based on reconsideration. *See Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) ("a statute should be construed so that effect is given to all its provisions." (quotation omitted)). Congress knew how to authorize reconsideration-based delays and did so only once, showing its omission from § 7412(r)(7) was "intentional[]." *Russello v. United States*, 464 U.S. 16, 23 (1983). EPA cannot rely on § 7412(r) to authorize delay for reconsideration, "when a specific statutory directive," here § 7607(d)(7)(B), "defines the relevant functions of EPA in [that] particular area." *Am. Petrol. Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

Even if rule-by-rule enumeration were required to apply § 7607(d)(7)(B) to § 7412(r)(7) rules, the Act does that. EPA did not "elect[] to invoke § 7607(d)." Indus. Intvs. Br. 27 n.4. EPA acknowledged § 7607(d) applies through § 7412(r)(7)(E), which treats § 7412(r) rules as § 7412(d) standards. 42 U.S.C. § 7607(d)(1)(C); RTC-2 at 11, JA1649.

B. EPA's Delay of the Effective Date Independently Violates § 7412(r)(7).

The only authority EPA now asserts for the Delay Rule is § 7412(r)(7).[6] Its action is therefore *ultra vires*, as EPA has not shown the Delay Rule meets the requirements of § 7412(r)(7). EPA argues that the words "practicable" and "reasonable" in § 7412(r)(7) provide unfettered power to decide what is relevant for an effective date. EPA Br. 27-29. EPA manufactures three factors to defend the Delay Rule: "time needed to undertake reconsideration," "regulatory certainty during reconsideration," and "the minimal, if any, benefits lost by delaying the emergency coordination activities for twenty months." *Id.* at 29.

The Act's text, however, is not "silent" with respect to relevant factors. EPA may not invoke a novel "totality-of-the-circumstances" or "all-things-

[6] EPA has abandoned alternative assertions of authority, and Industry Intervenors cannot resuscitate those arguments. *See* Cmty. Br. 31-33, 37-38. Industry Intervenors newly cite § 7607(d)(1)(V) but EPA nowhere relied on this, and like the rest of § 7607(d)(1), that provision provides no delay authority. Cmty. Br. 37-38.

considered" test that does not appear in the statute. EPA Br. 28-29 (quoting *Catawba County v. EPA*, 571 F.3d 20, 37, 39 (D.C. Cir. 2009)); *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1138 (D.C. Cir. 2013) ("*NACWA*"); *see also* State Petrs' Reply 17-18 n.6 (distinguishing *Catawba County*). The factors EPA selected also cannot be reconciled with the statutory text. EPA's reading does not advance compliance or safety but rather stalls it. Cmty. Br. 41, 43. The statute "foreclose[s]" EPA's "preferred interpretation." *NACWA*, 734 F.3d at 1126.

First, the text of § 7412(r)(7) *constrains* EPA's discretion with respect to effective dates, providing EPA must "assur[e] compliance as expeditiously as practicable." 42 U.S.C. § 7412(r)(7)(A). This directive refutes at *Chevron* step one EPA's assertion that EPA can consider any factors it wishes. In response to the argument that the Delay Rule enables non-compliance, rather than "assur[es] compliance," Cmty Br. 41-42, EPA contends only that "inherent in this argument is the premise that the underlying regulations with which sources must comply are … appropriate regulations." EPA Br. 32. EPA validated that premise when it adopted the Chemical Disaster Rule; it has not reached any alternate conclusion. *See* Pt.I, *supra*. EPA concedes it has not changed its findings nor found any error in that rule. *E.g.*, 82 FR 27,138, 27,141, JA0010, JA0013; EPA Br. 30. EPA's counsel may not effectively disavow statements that are facts in the record.

NACWA, 734 F.3d at 1138 (court "cannot accept appellate counsel's post hoc rationalizations" (quotation omitted)); *see* Pts. I, IV *infra* (citing EPA's failures to change findings).

Additionally, the statute sets specific health and safety-focused factors under § 7412(r)(7)(B), which EPA has not met by suspending a rule that would protect public health. RIA at 16, 80, JA1115, JA1179; Cmty. Br. 44-46; *but see* EPA Br. 31. EPA determined the pre-existing regulations, alone, were not sufficient, and thus no longer "reasonable" to provide "to the greatest extent practicable" for the "prevention and detection of accidental releases" or emergency response. 42 U.S.C. § 7412(r)(7)(A), (B); *see* Pt.I, *supra*; 82 FR 4597-98, JA0096-97 (concluding new provisions' costs are "reasonable" relative to benefits); *see also* RIA at 17, JA1116 (finding "regulatory need" for new provisions). EPA has not revised these conclusions, and § 7412(r)(7) does not authorize EPA to delay a rule needed to fulfill these statutory mandates.

The statute also provides no room for EPA to apply reconsideration-related factors instead of assuring sources' expeditious compliance as the basis for a rule's effective date. Section 7412(r)(7)(A) concerns the practicability of "compliance" for *sources*, just as EPA applied this language originally. 82 FR 4676, JA0175 (setting compliance deadlines to provide entities the time EPA found "necessary"); *see also* State Petrs' Reply 18 (discussing legislative history on practicability). In

the Delay Rule, EPA concedes it changed this test to "focus[] on the practicability of requiring compliance during reconsideration rather than the ability of sources to comply," EPA Br. 30-31. EPA did not explain this change and fully ignored it, even when overwriting the 2018 deadline for coordination based on compliance for sources. 82 FR 27,139-44, JA0011-16; *see also infra*, Pt.IV. Furthermore, the first two factors EPA cites would let EPA suspend any rule for virtually any time period just by announcing reconsideration. That contradicts both § 7412(r)(7)'s "expeditious" focus on compliance and its goal of urgent regulatory action to prevent chemical accidents.[7]

EPA's third factor, based on its allegation of minimal harm from delay, contradicts the prevention, compliance, and safety-focused requirements in § 7412(r)(7)(A) and (B), which do not allow EPA to discount harm from chemical accidents. EPA's reliance on this factor also controverts the record, which shows the Delay Rule postpones protections that EPA found necessary to avoid serious harm. *See* Pt.I, *supra*; Pt.IV, *infra*. EPA choice of this factor is impermissible because it ignores that other provisions, as well as emergency coordination, would have begun to provide benefits already. *Id.*

[7] EPA offers no response to the argument that *Reilly* additionally disfavors delay here because § 7412(r)(7) requires and is intended to ensure timely regulatory action (initially and in response to CSB recommendations, which are part of the basis for the Chemical Disaster Rule). Cmty. Br. 9-11, 36-37 (discussing statute and legislative history); *see also supra* n.1 (CSB findings).

IV. THE DELAY RULE IS ARBITRARY AND CAPRICIOUS.

First, EPA has failed to support nullifying the Chemical Disaster Rule for twenty months with the requisite "more detailed justification" for its about-face. *FCC v. Fox*, 556 U.S. 502, 515 (2009). EPA's attempt to avoid both its original findings and the *Fox* test exposes how EPA's action – changing "only the [Chemical Disaster Rule's] effective date," EPA Br. 45 – changes everything, and is fundamentally inconsistent with the "factual findings" that "underlay [EPA's] prior policy." *Fox*, 556 U.S. at 515; Cmty. Br. 46-48; *see, e.g.*, *Clean Air Council*, 862 F.3d at 7 (delaying effective date "relieves regulated parties of liability they would otherwise face").

The Chemical Disaster Rule is necessary to prevent and reduce harmful chemical accidents that occur like clockwork under existing regulations. Pt.I, *supra*; Cmty. Br. 11-16, 47-49 (citing record); *e.g.*, 81 FR 13,638, 13,671-72, JA0018, JA0051-52. The 2017 effective date and resulting compliance dates are based on the time sources need to comply with the improvements. 82 FR 4676, JA0175. EPA has given no justification for action that contradicts these findings much less the detailed explanation required. EPA also cannot support the Delay Rule by claiming foregone benefits during the twenty months are "speculative but likely minimal," 82 FR 27,139, JA0011, when the record shows the contrary:

prompt implementation is necessary to prevent injuries. Pt.I, *supra*; Cmty. Br. 9-18.

Second, EPA's non-explanation – that it has delayed the Chemical Disaster Rule because EPA *might* change it – fails even the most basic test for agency decision making. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983). The Delay Rule leaves communities without updated protections while deferring the agency's obligation to justify this twenty-month postponement. EPA Br. 51 (stating that "*if* … EPA actually changes" the requirements of the rule, it might later give an explanation). EPA cannot rely on a future explanation when changing the rule now. *Pub. Citizen v. Steed*, 733 F.2d 93, 102 (D.C. Cir. 1984).

Further, rather than give any rational metrics as grounds for the scope or length of its total rule delay, EPA concedes the length of its suspension is based solely on the agency's preferred time for reconsideration. EPA Br. 53; Cmty. Br. 49-50. The factors EPA considered, EPA Br. 46, frustrate the statute's objectives of finality and expeditious compliance, and are inconsistent with those "which Congress … intended." *U.S. Sugar v. EPA*, 830 F.3d 579, 606 (D.C. Cir. 2016) (quotation omitted); Pt.III, *supra*; Cmty. Br. 48-49.

In particular, EPA's reliance on uncertainty the agency itself creates is "circular," and does not support delay. *See Elec. Consumers Res. Council v.*

FERC, 747 F.2d 1511, 1516 (D.C. Cir. 1984) (finding "circular" reasoning arbitrary). Certainty is served *not* by postponing a rule EPA *might* change, but by finality and the requirement to explain *before* changing the rule.

Rather than preserving the "status quo," EPA Br. 31, "[d]elaying the effective date of a final rule disrupts the status quo" by "inject[ing] uncertainty into a previously settled situation."[8] *See also BLM*, 2017 WL 4416409, at *8, JA1761 (explaining why similar argument that delay preserved status quo was "circular at best" and factually inaccurate). Worse, the Delay Rule reverts to the *prior* status quo under which over one hundred harmful accidents per year are occurring. EPA Br. 22-23 (citing RIA).

Contrary to EPA's mischaracterization, this Court's precedent does not support EPA's delay. EPA Br. 52. This Court in *Mexichem Specialty Resins v. EPA*, 787 F.3d 544 (D.C. Cir. 2015) *rejected* a request for a stay under 5 U.S.C. § 705, due to industry's failure to show irreparable harm from complying with a rule that might change upon reconsideration. 787 F.3d at 555-57. If anything, *Mexichem* shows reconsideration and uncertainty alone cannot justify delaying a final rule.

[8] L. Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge*, Harv. L. & Pol'y Rev. at 27 (forthcoming) (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049004, JA1808.

The number of comments on the Delay Rule, EPA Br. 53, is a *post-hoc* rationale and does not support a lengthy delay of a rule for which EPA already considered and addressed over 160,000 comments. *NACWA*, 734 F.3d at 1138; *see* 81 FR 13,644, JA0024 (100,000 comments); 82 FR 4599, JA0098 (61,716 comments).

Finally, speculation about national security or any other matter cannot justify delay of a final rule issued to improve safety. EPA has reached no new conclusions, does not know whether or how the Chemical Disaster Rule will be revised, and "has not concluded [that any provision] would increase [security] risks." 82 FR 27,136, 27,141, JA0008, JA0013; EPA Br. 47, 48, 50, 55 ("might increase"; "may potentially"; "might conceivably"; "may actually"); EPA Br. 32 (not citing any finding that Chemical Disaster Rule would "actually make the public … less safe"); Cmty. Br. 50-51. As State Petitioners explained, EPA's national security and West, TX-based arguments are nothing more than hypothetical specters that contradict the record and do not support total delay. State Petrs' Reply Pt.III.B.2&3. EPA received no new "specific information" about such risks, EPA Br. 47, citing only industry arguments EPA previously rejected. RTC-1 at 195-96, 199-200, 246-48, JA1040-41, JA1044-45, JA1091-93; *see* 82 FR 27,133, 27,140-41, JA0005, JA0012-13; Cmty. Br. 18 (citing RTC-1 at 247-48, JA1092-93); *see, e.g.*, Comments of CSAG, EPA-HQ-OEM-2015-0725-

0594, JA0778 (comment regarding West, TX arson finding); *see also* EPA-HQ-OEM-2015-0725-0851, JA1314-15; EPA-HQ-OEM-2015-0725-0778, JA1289-92 (Delay Rule threatens national security); EPA-HQ-OEM-2015-0725-0841, JA1302-04; EPA-HQ-OEM-2015-0725-0861, JA1523-25 (West, TX finding does not undermine Chemical Disaster Rule). *Post-hoc* rationales from EPA, industry, or state intervenors – in charts, post-record declarations, or briefs – cannot substitute for reasoned agency decision making. EPA may not nullify the Chemical Disaster Rule and the safety policy it embodies, "[w]ithout showing that … policy is unreasonable," *Pub. Citizen*, 733 F.2d at 102.

CONCLUSION

This Court should vacate the Delay Rule and reinstate the health and safety protections required by the Chemical Disaster Rule. "Changes in course … cannot be solely a matter of political winds and currents," but must "be accomplished with … fidelity to law and legal process," or "government becomes a matter of … whim and caprice." *N.C. Growers Ass'n v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring).

DATED: January 31, 2018

Respectfully submitted,

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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 Reply 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 5,998 words, as counted by counsel's word processing system, and thus complies with the combined 11,000-word limit for Petitioners' and Petitioner-Intervenor's Reply Briefs 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 Reply 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** on all registered counsel through the Court's electronic filing system (ECF).

/s/ Gordon E. Sommers
Gordon E. Sommers

Attachment 1

INTERAGENCY AGREEMENT
BETWEEN THE
MINE SAFETY AND HEALTH ADMINISTRATION
U.S. DEPARTMENT OF LABOR
AND THE
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
U.S. DEPARTMENT OF LABOR

The Mine Safety and Health Administration (MSHA), U.S. Department of Labor, and the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, have entered into this agreement to delineate certain areas of authority, set forth factors regarding determinations relating to convenience of administration, provide a procedure for determining general jurisdictional questions, and provide for coordination between MSHA and OSHA in all areas of mutual interest.

A. AUTHORITY AND PRINCIPLE

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 91-173 as amended by Pub. L. 95-164 (Mine Act), authorizes the Secretary of Labor to promulgate and enforce safety and health standards regarding working conditions of employees engaged in underground and surface mineral extraction (mining), related operations, and preparation and milling of the minerals extracted.

2. The Occupational Safety and Health Act of 1970 (OSHAct) gives the Secretary of Labor authority over all working conditions of employees engaged in business affecting commerce except those conditions with respect to which other Federal agencies exercise statutory authority to prescribe or enforce regulations affecting occupational safety or health. The OSHAct also provides that States may operate their own occupational safety and health programs under a plan approved by the Secretary.

3. This agreement is entered into to set forth the general principle and specific procedures which will guide MSHA and OSHA. The agreement will also serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved. The general principle is that as to unsafe and unhealthful working conditions on mine sites and in milling operations, the Secretary will apply the provision of the Mine Act and standards promulgated thereunder to eliminate those conditions.

However, where the provisions of the Mine Act either do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (e.g., hospitals on mine sites) or where there is statutory coverage under the Mine Act but there exist no MSHA standards applicable to particular working conditions on such sites, then the OSHAct will be applied to those working conditions. Also, if an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSHAct may be applied to such an employer where the application of the OSHAct would, in such a case, provide a more effective remedy than citing a mine operator or an independent contractor subject to the Mine Act who does not, in such circumstances, have direct control over the working conditions.

B. CLARIFICATION OF AUTHORITY

1. Section 4 of the Mine Act gives MSHA jurisdiction over each coal or other mine and each operator of such mine. Section 3(d) defines "operator" and includes in that definition independent contractors performing construction at mines.

2. Section 3(h)(1) of the Mine Act gives MSHA jurisdiction over lands, structures, facilities, equipment, and other property used in, to be used in, or resulting from mineral extraction or used in or to be used in mineral milling. This includes the authority to regulate the construction of such facilities, structures and other property. Further, Section 3(h)(1) directs the Secretary of Labor, in making a determination of what constitutes mineral

milling, to give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

3. Appendix A provides more detailed descriptions of the kinds of operations included in mining and milling and the kinds of ancillary operations over which OSHA has authority. Notwithstanding the clarification of authority provided by Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle.

4. Under section 3(h)(1), the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling. Or, the term milling may be narrowed to exclude from the scope of the term processes listed in Appendix A where such processes are unrelated, technologically, or geographically, to mineral milling. Determinations shall be made by agreements between MSHA and OSHA.

5. The following factors, among others, shall be considered in making determinations of what constitutes mineral milling under section 3(h)(1) and whether a physical establishment is subject to either authority by MSHA or OSHA: the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility. The consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.

6. Pursuant to the authority in section 3(h)(1) to determine what constitutes mineral milling considering convenience of administration, the following jurisdictional determinations are made:

a. MSHA jurisdiction includes salt processing facilities on mine property; electrolytic plants where the plants are an integral part of milling operations; stone cutting and stone sawing operations on mine property where such operations do not occur in a stone polishing or finishing plant; and alumina and cement plants.

b. OSHA jurisdiction includes the following, whether or not located on mine property: brick, clay pipe and refractory plants; ceramic plants; fertilizer product operations; concrete batch, asphalt batch, and not mix plants; smelters and refineries. OSHA jurisdiction also includes salt and cement distribution terminals not located on mine property, and milling operations associated with gypsum board plants not located on mine property.

7. "Borrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction). "Borrow pit" means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

8. When any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator or OSHA State Designee in those States with approved plans shall attempt to resolve it at the local level in accordance with this Memorandum and existing law and policy. Jurisdictional questions that can not be decided at the local level shall be promptly transmitted to the respective National Offices which will attempt to resolve the matter. If unresolved, the matter shall be referred to the Secretary of Labor for decision.

C. ENFORCEMENT PROCEDURES

In the interest of administrative convenience and the efficient use of resources the agencies agree to the following enforcement procedures:

1. When OSHA receives information concerning unsafe or unhealthful working conditions in an area for which MSHA has authority for employee safety and health, OSHA will forward that information to MSHA.

2. When MSHA receives information regarding a possible unsafe or unhealthful condition in an area for which MSHA has authority and determines that such a condition exists but that none of the Mine Act's provisions with respect to imminent danger authority or any enforceable standards issued thereunder provide an appropriate remedy, then MSHA will refer the matter to OSHA for appropriate action under the authority of the OSHAct.

3. When MSHA receives information regarding unsafe or unhealthful working conditions in an area for which OSHA has authority for employee safety and health, MSHA will forward that information to OSHA for appropriate action.

4. Each agency agrees to notify the other of the disposition of enforcement matters forwarded to it for appropriate action.

5. OSHA will not conduct general inspections of mine or mill sites except with respect to those areas set forth in this Agreement and its Appendix A.

D. INTERAGENCY COORDINATION

1. The Office of Legislative and Interagency Affairs in OSHA and the Office of the Assistant Secretary in MSHA shall serve as liaison points to facilitate communication and cooperation between the participating organizations.

2. MSHA and OSHA will endeavor to develop compatible safety and health standards, regulations, and policies with respect to the mutual goals of the two organizations including joint rulemaking, where appropriate. This interagency coordination may also include cooperative training, shared use of facilities, and technical assistance.

E. SUBAGREEMENTS

Subagreements to accomplish the purposes set by this agreement may be developed and modified, as deemed necessary, by OSHA and MSHA. Such subagreements will include specific provisions for detailing the coordination between the agencies.

F. PERIOD OF AGREEMENT

This Interagency Agreement shall continue in effect unless terminated by mutual consent of both parties or terminated by either party upon thirty (30) days advance written notice to the other and approved by the Secretary in either case.

This agreement will become effective on the date of the last signature and it supersedes the Memorandum of Understanding between OSHA and MESA dated April 22, 1974.

Mine Safety and Health Administration
Assistant Secretary of Labor
for Mine Safety and Health
Dated: March 29, 1979

Occupational Safety and Health Administration
Assistant Secretary of Labor
for Occupational Safety and Health
Dated: March 29, 1979

Approved:

Secretary of Labor
Dated: March 29, 1979

(more)

APPENDIX A

Definitions:

"Coal or other mine" is defined in the Mine Act as:

"(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities."

"Miner" is defined in the Mine Act as:

"Any individual working in a coal or other mine."

"Operator" is defined in the Mine Act as:

"Any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

"Mining and Milling":

Mining has been defined as the science, technique, and business of mineral discovery and exploitation. It entails such work as directed to the severence of minerals from the natural deposits by methods of underground excavations, opencast work, quarrying, hydraulicking and alluvial dredging. Minerals so excavated usually required upgrading processes to effect a separation of the valuable minerals from the gangue constituents of the material mined. This latter process is usually termed "milling" and is made up of numerous procedures which are accomplished with and through many types of equipment and techniques.

Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

A CRUDE is any mixture of minerals in the form in which it occurs in the earth's crust. An ORE is a solid crude containing valuable constituents in such amounts as to constitute a promise of possible profit in extraction, treatment, and sale. The valuable constituents of an ore are ordinarily called valuable minerals, or often just minerals; the associated worthless material is called gangue.

In some ores the mineral is in the chemical state in which it is desired by primary consumers, e.g., graphite, sulphur, asbestos, talc, garnet. In fact, this is true of the majority of nonmetallic minerals. In metallic ores, however, the valuable minerals in their natural state are rarely the product desired by the consumer, and chemical treatment of such minerals is a necessary step in the process of beneficiation. The end products are usually the result of concentration by the methods of ore dressing (milling) followed by further concentration through metallurgical processes. The valuable produce of the oredressing treatment is called Concentrate; the discarded waste is Tailing.*

Specific Examples of MSHA Authority

Mining - MSHA

Following is a list indicating mining operations and minerals for which MSHA has authority to regulate.

Mining Operations
Underground Mining
Open Pit Mining
Quarrying

*Preface, p.v., Handbook of Mineral Dressing, Arthur P. Taggart, Second Printing, March 1947, John Wiley and Sons, Inc.

Solution Mining (Precipitate & Leaching)

Dredging (When the primary purpose of the dredging operation is to recover metal or nonmetallic minerals for milling and/or sale or use.)

Hydraulicking

Ponds - Brine Evaporation

Auger Mining

Minerals

Coal

Metals: (Included but not limited to)	Nonmetals: (Included but not limited to)
Alumina	Abrasives
Antimony	Aplite
Bauxite	Asbestos
Beryl	Barite
Bismuth	Baron
Chrome	Bromine
Cobalt	Calcium Chloride
Copper	Clay
Gold	Mica
Iron	Mineral Pigments
Lead	Oil Shale
Manganese	Peat
Mercury	Perlite
Molybdenum	Potash
Nickel	Pumice
Rare Earths	Potash Rock
Silver	Diatomite
Titanium	Feldspar
Tungsten	Fluorspar
Uranium	Gilsonite
Vanadium	Graphite
Zinc	Gypsum
Zirconium	Kyanite
Magnesite	
Salt	
Shale	
Sodium Compounds	
Sulfur	
Talc, Soapstone, and Pyrophllite	
Vermiculite	

Wollastonite

Subgroups of Nonmetals
(Sand and Gravel,and Crushed and Dimension Stone Industries)

Sand	Marble
Gravel	Native Asphalt
Cement	(impregnated stone & sand)
Gabbro	Quartizite
Gneiss	Schist
Lime	Slate
Limestone	Taprock or Diabase

Milling - MSHA Authority

Following is a list with general definitions of milling processes for which MSHA has authority to regulate subject to Paragraph B6 of the Agreement. Milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting.

Crushing

Crushing is the process used to reduce the size of mined materials into smaller, relatively coarse particles. Crushing may be done in one or more stages, usually preparatory for the sequential stage of grinding, when concentration of ore is involved.

Grinding

Grinding is the process of reducing the size of a mined product into relatively fine particles.

Pulverizing

Pulverizing is the process whereby mined products are reduced to fine particles, such as to dust or powder size.

Sizing

Sizing is the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes.

Concentrating

Concentrating is the process of separating and accumulating economic minerals from gangue, or the upgrading of ore or minerals.

Washing

Washing is the process of cleaning mineral products by the buoyant action of flowing water.

Drying

Drying is the process of removing uncombined water from mineral products, ores, or concentrates, for example, by the application of heat, in air-actuated vacuum type filters, or by pressure type equipment.

Roasting

Roasting is the process of applying heat to mineral products to change their physical or chemical qualities for the purpose of improving their amenability to other milling processes.

Pelletizing

Pelletizing is the process in which finely divided material is rolled in a drum, cone, or an an inclined disk so that the particles cling together and roll up into small spherical pellets. This process is applicable to milling only when accomplished in relation to, and as an integral part of, other milling processes.

Sintering

Sintering is the process of agglomerating small particles to form larger particles, cakes or masses, usually by bringing together constituents through the application of heat at temperatures below the melting point.

This process is applicable to milling only when accomplished in relation to, and as an integral part of, other milling processes.

Evaporating

Evaporating is the process of upgrading or concentrating soluble salts from naturally occurring, or other brines, by causing uncombined water to be removed by application of solar or other heat.

Calcining

Calcining is the process of applying heat to mineral materials to upgrade them by driving off volatile chemically combined components and effecting physical changes.

This process is applicable to milling only when accomplished in relation to, and as an integral part of, other milling processes.

Kiln Treatment

Kiln Treatment is the process of roasting, calcining, drying, evaporating, and otherwise upgrading mineral products through the application of heat.

This process is applicable to milling only when accomplished in relation to, and as an integral part of, other milling processes.

Sawing and Cutting Stone

Sawing and cutting stone is the process of reducing quarried stone to smaller sizes at the quarry site when the sawing and cutting is not associated with polishing or finishing.

Heat Expansion

Heat expansion is a process for upgrading material by sudden heating of the substance in a rotary kiln or sinter hearth to cause the material to bloat or expand to produce a lighter material per unit of volume.

Retorting

Retorting is a process usually performed at certain mine sites, and is accomplished by heating the crushed material in a closed retort to volatilize the metal, material or hydrocarbon which is then condensed and recovered as upgraded metal, material or hydrocarbon.

Leaching

Leaching is the process by which a soluble metallic compound is removed from a mineral by selectively dissolving it in a suitable solvent, such as water, sulfuric acid, hydrochloric acid, cyanide, or other solvent, to make the compound amenable to further milling processes.

Briquetting

Briquetting is a process by which iron ore, or other pulverized mineral commodities, are bound together into briquettes, under pressure, with or without a binding agent, and thus made conveniently available for further processing.

MSHA Authority Ends - OSHA Authority Begins

Subject to Paragraph B.5. of the Agreement, the following are types of operations which may be on or contiguous to mining and/or milling operations listed above, over which MSHA does not have authority to prescribe and enforce employee safety and health standards, and over which OSHA has full authority, under the Act, to prescribe and enforce safety and health standards regarding working conditions of employees.

OSHA regulatory authority commences as indicated in the following types of operations:

Gypsum Board Plant

If the plant is located on mine property, commences at the point when milling, as defined, is completed, and the gypsum and other materials are combined to enter the sequential processes necessary to produce gypsum board. If not located on mine property, OSHA has authority over entire plant.

Brick, Clay Pipe and Refractory Plants

Commences after arrival of raw materials at the plant stockpile.

Ceramic Plant

Commences after arrival of the clay and other additives at the plant stockpile.

Fertilizer Products

Commences at the point when milling, as defined, is completed, and two or more raw materials are combined to produce another product. Note that a "kiln", as it relates to these products for roasting and drying, is considered to be within the scope of the milling definition.

Asphalt-Mixing Plant

Commences after arrival of sand and gravel or aggregate at the plant stockpile.

Concrete Ready-Mix or Batch Plants

Commences after arrival of sand and gravel or aggregate at the plant stockpile.

Custom Stone Finishing

Commences at the point when milling, as defined, is completed, and the stone is polished, engraved, or otherwise processed to obtain a finished product and includes sawing and cutting when associated with polishing and finishing.

Smelting

Commences at the point when milling, as defined, is completed, and metallic ores or concentrates are blended with other materials and are thermally processed to produce metal.

Electrowinning

Commences at the point when milling, as defined, is completed, and metals are recovered by means of electrochemical processes.

Salt and cement distribution terminals not located on mine property.

Refining

Commences at the point when milling, as defined, is completed, and material enters the sequential processes to produce a product of higher purity.

Attachment 2

Are mining facilities required to notify under Sections 311 and 312?

Mining facilities regulated by the Mining Safety and Health Administration, (MSHA) are not subject to OSHA's Hazard Communication Standard (HCS) and, therefore, are not subject to the Sections 311 and 312 requirements. However, it should be noted that because MSHA covers only actual mining activities, all other operations, such as refining, are covered under OSHA's HCS and are thus subject to Sections 311 and 312.

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Have more questions? Submit a request

Attachment 3

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DAILY NEWS

CSB Backs Parts Of Obama EPA RMP Rule To Address Facility Flood Risks

November 15, 2017

The U.S. Chemical Safety Board (CSB) is backing parts of the Obama EPA's facility safety prevention rule to help facilities better prepare for worsening risks from flooding, saying companies should reassess their emergency planning and coordination with first responders and communities to ensure adequate planning for extreme weather.

During a Nov. 15 conference call updating CSB's investigation of an Aug. 31 chemical facility fire sparked by Hurricane Harvey floodwaters, CSB Chairwoman Vanessa Allen Sutherland called for facilities to reassess emergency plans to account for flood risks, and underscored the need for key prevention concepts included in the agency's facility safety rule -- one of the regulations that the Trump administration plans to scale back.

With “tropical storms in the Gulf of Mexico increasing in frequency and intensity, it's important that facilities have effective emergency response procedures in place,” Sutherland said.

While Sutherland did not overtly back the Obama EPA's Jan. 12 final rule updating the agency's Risk Management Plan (RMP) facility accident prevention program with new requirements for hazard analysis, coordination with first responders and streamlined sharing of facility hazard data with communities, she strongly backed the three concepts that were a significant part of the rule that now faces possible repeal.

There is a need for “better preparation and planning and communication with communities and emergency responders about risks and possible consequences,” Sutherland said. “We want people to be comfortable near a facility,” she added, noting that facilities should communicate “what they're storing and what the possible consequences could be of a catastrophic event.”

Sutherland also said the change from the Obama to Trump administration does not affect CSB's mission of investigating accidents and recommending improvements to safety rules.

“Our job as an independent non-regulatory agency is unique. Our mission is to hold everyone accountable -- the regulated community for how their operations run . . . and also to hold the regulators accountable,” she said. “The CSB will issue recommendations as many times as we need to to drive chemical safety change.”

CSB is investigating the Aug. 31 fire at an Arkema, Inc. facility in Crosby, TX. The fire occurred after rising floodwaters from Hurricane Harvey overwhelmed backup cooling systems needed for safe storage of organic peroxide chemicals stored on site and used in the production of consumer products. First responders sought medical attention after exposure to smoke from the fire.

Facility Safety

Environmentalists and some Democratic lawmakers have argued that the Arkema fire casts doubt on EPA Administrator Scott Pruitt's nearly two-year delay and plan to revise aspects of the Obama-era RMP rule.

Although the Trump EPA has not announced potential changes, Pruitt, in his prior role as Oklahoma's GOP attorney general, opposed the proposed rule's requirement for sharing of facility data with the public, arguing such disclosure raises security concerns.

Sen. Tom Carper (D-DE), in a **Sept. 1 letter** to Pruitt argued that the Arkema fire cast doubt on Trump administration plans to roll back the RMP rule, and suggested stronger requirements to bolster emergency planning may be necessary in an era of increased flooding, often attributed to climate change.

During the call, CSB officials said that as part of their investigation of the Arkema incident, staff is reviewing existing guidance documents on preparing facilities for flood risks to determine if new guidance or regulation may be necessary. Officials also said they plan on completing the Arkema investigation and issuing a final report by June to inform industry preparations for next year's hurricane season.

The CSB call for stronger efforts to harden facilities from future storms comes the day after board members voted 3-1 to rescind an earlier recommendation to bolster certain worker protections at off-shore drilling operations after the April 2010 explosion on the Deepwater Horizon oil rig in the Gulf of Mexico.

The move came after the Interior Department's Bureau of Safety and Environmental Enforcement refused to implement the recommendation for strengthening requirements for worker participation in safety management, including empowering worker representatives to collaborate with employers on safety procedures and issue stop work orders if a task is deemed unsafe.

During the meeting board members who voted for withdrawing the recommendation said they plan to continue pushing for the new safeguards but must first urge Congress to determine which federal agency should implement the changes, noting that the Occupational Safety and Health Administration is one possible recipient of the recommendations. -- *Dave Reynolds* (dreynolds@iwpnews.com)

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