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DIVISION OF APPEALS & OPINIONS  
NEW YORK CITY BUREAU

May 25, 2018

Mark Langer  
Clerk of the Court  
U.S. Court of Appeals for the D.C. Circuit  
E. Barrett Prettyman U.S. Courthouse  
333 Constitution Ave., NW  
Washington, DC 20001

Re: Petitioners' Joint Response to FRAP 28(j) Letter in *Air Alliance Houston v. EPA*, Docket Nos. 17-1155, 17-1181

Dear Mr. Langer,

Petitioners submit this response to EPA's notification that it has signed a pre-publication proposal on which it intends to take notice-and-comment.<sup>1</sup> If finalized, that proposal suggests that EPA would rescind critical protections of the 2017 Accident Prevention Amendments, while further delaying others that the Delay Rule under review postponed until February 2019.

EPA's proposal does not change the need for a swift disposition of this expedited proceeding to end the harm from the Delay Rule. EPA now proposes to exacerbate that harm by *further delaying* even those requirements the proposal retains (Proposal 44-47), including the emergency response coordination that would have been required by March 2018 before the impending hurricane season.

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<sup>1</sup> The proposal is available at: <https://www.epa.gov/rmp/proposed-risk-management-program-rmp-reconsideration-rule>.

Indeed, EPA does not argue that its proposal moots this case or provides grounds to defer a ruling. Nor could it; EPA's unlawful Delay Rule must be evaluated on the record the agency created for its action at the time, and an after-the-fact proposal cannot provide grounds to support an unlawful rule. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947). Under similar circumstances, the Second Circuit recently vacated an agency's delay of a final rule, notwithstanding the proposal of a replacement rule just before oral argument.<sup>2</sup>

EPA's proposal also contains statements inconsistent with EPA's representations to this Court. For example, EPA characterized the Amendments' immediate compliance obligations as minor and "non-substantive" (Br. 20), yet proposes to rescind nearly all of these important changes (Proposal 11). EPA justified its unlawful delay based on the announcement that arson caused the West Fertilizer incident (Br. 30), but still cites no evidence of security concerns regarding the accident prevention measures and even "reaffirms" that, regardless of cause, this incident demonstrates the need for enhanced safety measures (Proposal 74-75). And EPA previously insisted that its delay did not affect post-2019 deadlines (Br. 14), but the proposal would formally extend those compliance deadlines as *a direct consequence* of the Delay Rule (Proposal 93-94).

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<sup>2</sup> *NRDC v. NHTSA*, No. 17-2780 (2d Cir. April 23, 2018), ECF No. 194; *see* Notice of Proposed Rulemaking (Mar. 27, 2018), *available at* [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/nprm\\_cafe-fines-03262018\\_0.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/nprm_cafe-fines-03262018_0.pdf).

Respectfully submitted,

/s/ David S. Frankel

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of May, 2018, I have served Petitioners' **Joint Response to EPA's FRAP 28(j) Letter** on all registered counsel through the Court's electronic filing system (ECF).

/s/ David S. Frankel  
David S. Frankel

**CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS**

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that Petitioners' **Joint Response to EPA's FRAP 28(j) Letter**, filed on May 25, 2018, contains 350 words as counted by the word count feature of Microsoft Word. This is in compliance with Fed. R. App. P. 28(j).

DATED: May 25, 2018

/s/ David S. Frankel  
David S. Frankel