ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1155 (Consolidated with No. 17-1181)

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

AIR ALLIANCE HOUSTON, *et al.*,

Petitioners,

v.

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

Respondents.

On Petition for Review of a Final Rule
Issued by the Environmental Protection Agency

FINAL BRIEF FOR AMICI CURIAE FORMER REGULATORY OFFICIALS BETH ROSENBERG, DAVID MICHAELS, AND JORDAN BARAB IN SUPPORT OF PETITIONERS AND VACATUR

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November 1, 2017

CERTIFICATE AS TO PARTIES, RULINGS, RELATED CASES, AND FILING OF SEPARATE BRIEF

As required by Circuit Rules 28(a)(1) and 29(d), counsel for amici curiae, former regulatory officials Beth Rosenberg, David Michaels, and Jordan Barab, hereby certify as follows:

A. Parties and Amici

Except as indicated below, all parties, intervenors, and amici appearing in this court are listed in the certificates to the 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, and the Opening Brief for State Petitioners. Those briefs do not list the following, who have filed or are expected to file motions for leave to appear as amici curiae:

1. Beth Rosenberg, David Michaels, and Jordan Barab (the "former regulatory officials"), amici curiae in support of petitioners in Nos. 17-1155 and 17-1181.

2. The Institute for Policy Integrity, a nonprofit organization at New York University School of Law, amicus curiae in support of petitioners in Nos. 17-1155 and 17-1181.

B. Rulings Under Review

References to the final agency action under review appear in the certificates to the 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, and the Opening Brief for State Petitioners.

C. Related Cases

References to related cases appear in the certificates to the 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, and the Opening Brief for State Petitioners.

D. Separate Brief

The former regulatory officials joining this brief have sought leave to file a separate brief from the other amicus supporting petitioners because a single amicus curiae brief is not practicable in this case. The former regulatory officials and the Institute for Policy Integrity have different perspectives on the issues and address distinct aspects of the

problem posed by the agency action in this case: The former regulatory officials address legal and other considerations relating to the establishment of regulatory effective dates, while the Institute, consistent with its focus of study, addresses issues of cost-benefit analysis. Combining these different viewpoints and approaches into a single brief would not be practicable. *See* D.C. Cir. R. 29(d).

Respectfully submitted,

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GLOSSARY

APA	Administrative Procedure Act
EPA	Environmental Protection Agency
OSHA	Occupational Safety and Health Administration
STAA	Safer technology and alternatives analysis

STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in the addendum to the Brief for Community Petitioners in No. 17-1155.

INTEREST OF AMICI CURIAE[1]

Amici curiae are three former regulatory officials with expertise in regulating hazardous chemicals that pose significant risks to workers at chemical facilities and the public.

Amicus Beth Rosenberg holds a Doctor of Science degree in Work Environment Policy and is Assistant Professor of Public Health and Community Medicine at the Tufts University School of Medicine. From 2013 to 2014, she served, by Presidential appointment and Senate confirmation, as a member of the United States Chemical Safety Board, which investigates causes of major incidents at chemical facilities and oil refineries and makes evidence-based recommendations for regulatory changes to prevent their recurrence.

Amicus David Michaels is an epidemiologist with a Ph.D. from Columbia University, and is Professor of Environmental and

[1] Amici have moved for leave to file this brief. The brief was not authored in whole or part by counsel for a party. No party or counsel for a party, and no person other than the amici curiae or their counsel, contributed money intended to fund its preparation or submission.

Occupational Health at the Milken Institute School of Public Health at the George Washington University. From December 2009 through January 2016, he served as Assistant Secretary of Labor for Occupational Safety and Health and directed the Occupational Safety and Health Administration (OSHA). He also served as Assistant Secretary of Energy for Environment, Safety and Health from 1998 until January 2001. In both capacities, his responsibilities included protection of workers and the public from risks posed by hazardous chemicals.

Amicus Jordan Barab is an expert in regulating hazardous chemicals and workplace hazards and has served in several governmental positions with responsibilities concerning those subjects. From April 2009 through January 2017, he served as Deputy Assistant Secretary of Labor for Occupational Safety and Health, the second-ranking official in OSHA and acting head of the agency before and after Dr. Michaels' tenure. Mr. Barab's responsibilities at OSHA included involvement in enforcing OSHA's Process Safety Management of Highly Hazardous Chemicals Standard.

Amici are deeply interested in effective regulation of the dangers posed by hazardous chemicals at facilities throughout the United States

and the attendant risks of catastrophic releases that endanger workers at those facilities and millions of Americans who live and work near them. Amici submit this brief because they believe that delaying the effective date of a rule aimed at preventing and mitigating such potentially deadly accidents unlawfully reduces common-sense protections for public health and safety.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Environmental Protection Agency (EPA), addressing the nationwide problem of accidental releases of hazardous air pollutants from chemical plants, issued a final rule, the "Chemical Disaster Rule," aimed at preventing such releases and ameliorating their consequences. 82 Fed. Reg. 4594 (Jan. 13, 2017). The Chemical Disaster Rule reflects an extensive record, and long and careful consideration by EPA of measures needed to address the recurrent problem of deadly chemical accidents. It sets forth a multifaceted approach to enhance training of plant personnel, facilitate effective responses to releases by emergency personnel, and promote community awareness of and planning for potentially catastrophic releases. The rule also requires chemical plant operators to analyze incidents involving releases or potential releases to

determine their causes and take preventive measures to avoid future releases, including, in some cases, employing "safer technology and alternatives analysis" (STAA) to consider substituting inherently safer technologies for substances posing risks of catastrophic accidents. All these measures share the critically important aims of protecting members of fence-line communities and other people who live in the paths of often deadly accidental releases, enhancing safety of first responders who are on the front lines when chemical disasters occur, and benefiting chemical plant workers who are the first victims when explosions, fires and other accidents result in releases of hazardous chemicals.

The Chemical Disaster Rule imposed a carefully considered timeframe for affected facilities to comply with its requirements. Several of the rule's provisions, including requirements concerning training, incident reports, and other actions required when incidents involving releases or potential releases occur, were to become mandatory immediately upon the rule's effective date of March 14, 2017. As to other provisions, EPA concluded that facilities needed more time to comply and, therefore, established later compliance dates.

After the Trump Administration took office in January 2017, EPA announced it would reconsider the Chemical Disaster Rule. After issuing an order staying the rule's effective date for three months pending reconsideration, EPA conducted notice-and-comment rulemaking and, in June 2017, issued a final rule delaying the Chemical Disaster Rule's effective date until February 19, 2019—nearly two years after its original effective date. 82 Fed. Reg. 27133 (June 14, 2017) ("Delay Rule"). The principal reason for the delay was EPA's decision to reconsider the Chemical Disaster Rule. The Delay Rule was not based on analysis of whether the new effective date would fulfill the protective purposes of the Chemical Disaster Rule or was necessary to make industry compliance with its provisions practicable; rather, it was explicitly designed to spare industry the burden of complying or even having to prepare to comply with the rule while EPA reconsidered it.

The Delay Rule is arbitrary and capricious and contrary to law. Provisions establishing effective dates are integral, substantive provisions of regulations. Without them, the benefits regulations are intended to provide are meaningless and unattainable: A rule cannot function if it is not effective. The lawfulness of provisions establishing a

regulation's effective date must therefore meet the same standards for validity under the Administrative Procedure Act (APA) as other substantive rules: They must be promulgated in "observance of procedure required by law," 5 U.S.C. § 706(2)(D), and must comply with applicable statutory requirements and limitations on the issuing agency's authority, *see id*. §§ 706(2)(A), (C). And, like all other substantive rules, provisions establishing effective dates cannot stand if they are "arbitrary, capricious, [or] an abuse of discretion," *id*. § 706(2)(A), when viewed in light of the factors the agency is permitted to consider in issuing regulations under its governing statutes.[2]

Therefore, it is not enough that EPA conducted notice-and-comment rulemaking when amending the Chemical Disaster Rule's effective date. Such rulemaking procedures are necessary but not sufficient to establish the lawfulness of a substantive amendment such as a change in an effective date. The amended rule must also comport with express requirements of law and the agency's obligation not to engage in

[2] The Clean Air Act's judicial review provision replicates these APA requirements verbatim. 42 U.S.C. § 7607(d)(9).

arbitrary and capricious action. The Delay Rule falls short of those requirements in several respects.

First, the amendment violates a substantive statutory limitation on EPA's authority to delay effective dates of Clean Air Act regulations: The agency may not impose a delay of more than three months based on the pending reconsideration of a rule. 42 U.S.C. § 7607(d)(7)(B).

Second, the Delay Rule violates a substantive statutory requirement for rules issued under the Clean Air Act provision invoked by EPA as authority for both the underlying rule and its amendment: Such rules must have effective dates "assuring compliance as expeditiously as practicable." 42 U.S.C. § 7412(r)(7)(A). EPA's rule does not meet this requirement. Its purpose is to relieve facilities from compliance with requirements they otherwise could practicably meet within the time allowed by the original rule.

Third, the Delay Rule is arbitrary and capricious because it does not reflect rational consideration of the factors EPA must consider in issuing rules under the statutory provisions that authorized the Chemical Disaster Rule—considerations that revolve around protecting the public against potentially catastrophic releases of hazardous air

pollutants. The amended effective date is designed *not* to permit implementation of requirements of the Chemical Disaster Rule that EPA determined were necessary and appropriate to fulfill the purposes and policies of the authorizing statutes. But EPA has neither amended those requirements nor disavowed the findings and reasoning that supported them, nor has it provided any explanation that could support such an about-face. Had EPA issued the Chemical Disaster Rule in the first instance with an effective-date provision intended to avoid requiring anyone to comply with it, there would be no doubt that its internally contradictory, self-defeating action was arbitrary and capricious. A subsequent rule that purports to leave the remainder of the rule intact—because EPA has identified no grounds for repealing it—while adopting a new effective date that is designed to frustrate the achievement of its purposes, is just as arbitrary.

ARGUMENT

I. A rule's effective date is a substantive provision of the rule subject to procedural and substantive requirements of the APA and the statutes authorizing the agency to promulgate the rule.

A. Effective dates determine obligations of regulated entities and expectations and entitlements of the public, and their establishment is a matter of substantial regulatory deliberation.

The effective date of a substantive rule determines when it first imposes obligations with the force of law. A rule's effective date is therefore a critical substantive provision of the rule, on which the rest of the rule's provisions depend. "It is an essential part of any rule: without an effective date, the 'agency statement' could have no 'future effect,' and could not serve to 'implement, interpret, or prescribe law or policy.' In short, without an effective date a rule would be a nullity because it would never require adherence." *NRDC v. EPA*, 683 F.2d 752, 761-62 (3d Cir. 1982).

The effective date, together with additional compliance dates that a rule may establish, controls both when the public receives the benefits a rule is designed to achieve and when regulated entities incur legal obligations to conform to the rule. These dates also guide regulated

entities in *preparing* for compliance by allowing them to gauge when they must begin taking the practical steps needed to comply once the rule's requirements become legally operative. Such preparatory efforts, no less than compliance once the rule's requirements become legally binding, are essential if the objectives of a regulation are to be met and the protections it is intended to offer the public achieved.

Thus, consideration of a rule's effective date, and of additional compliance deadlines it may trigger, is often a key component of an agency's deliberations when crafting a final rule. When a rule imposes obligations to employ new and developing technologies or make capital investments in new equipment to protect workers or the public, agency rulemakers typically devote considerable attention to determining the time required to make compliance feasible. Rules that require regulated entities to adopt new procedures and practices may also require time for development and implementation of the necessary changes. The interests of those who must comply with a new rule, however, are by no means the only consideration; rulemakers must also consider harms or risks that members of the public may face if compliance is delayed. Central to the

establishment of an effective date is its effect on the rule's achievement of the purposes it is designed to serve.

The Chemical Disaster Rule as originally promulgated reflected exactly such attention to important issues of regulatory timing. The rule provided for an effective date 60 days after promulgation, but established later compliance dates for many provisions that impose significant new responsibilities on facilities. Those dates were the subject of substantial attention by commenters. *See* 82 Fed. Reg. 4676-78. EPA ultimately concluded:

> [A]dditional time is necessary for facility owners and operators to understand the revised rule; train facility personnel on the revised provisions, learn new investigation techniques, as appropriate; research safer technologies; arrange for emergency response resources and response training; incorporate change into their risk management programs; and establish a strategy to notify the public that certain information is available upon request.

Id. at 4676. EPA accordingly required compliance with the rule's new provision requiring coordination with emergency responders one year after the effective date, while setting a compliance date of four years after the effective date for provisions requiring third-party compliance audits, root cause investigations of incidents, STAA, facility emergency response exercises, and information availability. *Id*. at 4676-77. EPA

required compliance immediately upon the rule's effective date with other important provisions concerning training of facility employees, preparation of incident reports, and use of incident reports and process safety information in process hazard reviews and analyses. *See id*. at 4696; *see also* Delay Rule, 82 Fed. Reg. 27143.

B. The APA and the terms of the statutes that authorize regulation substantially constrain agency choices about effective dates.

In considering when a rule should go into effect, and whether compliance with particular provisions should be deferred through the establishment of compliance deadlines after the rule's effective date, an agency does not act without legal guideposts. Several legal requirements constrain the agency's choices.

The APA itself imposes one such constraint: It provides that, for a substantive rule that imposes new obligations or restrictions, "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date" absent good cause. 5 U.S.C. § 553(d). That provision, however, does not imply that agencies have unfettered discretion to set effective dates for regulations more than 30 days after publication. The statutes that provide agencies with

rulemaking authority provide other significant checks on their discretion to establish effective dates.

Some such statutes contain provisions expressly limiting an agency's discretion to establish effective dates. The Occupational Safety and Health Act, for example, provides that the effective date of an occupational safety or health standard may provide for a delay of its effective date for not more than 90 days beyond its promulgation. 29 U.S.C. § 655(b)(4).[3] The Clean Water Act provides that new source standards of performance "shall become effective upon promulgation." 33 U.S.C. § 1316(b)(1)(B). Clean Water Act effluent standards for certain toxic pollutants may be made effective no more than "one year from the date of … promulgation," unless compliance within one year would be infeasible for a certain category of sources, in which case the effective date may be extended to "the earliest date upon which compliance can be

[3] The Occupational Safety and Health Act also provides authority to establish compliance dates for particular aspects of a standard, or particular affected industries, at more distant future dates, because of its requirement that any standard must be "feasible." *See* 29 U.S.C. § 655(b)(5). At the same time, the statute permits delay in compliance only to the extent necessary to make compliance feasible. *See*, *e.g.*, *Indus. Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 479 (D.C. Cir. 1974) (upholding four-year delay for compliance "with regard to those industries that require that long to meet the standard").

feasibly attained," but "in no event more than three years after the date of such promulgation." *Id.* § 1317(a)(2). The Clean Air Act's provisions authorizing standards of performance for stationary sources of air pollutants and emission standards for hazardous air pollutants provide that such standards "shall" be "effective upon promulgation." 42 U.S.C. §§ 7411(b)(1)(B), 7412(d)(10), 7412(f)(3). The statute further authorizes compliance dates up to three years later than the effective date of a hazardous pollutant emission standard, if such later dates "provide for compliance as expeditiously as practicable." *Id*. § 7412(i)(3). As these examples illustrate, Congress views effective dates as important matters that often require express statutory direction to agencies.

The Clean Air Act provisions authorizing rules to prevent accidental releases of hazardous substances, at issue here, likewise expressly constrain the agency's authority to specify an effective date. Such regulations, the statute provides, "shall have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable." 42 U.S.C. § 7412(r)(7)(A). Although this provision, unlike some of the others described above, does not provide for an absolute outside limit on the time between a rule's promulgation and its effective

date, it significantly limits the agency's discretion by preventing the establishment of an effective date beyond the time when compliance is practicable. And although "expeditiously as possible" is "a standard which permits some flexibility," *Cal. ex rel. Air Res. Bd. v. EPA*, 774 F.2d 1437, 1442 (9th Cir. 1985), that flexibility is not unlimited: The standard plainly prevents the agency from establishing an effective date if it is "economically or technologically possible" for compliance to be "more rapid." *Union Elec. Co. v. EPA*, 427 U.S. 246, 264 n.13 (1976) (discussing meaning of "as expeditiously as possible" in another Clean Air Act provision).

Even absent statutory provisions specifically addressing the effective dates of regulations, agencies do not have unfettered discretion in establishing effective dates. Like all other substantive provisions of rules, effective dates must withstand scrutiny under the APA's prohibition on rules that are "arbitrary and capricious" or reflect "abuse of discretion." 5 U.S.C. § 706(2). Thus, a provision setting a rule's effective date, no less than any other aspect of the rule,

> would be 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). Under these principles, an agency's decision to establish a particular effective date for a rule must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id*.

Thus, a regulation's effective date must be based on a rational consideration of the same factors that guide the agency's rulemaking under the statute authorizing the rule. When an agency has concluded that a regulation is justified by permissible considerations under a statute, it would be arbitrary and capricious for the agency to set an effective date that frustrates the achievement of the regulation's benefits or is not rationally calculated to serve the authorizing statute's objectives. *Cf. Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 865-67 (D.C. Cir. 2000) (finding an agency compliance date that frustrated statutory objectives to be arbitrary and capricious). The same would be true if the agency, having established a regulatory requirement, delayed its implementation based on factors that the statute did not permit the

agency to consider. For example, if a statute prohibited an agency from considering costs in developing a standard, it would surely also prohibit the agency from delaying the standard's effectiveness based on costs absent additional statutory authorization for such delay. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001) (holding that an agency may not consider costs without statutory authorization).

In this case, the statutory authorities for the issuance of the Chemical Disaster Rule are found in 42 U.S.C. § 7412(r). Section 7412(r)(1) provides that "the objective of the regulations … authorized under this subsection" is "to prevent the accidental release and to minimize the consequences of any such release" of substances whose accidental release poses threats of death, injury, or other serious adverse health and environmental effects. The specific paragraph of subsection (r) that authorizes accident prevention regulations such as the Chemical Disaster Rule, § 7412(r)(7), provides further that those regulations shall "provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases." *Id*. § 7412(r)(7)(B)(i). The lawfulness of any effective date for a

rule issued by EPA under this authority therefore depends on whether the agency has articulated a rational connection between that date and the achievement of these statutory objectives. For example, if EPA were to determine (as it did here) that regulatory requirements would reasonably provide for prevention of accidental releases and that they could be practicably implemented within 60 days of the promulgation of a rule, the agency could not at the same time rationally decide to delay their effective date by two years just so that regulated entities would not have to comply in the interim. The agency's desire to spare parties from complying with an otherwise justified rule is not itself a permissible consideration, nor does it provide a rational explanation for delay consistent with the statutory objectives.

II. Amendment of a rule's effective date is rulemaking subject to procedural and substantive standards established by the APA and the statutes administered by the agency.

An agency may amend a rule's effective date, as it may any other substantive provision of the rule. But amending a rule, like promulgating it in the first instance, is rulemaking subject to all the procedural and substantive requirements for issuance of a lawful rule. The APA itself makes this point clear by defining "rule making" as the "agency process

for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Thus, amendments to a substantive rule are subject to the same requirements under the APA as the rule's original promulgation. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). That is, amendments must typically be issued through notice-and-comment rulemaking proceedings absent some statutory exemption. *See Perez*, 135 S. Ct. at 1206. And they must be set aside as unlawful if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority or limits." 5 U.S.C. §§ 706(2)(A), (C).

This Court and others have repeatedly held that an amendment to a rule's effective date is rulemaking subject to APA requirements. As this Court has put it, "The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under [the] APA …." *Envtl. Def. Fund v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983). *Accord, Envtl. Def. Fund v. Gorsuch*, 713 F.2d 802, 815-16 (D.C. Cir. 1983); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981); *see also NRDC v. Abraham*, 355 F.3d 179, 194, 203 (2d Cir. 2004); *NRDC v. EPA*, 683 F.2d at 761-64. Any other view, as the Third Circuit

explained in its influential decision in *NRDC v. EPA*, "would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *Id*. at 762.

Many of the precedents on this point have arisen in cases where an agency sought to alter a rule's effective date without notice-and-comment rulemaking, and thus have focused on the APA's requirement of such procedures when an agency amends a substantive rule. In this case, the agency complied with that requirement. But contrary to EPA's apparent view, *see* 82 Fed. Reg. 27135-36, notice-and-comment rulemaking is only a *necessary* requirement for promulgating a valid amendment to a rule; it is not *sufficient*: The amendment must also satisfy the same requirements of consistency with governing law and non-arbitrariness that are required of any other rule under the APA. *See Fox Television*, 556 U.S. at 515; *see also* Peter Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C.L. Rev. 645, 662-75, 686-92 (1987).

Broadly speaking, an amendment to a rule—including an amendment to its effective date—may run afoul of these requirements in

two basic ways: It may be exceed statutory limits on an agency's authority, or it may reflect arbitrary and capricious agency decisionmaking. *See id*. at 662-63. The first category includes rules that are contrary to an express statutory *prohibition* on taking an action or doing so for a specific reason. *See*, *e.g.*, *Abraham*, 355 F.3d at 206 (holding that amendment of energy-efficiency standards violated a statutory anti-backsliding provision). Relatedly, it includes rules that fail to reflect application of express statutory language that *authorizes* a particular type of action but defines specific criteria that channel the exercise of that authority. *See*, *e.g.*, *NRDC v. EPA*, 489 F.3d 1364, 1373-74 (D.C. Cir. 2007) (holding that amendment of a regulation's compliance date violated a statutory provision defining the agency's authority to delay compliance dates).

Additionally, an amendment is arbitrary and capricious if the agency fails to provide a "reasoned explanation" for the change in light of the considerations that, under the authorizing statute, must guide its exercise of regulatory authority. *See*, *e.g.*, *Am. Wild Horse Pres. Campaign v. Perdue*, __ F.3d __, 2017 WL 4385259 at *3 (D.C. Cir. 2017). Because an amendment, including one reflecting a change in the agency's

view on when a rule should become effective, involves a departure from a previous action with the force of law, the requirement of rational decisionmaking carries with it an obligation to "acknowledge the change and offer a reasoned explanation for it." *Id.*; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Moreover, when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate," because "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television*, 562 U.S. at 515-16; *see*, *e.g.*, *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 719 (D.C. Cir. 2016). When an agency suspends the effectiveness of a rule without providing such an explanation, its action is arbitrary and capricious and, hence, unlawful. *See*, *e.g.*, *Pub. Citizen v. Steed*, 733 F.2d 93 (D.C. Cir. 1984).

III. The Delay Rule flouts basic norms governing lawful agency decisionmaking.

EPA's amendment of the effective date of the Chemical Disaster Rule is unlawful in each of the respects described above: It violates an explicit statutory prohibition on delaying a Clean Air Act rule for the

reasons stated by the agency; it is irreconcilable with the applicable Clean Air Act provision governing effective dates of rules aimed at preventing accidental releases of hazardous chemicals; and it is arbitrary and capricious because the agency has not provided a reasoned explanation for turning its back on its earlier determination that the Chemical Disaster Rule with its originally promulgated effective date serves critically important interests in public health and safety.

A. EPA's Delay Rule violates the statutory limitation on postponement of a Clean Air Act rule's effective date pending agency reconsideration.

The stated basis of EPA's Delay Rule is the agency's decision to convene proceedings to reconsider the rule pursuant to 42 U.S.C. § 7607(d)(7)(B), which authorizes reconsideration of Clean Air Act regulations in specified circumstances. Delaying the rule for that reason, and for the many months provided for in the Delay Rule, contravenes the express terms of that statutory provision, which state explicitly that "reconsideration shall not postpone the effectiveness of [a] rule," except that "[t]he effectiveness of the rule may be stayed during such reconsideration … by the Administrator or [a] court *for a period not to exceed three months*." *Id*. (emphasis added).

EPA acknowledged the applicability of this statute to its authority to stay the Chemical Disaster Rule when, before the rulemaking at issue here, it invoked the statute to issue a three-month stay pending reconsideration. 82 Fed. Reg. 13968 (Mar. 16, 2017). Both in the stay order and the Delay Rule itself, EPA acknowledged that three months is the maximum amount of time such a stay can delay the effective date of a Clean Air Act rule under § 7607(d)(7)(B). *See id*. at 13969; 82 Fed. Reg. at 27135. EPA's claim that it could nonetheless postpone the effectiveness of the rule pending reconsideration by an additional 20 months rests on its view that the statute is not a substantive limit on its power to delay a rule's effective date, but is principally directed at procedure. Specifically, EPA argues that the statute is intended to allow a three-month stay without notice-and-comment rulemaking proceedings while requiring notice-and-comment for any delay exceeding three months.

But that is not what the statute says: It provides broadly that "reconsideration shall not postpone the effectiveness of the rule," subject to one narrowly defined exception—a stay limited to three months. Nothing in the statute's language suggests that it is limited to

postponements issued through particular procedures or that it embodies an additional, unwritten exception authorizing the agency to grant a delay exceeding three months through rulemaking. Indeed, this Court held to the contrary in *NRDC v. Reilly*, 976 F.2d 36 (D.C. Cir. 1992), when it concluded that the Clean Air Act generally gave EPA "no authority to stay the effectiveness of a promulgated standard except for the single-three-month period authorized by … 42 U.S.C. § 7607(d)(7)(B)." *Id.* at 41. *Reilly* specifically rejected EPA's argument that its general rulemaking authority allowed it to bypass this limitation by "allow[ing] for a stay of any regulation issued by the Agency." *Id.* The Court stated in no uncertain terms that it would not "read such open-ended power into" the Clean Air Act. *Id.*

In the Delay Rule, EPA sought to avoid *Reilly* by pointing out that the specific rulemaking there differed in its details from this one and involved other provisions of the Clean Air Act. Those details do not alter *Reilly*'s unambiguous holding on the point at issue: Absent some other applicable authorization for a delay in the Clean Air Act, EPA lacks authority to delay the effectiveness of a standard for more than three months pending reconsideration, and EPA's general rulemaking

authority cannot supply the necessary authorization to overcome that clear limit. Indeed, the Delay Rule does not even address the relevant language in *Reilly* concerning the exclusivity of § 7607(d)(7)(B)'s authorization of the delay of effective dates for purposes of reconsideration. Given *Reilly*'s unambiguous rejection of EPA's claim of authority, binding circuit authority requires that the Delay Rule be set aside as "not in accordance with law." 42 U.S.C. § 7607(d)(9).

B. The Delay Rule fails to assure compliance with the Chemical Disaster Rule as expeditiously as practicable.

The Delay Rule is also contrary to law because it violates the statute's requirement that a rule establishing requirements to prevent and mitigate accidental releases of hazardous substances under 42 U.S.C. § 7412(r) "shall have an effective date … assuring compliance as expeditiously as practicable." *Id*. § 7412(r)(7)(A).

EPA acknowledges that the Chemical Disaster Rule and the Delay Rule were both issued under the authority of § 7412(r). *See* 82 Fed. Reg. 27134, 27135. There is no doubt that when an agency issues a rule that amends the effective date of an earlier issued regulation without amending other relevant substantive requirements, the effective date

must comply with the same statutory requirements that applied to the establishment of the rule's effective date when it was first promulgated. *See NRDC v. EPA*, 489 F.3d at 1373-74 (striking down EPA rule purporting to amend a Clean Air Act compliance date because it did not comply with a statutory provision requiring "compliance as expeditiously as possible, but in no event later than 3 years after the effective date of [the] standard") (citing 42 U.S.C. § 7412(i)(3)(A)).

Thus, in issuing the Delay Rule, EPA did not contest that its action must comply with § 7412(r)(7)(A)'s requirement of an effective date that "assur[es] compliance as expeditiously as practicable." Indeed, the Delay Rule repeatedly admitted the applicability of this requirement. *See* 82 Fed. Reg. at 27135-39.

EPA sought to justify its action by pointing out that the § 7412(r)(7)(A) does not, unlike some other statutes, impose an "outside date (*e.g.*, 'in no case later than date X')," beyond which an effective date may not be established. 82 Fed. Reg. at 27136. That point does not alter the fact that § 7412(r)(7)(A) requires EPA to determine that the effective date it selects will "*assur[e] compliance* as expeditiously as practicable" (emphasis added). EPA did not do so.

Instead, EPA made a very different determination: that it was not "practicable" to require earlier compliance because EPA wanted more time to consider changing the Chemical Disaster Rule, and it did not want facilities to have to comply, or even prepare to comply, while it deliberated. *See* 82 Fed. Reg. at 27136. Thus, the agency asserted, because "[a] delay of 20 months is a reasonable length of time to engage in the process of revisiting" the Chemical Disaster Rule, it follows that "the delay of effectiveness for 20 months is as expeditious as practicable for allowing the rule to go into effect." *Id*.

Notably absent from this reasoning is any determination that the new effective date will *assure compliance* with the existing rule as expeditiously as possible. Indeed, the agency acknowledged that absent the Delay Rule, the "regulated community and local responders" would "prepare to comply with, or in some cases immediately comply with" the Chemical Disaster Rule. *Id*. at 27139. Far from assuring compliance as expeditiously as possible, the Delay Rule *excuses* compliance precisely because, absent the delay, compliance could practicably, and would in fact, begin earlier. The statute's terms do not authorize the agency to establish an effective date that assures that compliance will occur *less*

expeditiously than is practicable merely because the agency wants to think more about an already-promulgated rule.

C. The Delay Rule is arbitrary and capricious.

Finally, but not least importantly, the Delay Rule is arbitrary and capricious because it fails to offer a reasoned explanation of how delaying the Chemical Disaster Rule's effective date is consistent with the statutory aim of preventing and minimizing consequences of potentially disastrous releases of hazardous chemicals to the "greatest extent possible." 42 U.S.C. § 7412(r)(7)(B)(i). The Delay Rule also fails to explain why the agency has turned its back on its previous findings that the terms of the Chemical Disaster Rule are essential to fulfilling that objective and that regulated entities can practicably comply under the time-frames established by the rule's original effective and compliance dates.

Instead, EPA has stated vaguely that various legal arguments made by the rule's opponents justify reconsideration of some aspects of the Chemical Disaster Rule and that others pose questions the agency "may wish to address." 82 Fed. Reg. at 27138. But EPA has purported to leave all the rule's substantive provisions except its effective date intact, and

has identified no specific respects in which the findings supporting them are deficient. EPA's decision to excuse the regulated community from complying or even having to prepare to comply with the amply justified provisions of the rule thus fails the basic test of reasoned explanation.

In particular, EPA's decision to delay compliance with the provisions that would otherwise have gone into effect immediately upon the Chemical Disaster Rule's effective date lacks any semblance of an adequate explanation. Those provisions cover such important matters as adequate employee training, use of findings from incident reports and potential failure scenarios in hazard reviews and process hazard analyses for regulated facilities, deadlines for completion of incident investigation reports, and maintenance of up-to-date process safety information. *See* 82 Fed. Reg. 27143-44. EPA acknowledges that these requirements do not involve significant costs for the regulated community, *see id.*, and it identifies no specific respects in which its earlier determinations that these provisions serve important purposes in fulfilling the statutory objectives were erroneous or unjustified. It has thus failed to offer a rational explanation for delaying their effectiveness and, with them, the

contribution they will make to reducing the likelihood and consequences of releases of hazardous chemicals.

Likewise, EPA acknowledges that its action will necessarily delay, by nearly a year, compliance with what it admits is a major provision of the Chemical Disaster Rule: its emergency response coordination provisions. In promulgating the rule, EPA explained the important role these provisions would play in improving the performance of the critically important function of emergency response to chemical disasters. The effectiveness of disaster response is literally a matter of life and death for first responders and the populations exposed to releases of hazardous chemicals, and is critical to protection of the property of regulated chemical facilities and individuals and businesses in surrounding communities. EPA admits that the costs to the regulated community avoided by delaying the compliance deadline for these provisions are "small relative to the total costs" of the rule. 82 Fed. Reg. at 27143. And EPA neither demonstrates any specific respect in which its previous determination that these rules would serve the statutory objective of preventing or minimizing the consequences of chemical accidents was erroneous or legally flawed, nor finds that the emergency

coordination provisions could not be implemented by the original compliance date or that implementing them would not be beneficial. Its decision to delay these provisions thus fails to meet the test of reasoned explanation.

Lastly, EPA's observation that the Delay Rule will not affect the compliance dates for the "most major provisions" of the rule, which "were set for four years after the final rule's effective date," 82 Fed. Reg. at 27138, does not support the rationality of its action. Ordinarily, the establishment of compliance deadlines so far in the future for the most costly features of a rule would be a reason a stay of more limited duration is *not* necessary, and the Delay Rule does not adequately explain why that is not true here. Moreover, EPA's reasoning on this point reflects an important "fail[ure] to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43: It does not consider the negative impact of excusing regulated entities from even the need to "*prepare* to comply with" these provisions, 82 Fed. Reg. at 27139 (emphasis added), on their ultimate ability to meet the compliance deadlines for these critical aspects of the rule. Given that EPA has also offered no reason to question its previous determination that these key

provisions serve the need to prevent and mitigate chemical disasters, its failure to consider that the Delay Rule will impair their effectiveness is a glaring omission.

* * *

The Delay Rule attempts a de facto repeal of the Chemical Disaster Rule by excusing regulated entities from compliance despite the absence of any legally sufficient basis for amending its requirements. EPA lacks authority to short-circuit the process for repealing the rule by delaying compliance while it considers whether it has grounds for repealing the rule. Such delay conflicts with strict limits on EPA's power to postpone effectiveness of Clean Air Act rules pending reconsideration, and with the express requirement that a rule's effective date assure compliance as expeditiously as practicable, not defer it as long as possible. EPA's attempt to frustrate its regulation by excusing regulated entities from even preparing to comply fails to comport with basic norms of rational administrative decisionmaking. Having concluded that the Chemical Disaster Rule's protections advance the statutory objective of protecting the public, the agency cannot rationally establish an effective date that thwarts that objective.

CONCLUSION

This Court should set aside EPA's Delay Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Final Brief for Amici Curiae Former Regulatory Officials in Support of Petitioners and Vacatur complies with the type-volume limitations of FRAP 32(a)(7)(B) and 29(d). The brief is composed in a 14-point proportional typeface, Century Schoolbook BT. As calculated by my word processing software (Microsoft Word 2016), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 6,477 words.

s/Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that, on November 1, 2017, this Final Brief for Amici Curiae Former Regulatory Officials in Support of Petitioners and Vacatur was served through the court's ECF system on counsel for all parties.

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