ORAL ARGUMENT NOT YET SCHEDULED

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

No. 17-1155 (consolidated with Case No. 17-1181)

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

v.

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

On Petition for Review of Final Agency Action of the
United States Environmental Protection Agency

FINAL BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Richard L. Revesz
Madison Condon
Bethany A. Davis Noll
Denise A. Grab
Jason A. Schwartz
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, Room 319
New York, NY 10012
(212) 992-8932
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity

November 1, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASE

All parties, intervenors, and *amici* appearing in this case are listed in the brief for State Petitioners and the brief for Community Petitioners Air Alliance Houston et al. ("Community Petitioners") and Petitioner-Intervenor United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, except for the present movant *amicus curiae* in support of Petitioners and Former Regulatory Officials, Beth Rosenberg, David Michaels, and Jordan Barab, movants *amici curiae* in support of Petitioners. References to related cases appear in both Petitioners' briefs.

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

We understand that a group of former regulatory officials also plan to file an amicus brief. A single amicus curiae brief is not practicable in this case. As we explain further below in the section entitled Interest of Amicus Curiae, the Institute for Policy Integrity has a wholly distinctive perspective on the issues involved. *See* D.C. Cir. R. 29(d).

Under Federal Rule of Appellate Procedure 29(a), the Institute for Policy Integrity states that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity ("Policy Integrity") is a not-for-profit organization at New York University School of Law. Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity has no parent companies. No publicly-held entity owns an interest of more than ten percent in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASE i

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS ii

RULE 26.1 DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

EPA FAILED TO PROVIDE A REASONED EXPLANATION FOR DELAYING THE CHEMICAL DISASTER RULE 6

A. EPA Is Required to Analyze the Forgone Benefits of the Chemical Disaster Rule 7

B. EPA's Assessment of the Forgone Benefits of the Chemical Disaster Rule Was Arbitrary and Capricious 10

1. EPA Improperly Dismissed the Benefits of the Chemical Disaster Rule as "Speculative" 11

2. EPA Irrationally Disregarded the Impact of the Delay Rule on the Compliance Deadlines 15

CONCLUSION 19

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION 20

TABLE OF AUTHORITIES

Cases **Pages**

Am. Trucking Associations, Inc. v. EPA,
175 F.3d 1027 (D.C. Cir. 1999) 14

Becerra v. Dep't. of Interior,
No. 17-cv-02376, 2017 WL 3891678 (N.D. Cal. Aug. 30, 2017) 6

California v. BLM,
No. 17-cv-3804-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017) 6, 9, 17

Clean Air Council v. Pruitt,
862 F.3d 1 (D.C. Cir. 2017) 6, 18

Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.,
956 F.2d 321 (D.C. Cir. 1992) 7

Consarc Corp. v. U.S. Treasury Dep't, Office of Foreign Assets Control,
71 F.3d 909 (D.C. Cir. 1995) 9

Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.,
538 F.3d 1172 (9th Cir. 2008) 15

Davis Cty. Solid Waste Mgmt. v. EPA,
108 F.3d 1454 (D.C. Cir. 1997) 8

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 7

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 4, 7, 13

Michigan v. EPA,
135 S. Ct. 2699 (2015) 7

Mingo Logan Coal Co. v. EPA, 829 F.3d 710 (D.C. Cir. 2016) 7

TABLE OF AUTHORITIES (cont.)

Cases (cont.) **Pages**

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 6, 7

Nat. Res. Def. Council, Inc. v. U.S. Forest Serv.,
421 F.3d 797 (9th Cir. 2005) 18

Nat'l Ass'n of Home Builders v. EPA,
682 F.3d 1032 (D.C. Cir. 2012) 15

Pub. Citizen v. Steed,
733 F.2d 93 (D.C. Cir. 1984) 6

Public Citizen v. Fed. Motor Carrier Safety Admin.,
374 F.3d 1209 (D.C. Cir. 2004) 13-14

Sierra Club v. Jackson,
833 F. Supp. 2d 11 (D.D.C. 2012) 6, 8

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 14

Federal Register

58 Fed. Reg. at 51,735 (Oct. 4, 1993) 14

82 Fed. Reg. 27,133 (June 14, 2017) ..... passim

82 Fed. Reg. 4594 (Jan. 13, 2017) ..... passim

Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments, 82 Fed. Reg. 20,825 (May 4, 2017) 9

Proposed Extension of Applicability Dates, Definition of the Term "Fiduciary"; Conflict of Interest Rule, 82 Fed. Reg. 12,319 (March 2, 2017) 8

TABLE OF AUTHORITIES (cont.)

Court Documents **Pages**

Community Petitioners' Brief 4, 16

State Petitioners' Brief 4, 16

Other Authorities

Br. for Institute for Policy Integrity as Amicus Curiae, *California v. BLM*, No. 17-cv-3804-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017) 2

Br. for Institute for Policy Integrity as *Amicus Curiae*, *Clean Water Action v. Pruitt*, No. 17-817 (D.D.C. June 27, 2017), ECF No. 25 2

Br. for Institute for Policy Integrity as *Amicus Curiae*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) 2

Br. for Institute for Policy Integrity as *Amicus Curiae*, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Jan. 25, 2017) 2

EPA, *Guidelines for Preparing Economic Analyses* (2010) 9-10

EPA, *Regulatory Impact Analysis: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)* (2016), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-073 ..... passim

Executive Order 13,783, § 5(c) 8

Kenneth J. Arrow et al., Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles (1996), *available at* https://scholar.harvard.edu/files/stavins/files/benefit_cost_analysis_in_environmental.aei_.1996.pdf 14

TABLE OF AUTHORITIES (cont.)

Other Authorities (cont.) **Pages**

Letter from E. Scott Pruitt, EPA Administrator, to the Honorable Matt Bevin, Governor of Kentucky (Mar. 30, 2017), *available at* https://www.epa.gov/sites/production/files/2017-03/documents/ky_bevin.pdf.....18

Letter from Patrick Morrisey, West Virgina Attorney General et al., Re: The Clean Power Plan Stay (Feb. 12, 2016), *available at* http://ago.wv.gov/publicresources/epa/Documents/2016-02-12%20Letter%20to%20NARUC%20%20%20NACAA%20(M0118772xCECC6).....18

Memorandum re Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012), *available at* https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.....10

Office of Mgmt. & Budget, Memorandum: Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs" (Apr. 5, 2017) 8, 14

Office of Mgmt. & Budget, OMB Circular A-4 (2003) 8, 9

Policy Integrity Comments on Dep't of Interior's Proposed Repeal of the Coal Valuation Reform (May 4, 2017), *available at* https://www.regulations.gov/document?D=ONRR-2017-0001-0079.....3

Policy Integrity Comments on EPA's Further Stay of the Deadlines in EPA's Emission Standards for Methane Emissions from New, Reconstructed, and Modified Sources (Aug. 9, 2017), *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2010-0505-11337..... 2-3

Policy Integrity Comments on EPA's Proposed Further Delay of the Effective Date of amendments to the Risk Management Program (May 19, 2017), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0857.....3

TABLE OF AUTHORITIES (cont.)

Other Authorities (cont.) **Pages**

Richard L. Revesz, *Quantifying Environmental Benefits*, 102 Cal. L. Rev. 1423 (2014) 14-15

Speculative, Merriam-Webster.com (2017) 13

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

APA	Administrative Procedure Act
Chemical Disaster Rule	Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Final Rule, 82 Fed. Reg. 4594 (Jan. 13, 2017)
Circular A-4	Office of Mgmt. & Budget, OMB Circular A-4 (2003)
Community Petitioners	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
Delay Rule	Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, Final Rule, 82 Fed. Reg. 27,133 (June 14, 2017)
EPA	Respondents U.S. Environmental Protection Agency and Scott Pruitt, Administrator
Guidelines	EPA, *Guidelines for Preparing Economic Analyses* at 5-1 (2010)

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
State Intervenors	Respondent-Intervenors Louisiana, Arizona, Arkansas, Florida, Kansas, Kentucky, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin
State Petitioners	State Petitioners New York, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, and Washington
Policy Integrity	The Institute for Policy Integrity at New York University School of Law

INTEREST OF AMICUS CURIAE

The Institute for Policy Integrity at New York University School of Law[1] ("Policy Integrity") submits this *amicus* brief in support of Petitioners' challenge to the Environmental Protection Agency's ("EPA") Delay, 82 Fed. Reg. 27,133 (June 14, 2017) ("Delay Rule"), of the "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," 82 Fed. Reg. 4594 (Jan. 13, 2017) ("Chemical Disaster Rule").

Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, with a particular focus on natural resources, environmental, and economic issues. An area of special concern for Policy Integrity is the proper scope and estimation of costs and benefits in the promulgation of federal regulations. Our director, Richard L. Revesz, has published more than fifty articles and books on environmental and administrative law, including several works that address the legal and economic principles that inform rational regulatory decisions.[2]

---

[1] This brief does not purport to represent the views of New York University School of Law, if any.

[2] *See* Publications of Richard L. Revesz, NYU Law, http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.publications&personid=20228 (last visited Oct. 28, 2017).

Policy Integrity has filed *amicus curiae* briefs addressing agency analysis of costs and benefits in many cases. Particularly relevant to this case, Policy Integrity has filed briefs on how agencies should account for unquantified benefits and forgone benefits in regulatory actions. For example, Policy Integrity filed briefs in the Supreme Court and in this Court addressing EPA's treatment of unquantified benefits and its calculation of costs and benefits in its regulation of mercury emissions from power plants. *See* Br. for Institute for Policy Integrity as *Amicus Curiae*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015); Br. for Institute for Policy Integrity as *Amicus Curiae*, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Jan. 25, 2017).

In addition, Policy Integrity has filed *amicus* briefs discussing EPA and the Department of Interior's failure to conduct a proper assessment of costs and benefits in delaying final agency rules. *See* Br. for Institute for Policy Integrity as *Amicus Curiae*, *California v. BLM*, No. 17-cv-3804-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017); Br. for Institute for Policy Integrity as *Amicus Curiae*, *Clean Water Action v. Pruitt*, No. 17-817 (D.D.C. June 27, 2017), ECF No. 25. And Policy Integrity has submitted comments regarding the economic analyses of this Delay Rule as well as other recently proposed repeals and stays.[3]

[3] *See, e.g.*, Policy Integrity Comments on EPA's Further Stay of the Deadlines in EPA's Emission Standards for Methane Emissions from New, Reconstructed, and

Policy Integrity's expertise in cost-benefit analysis and experience with these cases gives it a unique perspective from which to evaluate Petitioners' claims that the Delay Rule should be vacated.

SUMMARY OF ARGUMENT

EPA arbitrarily disregards the benefits forgone by its Delay Rule simply because the effects could not be precisely quantified, and offers no explanation for changing its prior view on the importance of these unquantified effects. EPA also fails to acknowledge the benefits lost from the likely delay of the Chemical Disaster Rule's compliance dates. For those reasons, the Delay Rule violates established legal principles for rational rulemaking embodied in the Administrative Procedure Act ("APA").

EPA's Chemical Disaster Rule, originally set to become effective in March 2017, was intended to reduce the frequency and magnitude of chemical accidents at facilities around the country. 82 Fed. Reg. at 4597. As petitioners have explained, with the Delay Rule, EPA has illegally stayed the effective date of the Chemical Disaster Rule in violation of sections 307(d)(7)(B) and 112(r)(7) of the Clean Air

---

Modified Sources (Aug. 9, 2017); Policy Integrity Comments on Dep't of Interior's Proposed Repeal of the Coal Valuation Reform (May 4, 2017); Policy Integrity Comments on EPA's Proposed Further Delay of the Effective Date of amendments to the Risk Management Program (May 19, 2017). Website links to these and other documents are provided in the Table of Authorities.

Act. 82 Fed. Reg. at 27,139. *See* State Pet'rs' Br. 28-38; Community Pet'rs' Br. 29-45. But even if the Delay Rule did not violate the Clean Air Act, this Court should vacate it because EPA failed to provide a "reasoned explanation" for postponing the effective date. *FCC v. Fox Television Stations, Inc.* (*Fox*), 556 U.S. 502, 515 (2009).

EPA failed to provide a "reasoned explanation" because it did not adequately address the costs of the Delay Rule in its *Federal Register* notice. In issuing the Chemical Disaster Rule, EPA had found that the rule was justified because it would reduce the severity and frequency of chemical disaster accidents at manufacturing facilities, refineries, and other covered facilities. Only a few months after that finding, EPA dismissed the notion that delaying the Chemical Disaster Rule would cause harm, claiming that the Delay Rule "simply maintains the status quo." 82 Fed. Reg. at 27,138. But any delay that cancels or suspends benefits from a prior final rule, as this one did, imposes costs and disrupts, rather than maintains, the status quo. EPA is required to acknowledge these costs and provide a justification for imposing them on society.

In addition, the analysis that EPA provides of the forgone benefits of the Delay Rule is deficient for two reasons. First, EPA attempts to minimize those benefits by labeling them "speculative," but the benefits of the Chemical Disaster Rule were unquantified, not "speculative." Under a rich body of law, agencies may not ignore or dismiss unquantified benefits. And labeling those benefits now as "speculative"

is flatly inconsistent with EPA's previous findings that the Chemical Disaster Rule would reduce the frequency and severity of accidents. Nothing in the Delay Rule supports this reversal.

Second, EPA's attempt to dismiss the forgone benefits on the ground that the compliance dates fall after the new effective date ignores the reality of the delay: There are several important deadlines that do fall within the delay period, and EPA has not provided a rational explanation for why it is appropriate to forgo the benefits associated with those deadlines. With respect to the later deadlines, EPA previously found that firms needed the full ramp-up period to be prepared for compliance. But now, with its assumption that firms will not be preparing for compliance during the period of the stay, EPA has cut almost two years out of the preparation period. Further, EPA has suggested that it will change those compliance deadlines by proposing amendments "as necessary when considering future regulatory action." 82 Fed. Reg. at 27,142. Because of this lost preparation time and likelihood that those deadlines will be missed or moved, the Delay Rule can be expected to impose forgone benefits, even for the compliance deadlines that fall outside of the period of the Delay Rule. EPA's failure to account for these forgone benefits renders the Delay Rule arbitrary and capricious.

ARGUMENT

EPA FAILED TO PROVIDE A REASONED EXPLANATION FOR DELAYING THE CHEMICAL DISASTER RULE

The Delay Rule is a final agency action that is subject to review under the APA's arbitrary and capricious standard, set out in 5 U.S.C. § 706(2). *See Clean Air Council v. Pruitt*, 862 F.3d 1, 6-8 (D.C. Cir. 2017) (stay under 42 U.S.C. § 7607(d) is a final agency action reviewable under the APA); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 18 (D.D.C. 2012) (stay under 5 U.S.C. § 705 is subject to the APA's arbitrary and capricious standard).[4]

Under the arbitrary and capricious standard, an agency must "examine the relevant data" and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). This standard applies to suspension or delay rules as well as repeals. *See Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (explaining that agencies must "cogently explain" a suspension (*quoting State Farm*, 463 U.S. at 48)). In addition, when an agency reverses course through a suspension or repeal, it must provide a "reasoned explanation" for dismissing the "facts and circumstances

[4] *See also Becerra v. Dep't of Interior*, No. 17-cv-02376, 2017 WL 3891678 (N.D. Cal. Aug. 30, 2017) (reviewing 5 U.S.C. § 705 stay under § 706); *California v. BLM*, No. 17-cv-03804, 2017 WL 4416409, at *11 (N.D. Cal. Oct. 4, 2017) (same).

that underlay" the original rule. *Fox*, 556 U.S. at 515; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). EPA's explanation for the Delay Rule failed to meet this standard.

A. EPA Is Required to Analyze the Forgone Benefits of the Chemical Disaster Rule

An important category of "relevant data" that EPA must account for is the cost of the Delay Rule, in the form of forgoing the previously identified benefits of the Chemical Disaster Rule. *State Farm*, 463 U.S. at 43. "'[C]ost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Indeed, costs include "harms that regulation might do to human health or the environment." *Id.*; *see also Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 956 F.2d 321, 326-27 (D.C. Cir. 1992) (holding that the agency should have considered costs in the form of safety risks associated with the smaller size of more fuel-efficient cars).[5]

When an agency cancels or suspends a regulation, it removes the protections and benefits that the regulation would have provided to society—causing a cost in the form of forgone benefits. As Circular A-4, a guide for agencies on regulatory cost-benefit analysis issued by the Office of Management and Budget under

[5] *See also Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (considering the costs of a repeal "is common sense and settled law").

President George W. Bush, recognizes, the timing of a rule's compliance dates may "have an important effect on its net benefits." Office of Mgmt. & Budget, OMB Circular A-4 at 7 (2003) ("Circular A-4").[6] For example, a delay of an emissions limit can cause "significant deleterious effects on the environment." *See Sierra Club*, 833 F. Supp. 2d at 36 (vacating agency stay for failure to comply with APA procedures); *see also Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1458 (D.C. Cir. 1997) (describing substantial emissions that vacating EPA's emissions limit would impose during the time it took EPA to reissue the rule).

Other agencies under President Trump have acknowledged that delaying a rule can cause significant harm. For example, the Department of Labor acknowledged that delaying a rule designed to improve financial advice to retirement investors could cause those investors to miss out on millions of dollars in investment gains.[7] And the Food and Drug Administration acknowledged that

[6] The Trump administration recently instructed agencies to follow Circular A-4, originally issued under President George W. Bush. *See* Executive Order 13,783, § 5(c); Office of Mgmt. & Budget, Memorandum: Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs" pt. IV (Apr. 5, 2017) ("Guidance on Executive Order 13,771").

[7] *See* Proposed Extension of Applicability Dates, Definition of the Term "Fiduciary"; Conflict of Interest Rule, 82 Fed. Reg. 12,319, 12,320 (March 2, 2017).

delaying a nutritional labeling requirement would lead to millions of dollars in lost health benefits.[8]

EPA is not excused from addressing the forgone benefits of the Delay Rule by the claim that "delaying the effective date of the [Chemical Disaster Rule] simply maintains the status quo." 82 Fed. Reg. at 27,138. The "status quo is the last uncontested status which preceded the pending controversy." *Consarc Corp. v. U.S. Treasury Dep't, Office of Foreign Assets Control*, 71 F.3d 909, 913 (D.C. Cir. 1995). Here, without the Delay Rule, the Chemical Disaster Rule would be in effect. Rather than maintain the status quo, the Delay Rule "disrupt[s] it" by keeping it from going into effect. *California v. BLM*, 2017 WL 4416409, at *9 (finding that agency's delay of a rule just five months after its effective date and "[a]fter years of developing the Rule and working with the public and industry stakeholders, . . . plainly did not 'maintain the status quo'").

Basic principles that govern cost-benefit analysis provide further support for this argument. When assessing the economic impact of a new rule, including a suspension, agencies must first establish a "baseline," which is the agency's "best assessment of the way the world would look absent the proposed action"— in this case, the world without the Delay Rule. *See* Circular A-4 at 15; *see also* EPA,

[8] Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments, 82 Fed. Reg. 20,825, 20,828 (May 4, 2017).

Guidelines for Preparing Economic Analyses at 5-1 (2010) ("*Guidelines*") (a baseline is "the best assessment of the world absent the proposed regulation or policy action").[9] "A proper baseline should incorporate assumptions" about "other regulations promulgated by EPA," including any finalized regulations that have not been fully implemented yet. *Id.* at 5-1, 5-3, 5-11. According to its own *Guidelines*, EPA has misidentified the baseline against which to compare the costs and benefits of the Delay Rule. The proper regulatory baseline is one in which the Chemical Disaster Rule's effective dates have not been stayed and industry is on course to comply with the scheduled future compliance dates. Here, the Chemical Disaster Rule was final and its benefits should have been included in the baseline of the Delay Rule. Delaying the rule imposed harm by putting off important reductions in the severity and impact of chemical accidents promised by the Chemical Disaster Rule. *See* 82 Fed. Reg. at 4683-85.

B. EPA's Assessment of the Forgone Benefits of the Chemical Disaster Rule Was Arbitrary and Capricious

EPA dismissed the forgone benefits of the Delay Rule by claiming that they were "speculative" and "minimal," 82 Fed. Reg. at 27,139, but that treatment of the benefits was arbitrary and capricious.

---

[9] *See also* Memorandum re Current Guidance on Economic Analysis in SEC Rulemakings 7 (Mar. 16, 2012) (the baseline should include "the existing regulatory structure"),

1. EPA Improperly Dismissed the Benefits of the Chemical Disaster Rule as "Speculative"

When promulgating the Chemical Disaster Rule earlier this year, in January 2017, EPA undertook a thorough analysis of the costs and benefits of the Rule in a 155-page Regulatory Impact Analysis ("RIA")[10] and found that the rule was reasonable, as required by the statute, 42 U.S.C. § 7412(r)(7)(B)(i). 82 Fed. Reg. at 4598. In that analysis, EPA found two main categories of benefits. First, EPA explained that "chemical accidents can impose substantial costs on firms, employees, emergency responders, the community, and the broader economy." 82 Fed. Reg. 4685. EPA estimated that monetized accident damages for facilities covered by the Rule were $274.7 million per year. RIA at 87. As the Chemical Disaster Rule would "lower[] the probability and magnitude of accidents," these damage costs would be reduced—though the exact amount of the decrease was impossible to predict due to "highly variable impacts" and a lack of data. RIA at 73. Specifically, EPA determined that the rule would reduce the "number of people killed, injured, and evacuated," as well as damage to property and the environment. RIA at 73; *see also* 82 Fed. Reg. at 4683-85 (finding that the rule would "result in a reduction of the frequency and magnitude of damages" from accidents); Community

[10] EPA, *Regulatory Impact Analysis: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)* (2016) [hereinafter "RIA"].

Pet'rs' Br. at 12-16. EPA also analyzed how each provision of the Chemical Disaster Rule would lead to those decreased damages and provided "[e]vidence of the effectiveness" of the rule's regulatory approach through reference to peer-reviewed literature. RIA at 77-79.

Second, EPA explained that the damages calculation did not account for several other categories of important but unquantified benefits, including avoiding catastrophes, lost productivity, significant emergency response costs, transaction costs caused by accidents, property value impacts in nearby neighborhoods, and environmental damages. RIA at 88-92. EPA qualitatively described how the Rule would affect each of these categories of costs resulting from chemical accidents. EPA determined that "[t]he final rule is expected to reduce costs in each of these categories" but conceded that limited data did not allow EPA to quantify the reduction. RIA at 89-92. In light of overall likely costs and benefits, EPA concluded that the Chemical Disaster Rule was reasonable. 82 Fed. Reg. at 4598 ("When considering the rule's likely benefits that are due to avoiding some portion of the monetized accident impacts, as well as the additional non-monetized benefits described previously, EPA believes the costs of the rule are reasonable in comparison to its benefits.") *see also id.* at 4612-13 (finding that the rule was appropriate); *id.* at 4684-85 (explaining that reducing the frequency and severity of accidents "provides benefits to the potentially affected members of society").

Only a few months after EPA finalized the Chemical Disaster Rule, EPA issued the Delay Rule ignoring all of EPA's prior findings about the benefits of the rule. Instead, EPA dismissed the forgone benefits as "speculative," 82 Fed. Reg. at 27,139, and claimed that the Delay Rule would not "cause harm to workers at regulated facilities and members of the public in surrounding communities." 82 Fed. Reg. 27,138. But this failed to provide a "reasoned explanation . . . for disregarding facts and circumstances that underlay" the original rule. *Fox*, 556 U.S. at 516.

While insufficient data may render a particular benefit unquantifiable, that does not mean the benefit is "speculative." The term "speculative" (defined as "theoretical rather than demonstrable," Speculative, Merriam-Webster.com (2017)[11]) suggests that there may be no benefit at all, whereas an unquantified benefit is an expected benefit that currently lacks sufficient data to quantify. The benefits that EPA previously attributed to the Chemical Disaster Rule were not "speculative": they were real reductions in the frequency and severity of chemical disasters. 82 Fed. Reg. at 4683; RIA at 73.

EPA cannot rationally ignore benefits just because they are unquantified. As this Court has previously held, "[t]he mere fact that the magnitude of [an effect] is *uncertain* is no justification for *disregarding* the effect entirely." *Public Citizen v.*

[11] *Available at* https://www.merriam-webster.com/dictionary/speculative (last visited Oct. 30).

Fed. Motor Carrier Safety Admin., 374 F.3d 1209, 1219 (D.C. Cir. 2004). Stated differently, EPA has no license to ignore the effects of its decisions just because they are "difficult, if not impossible, to quantify reliably." *Am. Trucking Assocs., Inc. v. EPA*, 175 F.3d 1027, 1052 (D.C. Cir. 1999), *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). Executive Order 12,866—the leading executive order on agency cost-benefit analysis,[12] also makes clear that it is "essential to consider" the "qualitative measures of costs and benefits that are difficult to quantify." 58 Fed. Reg. at 51,735 (Oct. 4, 1993).[13]

The mere fact that a benefit cannot currently be quantified also does not mean that the benefit is "minimal," as EPA claims. *See* 82 Fed. Reg. at 27,139. That EPA presently lacks the necessary data to quantify a given benefit has no relationship with the magnitude of the benefit, or the certainty that the benefit exists. In fact, some of the most substantial categories of monetized benefits of environmental regulation were at one time considered to be unquantifiable. *See* Richard L. Revesz, *Quantifying Environmental Benefits*, 102 Cal. L. Rev. 1423, 1436 (2014). Mortality risks, for example, were once ignored by agencies due to unsatisfactory methods for assigning a value to a regulation's expected lifesaving effects. *Id.* The development of the "willingness-to-pay" methodology allowed economists to determine how

[12] *See* Guidance on Executive Order 13,771, at part II, *supra* note 5.
[13] *See also* Kenneth J. Arrow et al., Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles, 8 (1996).

much people, on average, were willing to spend on reductions in risk. *Id.* at 1437. This information could then be aggregated to determine the "value of statistical life." *Id.* The integration of the value of life in agency cost-benefit analysis has become standard practice, and has been instrumental in supporting regulations with life-saving benefits that justify their cost. *Id.* at 1438-39.

By dismissing the benefits of the Chemical Disaster Rule, EPA has improperly "put a thumb on the scale" in favor of the Delay Rule. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198, 1200 (9th Cir. 2008) (agency's failure to calculate the cost of carbon emissions was arbitrary and capricious because "while the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero"). This was a "serious flaw undermining" the agency's analysis, which renders the Delay Rule unreasonable. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012).

2. EPA Irrationally Disregarded the Impact of the Delay Rule on the Compliance Deadlines

EPA also asserted that the benefits of the Delay Rule "would not be impacted" because "most" of the Chemical Disaster Prevention Rule's major compliance deadlines come later—after the period of the delay. 82 Fed. Reg. at 27,139-40. But that was misleading because it (1) glosses over several significant deadlines that will

be, or already have been, missed and (2) fails to account for the likely impact of a delay of this magnitude on firms' readiness to comply with the later deadlines.

The Delay Rule pushes out the effective date until February 19, 2019, which means that several important deadlines, including the March 14, 2018, deadline for the Chemical Disaster Rule's emergency response coordination provisions, will be missed. 82 Fed. Reg. 4594, 4678 tbl.6, 4696, 4699 (Jan. 13, 2017). *See* State Pet'rs' Br. at 43-44; Community Pet'rs' Br. at 17, 41. Though EPA dismisses any impact on the Chemical Disaster Rule's benefits as "minimal," 82 Fed. Reg. at 27,140, these provisions were a significant part of that Rule. As EPA explained in issuing the Chemical Disaster Rule only a few months before issuing the Delay Rule, the emergency response coordination provisions were intended to allow first responders to provide "[f]aster and better coordinated responses," and to "reduce human health impacts and property damage, and limit the number of on-site and off-site impacts." RIA at 76. In addition, these provisions were intended to "reduce the duration of incidents, the likelihood of injuries to emergency responders, and limit exposures—particularly for long-duration events." *Id.* EPA's misleading statement that the benefits will "not be impacted," 82 Fed. Reg. at 27,139, ignores the benefits that the public, first responders, and employees will lose because of the decision to cancel that deadline.

Even if the missed deadlines were insignificant (and they are not), EPA's claim that the impact of the Delay Rule on the benefits will be "minimal" fails to account for the impact of the delay on the later deadlines. The lead-up time that EPA provided in the Chemical Disaster Rule prior to the later deadlines is time that companies have indicated that they need "to adjust their operations to come into compliance." *See California v. BLM*, 2017 WL 4416409 at *8 (describing the likely delay in compliance that would result from the postponement of a rule involving natural gas waste at oil and gas extraction operations). As EPA found in the Chemical Disaster Rule, firms needed several years to prepare for compliance with several of the most major deadlines. For example, additional time was "necessary for facility owners and operators to understand the revised rule," arrange for training and resources, "research safer technologies," revise facilities' risk management programs, and "establish a strategy to notify the public" on how to obtain information that was necessary to public preparedness. 82 Fed. Reg. at 4676.

Now in issuing the Delay Rule, EPA assumes that firms will not be expending resources to complete these tasks during the time of the Delay Rule. Indeed, EPA admits that firms would otherwise need to "expend resources to prepare for compliance," *id.* at 27,140, and EPA's intent in issuing the Delay Rule was to allow firms to delay compliance. As justification for the Delay Rule, EPA asserts that the delay is "reasonable and practicable" because firms should not be required to

"prepare to comply with, or in some cases, immediately comply with, rule provisions that might be changed during the subsequent reconsideration." *Id*. at 27,139.[14]

In fact, EPA's statements in the Delay Rule encourage companies to stop compliance efforts completely, including for those provisions with compliance deadlines that lapse during the stay. For example, rather than instructing firms to continue to prepare for compliance during the period of the Delay Rule, EPA states that "[c]ompliance with all of the rule provisions is not required as long as the rule does not become effective." *See id.* at 27,142. And EPA suggests in the Delay Rule that it will move those deadlines by proposing "amendments to the compliance dates as necessary when considering future regulatory action." *Id.*

As a result, EPA's statements that the Chemical Disaster Rule's benefits "will not be impacted" or that any impact will only be "minimal," *id.* at 27,139-40, are "inaccurate and thus unreasonable." *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017); *see also Nat. Res. Def. Council, Inc. v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (faulting the Forest Service's reliance on "[i]naccurate

[14] It is extremely likely that the regulated parties will seek to toll the later compliance deadlines once the new effective date arrives. *See, e.g.*, Letter from Patrick Morrisey, West Virginia Attorney General et al., Re: The Clean Power Plan Stay at 2 (Feb. 12, 2016) (explaining that if the Clean Power Plan is upheld, the parties would "expect that the deadlines would be tolled by the amount of time the Supreme Court's stay remains in place"); Letter from E. Scott Pruitt, EPA Administrator, to the Honorable Matt Bevin, Governor of Kentucky (Mar. 30, 2017) (explaining that any deadlines that "become relevant in the future" for the Clean Power Plan would likely be subject to "day-to-day tolling.").

economic information"). EPA's failure to account for these forgone benefits in its analysis of the Delay Rule is arbitrary and capricious.

CONCLUSION

The Court should vacate the Delay Rule and reinstate the original compliance deadlines of the Chemical Disaster Rule.

DATED: November 1, 2017

Respectfully submitted,

_/s/ Richard L. Revesz_____
Richard L. Revesz
Madison Condon
Bethany Davis Noll
Denise A. Grab
Jason A. Schwartz
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, Room 319
New York, NY 10012
(212) 992-8932
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae In Support of Petitioners contains 4400 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

DATED: November 1, 2017

/s/ Richard L. Revesz

Richard L. Revesz
Madison Condon
Bethany Davis Noll
Denise A. Grab
Jason A. Schwartz
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, Room 319
New York, NY 10012
(212) 992-8932
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity