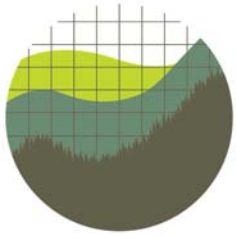

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

August 21, 2018

VIA ELECTRONIC SUBMISSION

Attn: James Belke, *belke.jim@epa.gov*
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Re: Docket ID No. EPA–HQ–OEM–2015–0725

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] submits the following comments on the Environmental Protection Agency's proposal to repeal[2] the majority of the Chemical Disaster Rule.[3]

Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. We write to make the following comments:

1. EPA does not provide an adequate justification for rescinding the Third-Party Audits, Safer Technology and Alternatives Analysis (STAA), Root Cause Analysis, and other prevention provisions (collectively "prevention provisions") of the Chemical Disaster Rule.
2. EPA should update the analysis of the forgone benefits to include the most recent information on the cost of chemical disasters.
3. EPA fails to provide a reasoned explanation for further delaying the local emergency coordination, emergency response exercises, and public meetings provisions.

[1] This document does not purport to present New York University School of Law's views, if any.

[2] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Proposed Rule, 83 Fed. Reg. 24,850 (May 30, 2018) ("Repeal Rule").

[3] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Final Rule, 82 Fed. Reg. 4594 (Jan. 12, 2017) ("Chemical Disaster Rule").

I. EPA Fails to Provide a Reasoned Explanation for Rescinding the Prevention Provisions.

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."[4] Courts will reverse where an examination of the agency's explanation makes clear that the agency failed to consider "an important aspect of the problem."[5] In addition, a "serious flaw undermining" an agency's cost-benefit "analysis can render the rule unreasonable."[6]

In issuing the Chemical Disaster Rule, EPA explained that "chemical accidents can impose substantial costs on firms, employees, emergency responders, the community, and the broader economy."[7] And EPA found that the Chemical Disaster Rule would have two main categories of benefits. First, EPA estimated that monetized accident damages would be $274.7 million per year.[8] EPA found that the Chemical Disaster Rule would "lower[] the probability and magnitude" of those accidents, reducing the damage costs—though the exact amount of the decrease was impossible to predict due to "highly variable impacts" and a lack of data.[9] 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.[10]

Second, EPA explained that the Chemical Disaster Rule would help avoid several other categories of important but unquantified damages, including high-consequence catastrophes, lost productivity, significant emergency response costs, transaction costs caused by accidents, property value impacts in nearby neighborhoods, and environmental damages.[11] 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 precisely quantify the reduction.[12] Nonetheless, despite the lack of data, when looking at "the rule's likely benefits that are due to avoiding some portion of the monetized accident impacts, as well as the

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[4] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[5] *Id. See also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[6] *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012).
[7] 82 Fed. Reg. at 4685.
[8] *Regulatory Impact Analysis: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, Section 112(r)(7) ("2016 RIA") at 87, available at https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0734.
[9] *Id.* at 73. *See also* 82 Fed. Reg. at 4683-85 (finding the rule would "result in a reduction of the frequency and magnitude of damages" from accidents).
[10] 2016 RIA at 77-79.
[11] *Id.* at 10.
[12] *Id.* at 89.

additional non-monetized benefits," EPA found that the "costs of the rule are reasonable in comparison to its benefits."[13]

Both of those categories of benefits would be forgone if EPA finalizes the Repeal Rule. And EPA has a responsibility to explain the decision to forgo those benefits. Despite that duty, EPA's treatment of the costs and benefits of the Repeal Rule is flawed in four significant respects.

A. EPA's Treatment of the Forgone Benefits of Repealing the Prevention Provisions Is Unreasonable

EPA proposes to rescind the Chemical Disaster Rule's prevention provisions.[14] But EPA's assessment of the forgone benefits of repealing those provisions is arbitrary and capricious.

1. EPA's Reliance on Cost Reductions Is Unreasonable

In justifying the Repeal Rule, EPA acknowledges that repealing the prevention provisions would "result in a reduction in the magnitude" of the benefits that would have been expected from those provisions.[15] Indeed, EPA acknowledges that there is still a need for the prevention provisions. EPA admits that "there continue to be serious chemical releases."[16] And EPA concedes that "market forces may not be sufficient to prevent accidents,"[17] acknowledging that a regulatory intervention is necessary to prevent and ameliorate the accidents. Yet in the face of that need, EPA proposes to rescind major provisions of the Chemical Disaster Rule in order to reduce costs and regulatory burden.[18] As a justification, EPA asserts that it is "reexamining the reasonableness" of the Chemical

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[13] 82 Fed. Reg. at 4598. *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").
[14] 83 Fed. Reg. at 24,852.
[15] *Id.* at 24,879; *see also Regulatory Impact Analysis: U.S. EPA, Reconsideration of the 2017 Amendments to the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)* (2018) ("2018 RIA") at 64 (that "any prevention benefits associated with those provisions would be foregone"), https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0907.
[16] 2018 RIA at 17.
[17] *Id.* at 18.
[18] 83 Fed. Reg. at 24,871. *See also* 2018 RIA at 19 (contending that the Repeal Rule "improves market efficiency by reducing regulatory burden"); 83 Fed. Reg. at 24,872 (explaining that third-party audits potentially burden the regulated community more than "is appropriate in light of new policy direction" and explaining that the new policy is to "put more emphasis on regulatory burden reduction and improved net benefits"); *Id.* at 24,871 (explaining that EPA will seek to reevaluate the Chemical Disaster Rule to determine whether the environmental benefits of additional requirements are "significant enough to justify their added cost"); *Id.* at 24,875 (seeking public comment on whether repeal addresses petitioners' concerns about "excessive regulatory costs and unjustified burdens."); *Id.* (seeking to reduce "undue burdens on facilities and local emergency responders as much as reasonably possible").

Disaster Rule in light of new executive orders that put the emphasis on reducing regulatory costs and burdens over the benefits of the rule.[19]

But it is well-settled that a lopsided focus on the compliance costs of a regulatory action is arbitrary and capricious.[20] And the Clean Air Act does not permit such a focus here. The states requires EPA to promulgate "reasonable regulations . . . . to 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."[21] A reading of the term "reasonable" in this context must, at a minimum, balance *both* goals of the statute: (1) that the regulation prevent and detect accidental releases of dangerous chemical substances, and (2) that the regulation impose reasonable and practicable requirements.[22] Stated differently, the mere existence of a compliance cost is insufficient to render the Chemical Disaster Rule unreasonable, because with that understanding the agency would never comply with its statutory duty to issue regulations preventing and detecting accidental releases. EPA has provided no explanation for how its decision satisfies that first goal of the statute. In sum, EPA's emphasis on reducing regulatory burden above the benefits of the protections provided by the rule is unreasonable.[23]

2. EPA's Reliance on a "Low and Declining Accident Rate" Is Unreasonable

In the RIA supporting the Repeal Rule, EPA states that the agency "believes the benefits and averted costs are large enough to justify the foregone benefits" of the Chemical Disaster Rule.[24] But that conclusion is unsupported and it ignores the significant unquantified benefits of the Chemical Disaster Rule.

The only support EPA provides for this claim is a "low and declining accident rate" at chemical plants.[25] But that claim is flawed. As EPA itself explained, the agency does not know whether its numbers are accurate and the tentative number of accidents it references

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[19] 83 Fed. Reg. at 24,871.
[20] *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (emphasis added) (Agencies ordinarily must pay "attention to the advantages *and the disadvantages* of agency decisions.").
[21] 42 U.S.C. § 7412(r)(7)(B)(i).
[22] *Id.*
[23] *Center for Biological Diversity v. National Highway Traffic Safety Admin*., 538 F.3d 1172, 1198 (9th Cir. 2008) (agencies are not authorized to "put a thumb on the scale" and overvalue the costs of a rule while undervaluing the benefits).
[24] Regulatory Impact Analysis: Reconsideration of the 2017 Amendments to the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7) ("2018 RIA") at 87 (April 27, 2018), available at https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0907.
[25] 83 Fed. Reg. at 24,873.

is likely to rise again at the end of the current five-year "reporting wave."[26] In addition, as EPA has acknowledged in a different section of the 2018 RIA, the number of facilities has also declined.[27] Thus, it is possible that the dip EPA claims to have found in the number of accidents does not represent any dip in the rate of accidents. EPA must assess the rate of accidents as well as confirm the actual number of accidents at the end of the reporting wave before making any conclusions based on the accident numbers. In sum, the recent accident numbers provide no reason to doubt that the agency's original conclusion that the costs of the rule are reasonable remains valid.

In any event, even if that "low and declining rate" were realistic, EPA also implicitly acknowledges in the Repeal Rule that the "significant non-monetized benefits" it previously identified nonetheless could cause the benefits of the Chemical Disaster Rule to outweigh the compliance costs.[28] As explained above, EPA previously found that the Chemical Disaster Rule could have helped prevent "many important categories of accident impacts including lost productivity, the costs of emergency response, transaction costs, property value impacts in the surrounding community (that overlap with other benefit categories), and environmental impacts," which are non-monetized.[29] In addition, EPA found that the Chemical Disaster Rule would help avoid catastrophes, which are rare but highly damaging events.[30]

EPA provides no basis for ignoring those important non-monetized benefits of the Chemical Disaster Rule now. EPA has an obligation to consider those reasonably foreseeable but difficult to quantify regulatory effects when deciding the best course to take here.[31] It is widely recognized that a cost-benefit analysis should give "due consideration to factors that defy quantification but are thought to be important."[32] The mere fact that a benefit cannot currently be quantified says little about its magnitude, and just assuming by default that it is zero is arbitrary and capricious. In fact, some of the currently most substantial categories of monetized benefits of environmental regulation were at one time considered to be unquantifiable.[33] Recognizing the significance of

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[26] 2018 RIA at 67. *See also id.* at 32 (EPA's "[p]ast experience with RMP facility accident reports suggests that . . . . accident totals will increase.").
[27] *Id.* at 24.
[28] 83 Fed. Reg. at 24,873.
[29] 82 Fed. Reg. at 4598.
[30] *Id.* at 4598. *See also* 2016 RIA at 89-92.
[31] *See, e.g.*, *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) ("The mere fact that the magnitude of [an effect] is uncertain is no justification for disregarding the effect entirely."); *Am. Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1052 (D.C. Cir. 1999) (rejecting the idea that EPA could ignore health effects that are "difficult, if not impossible, to quantify reliably"), *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).
[32] Kenneth J. Arrow et al., Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles 8 (1996), *available at* https://scholar.harvard.edu/files/stavins/files/benefit_cost_analysis_in_environmental.aei_.1996.pdf.
[33] *See* Richard L. Revesz, *Quantifying Environmental Benefits*, 102 Cal. L. Rev. 1423, 1436 (2014).

potential unquantified effects, Executive Order No. 12,866, the main executive order that has governed regulatory decision-making since 1993 and continues to govern today,[34] explicitly instructs agencies to consider such effects when analyzing proposed rules.[35] Similarly, in 2003 guidance to agency heads, the Office of Management and Budget instructed agencies not to ignore the potential magnitude of unquantified benefits, because the most efficient rule may not have the "largest quantified and monetized . . . estimate."[36]

Given the important unquantified benefits of the Chemical Disaster Rule, EPA's proposed conclusion that the costs of the Chemical Disaster Rule are likely to exceed the benefits is unreasonable.

3. The Costs of Implementing the Root Cause and Third-Party Audit Provisions Do Not Justify the Repeal Rule

Though EPA cites the desire to reduce regulatory burden as the grounds for repealing the third-party audit and root cause provisions,[37] an examination of the actual burden of those provisions through a breakeven analysis[38] demonstrates that the burden provides no justification for repeal. As a breakeven analysis for those two provisions helps show, when comparing those compliance costs to the monetized damages of accidents, it is clear that the benefits of the provisions are more than likely to outweigh the compliance costs:

- According to EPA, the third-party audit provision would cost $9.8 million annually.[39] That provision was expected to help prevent and mitigate the severity of future facility accidents.[40] EPA estimated that monetized accident damages are $274.5 million annually when issuing the Chemical Disaster Rule.[41] Thus, the third-party

[34] *See* Office of Mgmt. & Budget, Memorandum: Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs" pt. II (Apr. 5, 2017) ("EO 12866 remains the primary governing EO regarding regulatory planning and review.").
[35] *See* Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. at 51,735 ("Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.").
[36] *See* Office of Management and Budget, Circular A-4 at 2 (2003), 68 Fed. Reg. 58,366. Circular A-4 was originally issued under President George W. Bush and the current administration has instructed agencies to follow it. Office of Mgmt. & Budget, Memorandum: Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs" (Apr. 5, 2017).
[37] 83 Fed. Reg. at 24,872.
[38] Richard Revesz, *Quantifying Regulatory Benefits*, 102 Calif. L. Rev. 1423, 1426 (2014) (describing breakeven analysis).
[39] 83 Fed. Reg. at 24,879; 2016 RIA at 54.
[40] 2016 RIA at 74.
[41] *Id.* at 87.

audit provision would only need to reduce the risk of accidents by 3.5% for the costs of that provision to break even with the benefits of the rule.

- Similarly, EPA has estimated that the root cause incident investigation provision costs $1.8 million annually.[42] That provision was implemented to help facilities "prevent future accidents by identifying the underlying causes and corrective actions for serious accidents and near misses."[43] Given the $274.5 million annual cost of facility accidents, the provision would only need to reduce the risk of accidents by .6 % to break even.

It seems well within the range of reasonableness to conclude that these provisions would be able to provide this level of protection. At a minimum, these comparisons demonstrate that the low cost of the third-party audit and root cause provisions offer EPA no justification for repealing the provisions.

EPA should do a breakeven analysis for each of the provisions that it intends to rescind to assess the purported burden.

In addition, even if these comparisons showed a substantial burden, that would not account for the important unmonetized benefits that EPA identified in issuing the Chemical Disaster Rule.[44] If those benefits could be quantified, they would show that the total quantified benefits are significant amounts and outweigh the costs. As such, EPA's justification for repealing the root cause and third-party audit provisions is inadequate.

B. EPA Improperly Inflates the Benefit of Avoided Costs as a Result of Repealing the Prevention Provisions.

In analyzing the impact that the Repeal Rule will have on the costs and benefits of the Chemical Disaster Rule, EPA appropriately assumes full compliance with the Chemical Disaster Rule as the baseline.[45] But EPA does not assume full compliance with the Chemical Disaster Rule's original deadlines.[46] Instead, EPA assumes that facilities "will not have begun implementing or preparing for the implementation" of the Chemical Disaster Rule.[47] And then EPA takes credit for saving firms the full costs of complying with the Chemical Disaster Rule.[48]

But the assumption that firms have not begun complying with the Chemical Disaster Rule is inappropriate because the only reason that the Chemical Disaster Rule is not in effect is

[42] 83 Fed. Reg. at 24,879; 2016 RIA at 56.
[43] 2016 RIA at 75.
[44] *Id.* at 89-92; 82 Fed. Reg. at 4684.
[45] 2018 RIA at 19.
[46] 82 Fed. Reg. at 4594.
[47] 2018 RIA at 38.
[48] *Id.*

because EPA illegally delayed it through the Delay Rule.[49] Shortly after EPA finalized the Delay Rule, several petitioners petitioned for review in the U.S. Court of Appeals for the D.C. Circuit, arguing that the Delay Rule was illegal.[50] The court has now held that the Delay Rule was illegal both because EPA exceeded its statutory authority in issuing the Delay Rule and because EPA failed to provide a reasoned explanation for the delay.[51] Given that EPA illegally delayed the rule, EPA should not take credit for saving industry from the implementation costs that should have been incurred by now.

For example, in issuing the Chemical Disaster Rule, EPA estimated the annual cost associated with becoming familiar with the rescinded parts of the rule at $3.9–$4.6 million,[52] and a total undiscounted cost of $34.7 million.[53] This cost was supposed to be incurred in the first year of the rule—a year that should have already gone by were it not for the Delay Rule.[54] If that cost had already been incurred at the time of this proposed repeal, EPA would need to acknowledge it as a sunk cost, not count it as a benefit of the Repeal Rule. Sunk costs must be ignored in decisions about future actions, as they are nonrecoverable and have no effect on future costs and benefits.[55]

But instead of recognizing that cost as a sunk cost, EPA takes credit for saving industry from rule familiarization costs.[56] Because saving those costs was only possible due to EPA's illegal action, EPA should explain how the delay would be justified after causing sunk costs as well. Any other result allows EPA and industry to benefit from EPA's illegal action in this Repeal Rule.

The Repeal Rule also inappropriately takes credit for saving industry the full costs of the prevention provisions. Those provisions had compliance deadlines that were several years after the Chemical Disaster Rule's effective date, but some of the expenses of compliance should have been incurred by now[57] and so should not be included in the benefits of the Repeal Rule

For example, EPA found that facilities needed a full four years to "allow potential auditors enough time to establish internal protocols and identify personnel that meet the competency and independence criteria necessary to serve as a third-party auditor."[58] EPA

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[49] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133 (June 14, 2017).
[50] *See* Pet'rs Br. in *Air Alliance Houston v. EPA*, No. 17-1155 (D.C. Cir.).
[51] *Air Alliance Houston v. EPA*, No. 17-1155, 2018 U.S. App. LEXIS 23202, *5 (D.C. Cir. Aug. 17, 2018).
[52] 82 Fed. Reg. at 4597.
[53] 2016 RIA at 71.
[54] *Id.* at 52.
[55] Paul Krugman & Robin Wells, *Microeconomics* 238-239 (2nd ed., 2009).
[56] 2018 RIA at 38.
[57] *See* 82 Fed. Reg. at 4676.
[58] *Id.*

also stated that the four-year timeframe was necessary for auditors "to advertise their availability to conduct third-party audits so facility owners and operators can identify potential auditors before there is a need to conduct a third-party compliance audit."[59] In addition, EPA found that facility owners and operators needed the full four-year compliance period "to establish training and program development activities."[60] As such, according to the original deadlines in the Chemical Disaster Rule, those activities should have been ongoing for some time now.

Had EPA followed the law, this Repeal Rule would impose sunk costs on the industry players and first responders that began to come into compliance. EPA should explain how the Repeal Rule would be justified after imposing sunk costs, and not take credit for those cost-savings.

C. EPA Fails to Provide a Proper Opportunity to Comment on the Repeal Rule Because of the Illegal Delay Rule.

Agencies are required to provide the public with a "general notice of proposed rulemaking"[61] in enough detail to afford the public with a meaningful opportunity to comment on the proposed rulemaking.[62] In addition, agencies must allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[63]

As explained above, without the illegal Delay Rule, the rule would have been in place for more than a year at this point. As such, many companies would have begun making expenditures to prepare to comply with the Chemical Disaster Rule.[64] And on repeal, the public should have the opportunity to comment on the repeal of a rule that was in the process of being implemented, not the repeal of a rule that had been illegally delayed.

EPA does not have a "free pass . . . . to exceed" its statutory authority through the Delay Rule and ignore what should have been more than a year of implementation in the proposed Repeal Rule.[65] Rather, EPA should allow the public to comment on the repeal of a

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[59] *Id.*
[60] *Id. See also* 82 Fed. Reg. at 4677 (EPA finalizes longer compliance deadline for STAA because updates at complex sources "require a significant level of effort"); 82 Fed. Reg. at 4676 (EPA finalizes longer compliance deadline for all provisions since facilities must "understand the revised rule; train facility personnel. . . . learn new investigation techniques . . . . 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.").
[61] 5 U.S.C. § 553(b) (2017).
[62] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3rd Cir. 2011).
[63] 5 U.S.C. § 553(c) (2017).
[64] *See supra* pt. I.B.
[65] *California v. U. S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1126 (N.D. Cal. 2017).

rule that had been implemented, as though the Clean Air Act "had not been violated."[66] Because EPA has not provided the public with an opportunity to comment on that repeal, EPA has not satisfied its responsibility to provide the public with notice of the rulemaking or a meaningful opportunity to comment on the proposed rule.

D. The "Benefits" of the Proposed Repeal Rule Are Unsubstantiated.

The Repeal Rule proposes to rescind the "information disclosure provision that required facilities, upon request, to disclose information including names of regulated substances at the facility."[67] EPA claims that rescinding this provision will provide security benefits.[68] But that claim is speculative and unsubstantiated.

EPA claims that the benefit of repealing the information sharing provision "reflects reduced risks of terror or other attacks, thefts, and so on, that might have followed from freer-flowing information about the storage, processing, and emergency response procedures for RMP chemicals at RMP facilities."[69] To justify its claim that rescinding this provision provides security benefits, EPA lists past cases of terrorist activity related to chemical plants. But there is no connection between that terrorist activity and any increased information sharing. Indeed, as EPA admits, "these examples illustrate general security risks at chemical facilities, and not necessarily risks posed by information disclosure."[70] In contrast to EPA's finding that there was a connection between the provisions of the Chemical Disaster Rule and the benefits of the rule,[71] EPA's unsubstantiated and conclusory assertion of security benefits is insufficient to show that "there are good reasons for the new policy."[72]

II. EPA Should Update the Analysis of the Forgone Benefits to Include the Increased Risk of Accidents Caused by a Changing Climate and Other Benefits of Avoiding Chemical Accidents.

In addressing the forgone benefits of the Chemical Disaster Rule, EPA should update the estimate of the annual monetized accident damages and should work to obtain monetary

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[66] *Nat. Res. Defense Council, Inc. v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982). Though *Nat. Res. Defense Council, Inc. v. EPA* was decided under the Administrative Procedure Act, the analysis is equally applicable to the procedural requirements under the Clean Air Act. *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 523 (D.C. Cir. 1983) ("[F]ailure to observe the basic APA procedures, if reversible error under the APA, is reversible error under the Clean Air Act.").
[67] 2018 RIA at 65.
[68] 83 Fed. Reg. at 24,868.
[69] 2018 RIA at 11.
[70] *Id.* at 67-68.
[71] *See, e.g.*, 2016 RIA at 77-79, 89.
[72] *Fox Television Stations, Inc*., 556 U.S. at 515. *See also NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2013) (holding that the court would not "defer to the agency's conclusory or unsupported suppositions" (internal quotation marks omitted)); *National Treasury Employees Union v. Horner*, 654 F. Supp. 1159, 1163 (D.D.C.

estimates for the damages that are not monetized in the Chemical Disaster Rule. This is required because EPA has "reopen[ed] its consideration of regulatory costs" of the Chemical Disaster Rule in the analysis of the avoided costs of the Repeal Rule.[73] If EPA is reopening its costs consideration, EPA should also reopen the benefits calculation and take into account significant new information, which shows the gravity and increased risk of chemical accidents, among other information.

For example, one additional category of information that EPA should take into account in the calculation of damages is the increased risk of accidents caused by a changing climate. Natural disasters are increasing in rate and severity due to climate change.[74] And as seen with Hurricane Harvey's impact on the Arkema Crosby facility in Texas, those natural disasters can be accompanied by important and damaging secondary effects, such as "unprecedented damage to industrial facilities and other infrastructures."[75] Those secondary effects have "significant and long-term social, environmental, and economic impacts," which EPA should include in its calculation of the estimates of the annual monetized accident damages.[76]

In addition, EPA should address new information showing that facility incidents are more expensive than EPA originally determined in the Chemical Disaster Rule. For example, in calculating the benefits of avoiding chemical disasters in California, the Rand Corporation estimated annual monetized damages from chemical accidents at almost $800 million—close to $500 million more than EPA's estimate.[77] Other estimates similarly show that individual accidents are much more costly than the total 10-year estimate of accident costs that EPA used to assess the Chemical Disaster Rule.[78]

EPA should consider the Rand Study and the other estimates of monetized damages for two purposes. First, those estimates will help EPA calculate the monetary value of avoiding damage categories that are currently unmonetized in EPA's analysis. For example, the Rand

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1987) (an agency "may not proffer conclusory statements or unsubstantiated claims in defense of its decisions").

[73] 83 Fed. Reg. at 24,870.

[74] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,686-88 (Oct. 23, 2015); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497-98, 66,525, 66,533 (Dec. 15, 2009). *See also* U.S. EPA, *Technical Support Document For Endangerment Finding*, at ES-2- ES-3 (2009), https://www.epa.gov/sites/production/files/2016-08/documents/endangerment_tsd.pdf.

[75] U.S. Chemical Safety Board, *Organic Peroxide Decomposition, Release, and Fire at Arkema Crosby Following Hurricane Harvey Flooding Crosby, Texas* 122 (2018), http://www.csb.gov/file.aspx?DocumentId=6068.

[76] *Id.*; *see also, e.g.*, Elisabeth Krausmann, Ana Maria Cruz, and Ernesto Salzano, NATECH RISK ASSESSMENT AND MANAGEMENT: REDUCING THE RISK OF NATURAL-HAZARD IMPACT ON HAZARDOUS INSTALLATION at 20-22 (2017).

[77] Daniel Gonzales, et al., *Cost–Benefit Analysis of Proposed California Oil and Gas Refinery Regulations* 60, 72 (2016) [hereinafter "Rand Study"], https://www.rand.org/pubs/research_reports/RR1421.html.

[78] *Compare* 2016 RIA at 87 *with* Public Hearing Transcript at 79-80 (June 14, 2018), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0985.

calculation of monetized damages includes some of the important categories of avoided but unmonetized damages noted in the Chemical Disaster Rule, such as emergency services and other damages.[79] Second, EPA should use those estimates to gather data on categories of damages, which EPA did not originally consider in estimating the damages from chemical accidents. For example, the Rand Study includes analysis of the secondary and macroeconomic impacts of a chemical disaster as well as the impact on the price of gasoline.[80] EPA should include those categories of damages in the calculation of the annual monetized cost from chemical accidents and provide a reasoned explanation for forgoing the benefits of avoiding those damages in the Chemical Disaster Rule.

III. EPA Failed to Provide a Reasoned Explanation for Delaying the Local Emergency Coordination, Emergency Response Exercises, and Public Meetings Provisions.

EPA proposes to modify the local emergency coordination, emergency response exercises, and public meetings provisions in the Chemical Disaster Rule by delaying the compliance dates for those provisions.[81]

As explained above, 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."[82] This standard applies to decisions to delay deadlines, as well as repeals.[83] An important category of "relevant data" that EPA must account for in delaying those deadlines is the cost, in the form of the forgone benefits of those provisions.[84]

Yet EPA's explanation for the delay does not address at all the forgone benefits of delaying the emergency response exercises, local emergency coordination, and public meetings provisions. That failure renders the delay arbitrary and capricious.

In addition, the justification that EPA does provide for the delay is insufficient. EPA asserts in the Repeal Rule that the delay is necessary because "local responders should not be expected to expend resources complying with rule provisions that may change."[85] But the fact that EPA might change a policy in the future is no justification for suspending it.[86]

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[79] *Compare* Rand Study at 22 *with* 2016 RIA at 87-88.
[80] *See* Rand Study at 51-60.
[81] 83 Fed. Reg. at 24,861, 24,875.
[82] *State Farm*, 463 U.S. at 43 (1983) (internal quotation marks omitted).
[83] *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))
[84] *State Farm*, 463 U.S. at 43; *Air Alliance Houston*, 2018 U.S. App. LEXIS 23202, *45 (holding that EPA failed to explain how the harms that the Chemical Disaster Rule would have prevented were now only "speculative").
[85] 83 Fed. Reg. at 24,875.
[86] *Air Alliance Houston*, 2018 U.S. App. LEXIS 23202, *43-44 ("[T]he mere fact of reconsideration, alone, is not a sufficient basis to delay promulgated effective dates specifically chosen by EPA on the basis of public input

Under the Clean Air Act, the regulated community is required to comply with final rules, unless and until an agency lawfully repeals or revises them.[87]

Moreover, the only reason that those resources have not been spent yet is because the provisions were delayed through the Delay Rule.[88] But as explained above, EPA should not be permitted to rely on that Delay Rule to excuse the continued delay. As the court held in *Air Alliance v. Environmental Protection Agency*, the Delay Rule was illegal both because EPA exceeded its statutory authority in issuing the delay and because EPA failed to provide a reasoned justification for the delay. Allowing EPA to rely on the illegal delay to justify further delay here would give EPA a "free pass . . . to exceed [the agency's] statutory authority and ignore [its] legal obligations under the APA."[89]

Respectfully,

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and reasoned explanation."); *Pub. Citizen*, 733 F.2d at 102 ("Without showing that the old policy is unreasonable, for NHTSA to say that no policy is better than the old policy solely because a new policy might be put into place in the indefinite future is as silly as it sounds.").

[87] *See Air Alliance Houston*, 2018 U.S. App. LEXIS 23202, *40 ("EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits.").

[88] 82 Fed. Reg. 27,133.

[89] *California*, 277 F. Supp. 3d at 1126.