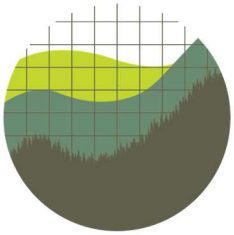

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

May 19, 2017

VIA ELECTRONIC SUBMISSION

Attn: James Belke, *belke.jim@epa.gov*
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Re: Docket ID No. EPA-HQ-OEM-2015-0725; Proposed Delay of the Effective Date

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 delay the effective date of the rule finalized on January 13, 2017 (82 Fed. Reg. 4594), amending the Risk Management Program regulations under the Clean Air Act ("Risk Management Amendments").

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 failed to provide an adequate explanation for this proposed delay.
2. The proposed twenty-month delay would violate the Clean Air Act and would be procedurally improper.

I. EPA Has Failed to Adequately Explain the Basis for this Action.

EPA is required to give "a statement of its basis and purpose" for this rule, including the "factual data on which the proposed rule is based," "the methodology used in obtaining the data and in analyzing the data," and "the major legal interpretations and policy considerations underlying the proposed rule."[2] It is also settled that when an agency changes a regulation by postponing compliance deadlines indefinitely, it "'must cogently explain'" the reasons for a delay.[3] EPA must then allow the public to comment on the

[1] This document does not purport to present New York University School of Law's views, if any.
[2] 42 U.S.C. § 7607(d)(3).
[3] *Public Citizen v. Steed*, 733 F.2d 93, 98-99 (D.C. Cir. 1984) (quoting *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 48); *see also* 42 U.S.C. § 7607(d)(3), (5), (6); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009).

grounds for the rule and, in any final rule, respond to "each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period."[4]

EPA has not complied with the requirements to inform the public about the "basis and purpose" of this rule because it failed (1) to describe the basis for reconsidering the rule, including informing the public which questions or issues are subject to reconsideration, and (2) to explain the justification for putting off the benefits of the Risk Management Rule indefinitely. As a result EPA has deprived the public of the ability to meaningfully comment on whether or not this delay is authorized.[5]

A. EPA failed to provide information about the questions that are subject to reconsideration.

In this proposal, EPA asserts authority under section 307 of the Clean Air Act to reconsider and stay the rule. But EPA did not state which issues met the criteria for reconsideration. The most EPA said was that the "criteria for reconsideration have been met for at least one of the objections" in the petition for reconsideration filed by the RMP Coalition.[6] Instead of providing the issues here, EPA promised to inform the public later which issues met the criteria for reconsideration.[7] That is manifestly insufficient because the public has no ability now to comment on whether section 307 provides a basis for this delay action.

In this proposal, EPA also referenced a March 13, 2017, letter in which EPA informed the RMP Coalition that the petition raised objections that met the requirements in section 307(d)(7)(B) for reconsideration.[8] But that letter did not give the reasons for reconsideration either. The letter described only one potential issue that qualified for reconsideration. It then stated—without details—that "at least some final rule provisions may have lacked notice" and made clear that EPA reserved the right to decide whether other issues warranted reconsideration.[9]

And a review of the petitions does not lend obvious support to EPA's vague assertion that there are issues that qualify for reconsideration. For example, in its petition for

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[4] 42 U.S.C. § 7607(d)(6).

[5] *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 452-53 (3rd Cir. 2011) (failure to provide sufficient information in proposal prejudiced public's ability to meaningfully engage in the rulemaking); *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 532 (D.C. Cir. 1982) (agency must provide sufficient information about "the technical background of the rules" to "allow for meaningful comment during the rule-making process").

[6] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 16148 (April 3, 2017).

[7] *Id.*

[8] *Id.*

[9] *See* Letter from S. Pruitt to J. Savage (March 13, 2017), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0763.

reconsideration, RMP Coalition argued that EPA's analysis of the benefits and reliance on unquantified benefits of the rule was insufficient to satisfy EPA's duty to analyze the rule's cost and benefits.[10] But that argument does not provide a basis for reconsideration or, as a result, for this twenty-month stay. Only arguments that could not have been raised during the time for public comment are appropriate for reconsideration.[11] Not only was RMP Coalition able to bring up the benefits argument during the notice and comment period, but RMP Coalition *did* raise the argument during that period.[12] And, in response, EPA properly addressed and rejected the argument in the final Risk Management Amendments.[13]

EPA's proposal to stay the rule so that it can reconsider some unknown issues is hopelessly vague and insufficient to explain the statutory basis for staying the rule. Without any information about the issues that EPA plans to reconsider, it is impossible to comment on whether EPA is reasonable in reconsidering the rule and as a result whether EPA has a statutory basis for delaying the effective date of this rule.

B. EPA has not adequately justified the delay.

EPA conducted a cost-benefit analysis as part of its support for issuing the Risk Management Amendments in the first place.[14] And to justify this stay, EPA must explain why it is appropriate to forgo the benefits of the rule during the period of the stay. Because EPA failed to do that, any stay here would be arbitrary and capricious.

In issuing the Risk Management Amendment, EPA explained that "chemical accidents can impose substantial costs on firms, employees, emergency responders, the community, and the broader economy."[15] But the "accidents themselves have highly variable impacts that are difficult to predict."[16] Because of this uncertainty, even though EPA had "no data to project the specific impact on accidents made by each final rule provision,"[17] EPA qualitatively assessed several categories of important benefits and decided that the rule was reasonable in light of overall likely costs and benefits.

First, EPA "estimated monetized damages" from facility accidents of $274.7 million per year.[18] These accidents "impose substantial costs on firms, employees, emergency

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[10] Letter from J. Savage to S. Pruitt with attached Petition for Reconsideration and Stay ("RMP Coalition Petition") at 10 (Feb. 28, 2017), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0759.
[11] *See* 42 U.S.C. § 7607(d)(7)(B).
[12] *See* Letter from American Chemistry Council, et al, to H. Shelanski (Nov. 29, 2016), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0630.
[13] *See* 82 Fed. Reg. 4685.
[14] *See id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 4683.

responders, the community, and the broader economy."[19] And EPA found that the rule would "result in a reduction of the frequency and magnitude of damages" from those accidents.[20] Second, EPA looked at important unquantified benefits to find that this rule was justified, including avoiding catastrophes, lost productivity, significant emergency response costs, transaction costs caused by accidents, property value impacts in nearby neighborhoods, and environmental damages from an accident.[21]

The rule makes several sensible improvements to address these issues. It improves coordination between local first responders and facilities and improves access to information for the neighboring community about the hazards at facilities.[22] These improvements are designed to help first responders and communities more safely address and react to an accident and prepare for the risk of accidents.[23]

Reliance on these types of unquantified benefits to achieve sensible objectives is an important part of any cost-benefit analysis and is essential to identifying rules that maximize net social welfare. Agencies have an obligation to consider reasonably foreseeable but difficult to quantify regulatory effects.[24] And agencies are expected to weigh these unquantified effects against monetized costs and benefits in accordance with their judgment and expertise.[25]

It is widely recognized that a cost-benefit analysis should give "due consideration to factors that defy quantification but are thought to be important."[26] The mere fact that a benefit cannot currently be quantified says little about its magnitude. In fact, some of the currently most substantial categories of monetized benefits of environmental regulation were at one time considered to be unquantifiable.[27]

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[19] Regulatory Impact Analysis at 9-10 (Dec. 16, 2016), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0734.
[20] 82 Fed. Reg. at 4683.
[21] *See* Regulatory Impact Analysis at 88-92 (Dec. 16, 2016), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0734.
[22] 40 C.F.R. §§ 68.96(a), 68.90(b)(5), 68.93.
[23] *See* 82 Fed. Reg. at 4595-96.
[24] *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).
[25] *See Entergy Corp. v. Riverkeeper, Inc*., 556 U.S. 208, 235 (2009) (Breyer, J., concurring in part and dissenting in part) (writing approvingly of EPA's ability to "describe environmental benefits in non-monetized terms and to evaluate both costs and benefits in accordance with its expert judgment and scientific knowledge").
[26] 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.
[27] *See* Richard L. Revesz, *Quantifying Environmental Benefits*, 102 Cal. L. Rev. 1423, 1436 (2014).

For the last twenty-five years, under administrations of both political parties, EPA has consistently recognized the importance of considering unquantified benefits. In response to criticism of its benzene regulations under Section 112, EPA under President George H.W. Bush "reject[ed] the position that only quantified information can be considered in the decisions."[28] EPA under President Clinton considered the "real, but unquantifiable benefits" of emissions standards for hazardous waste combustors.[29] EPA under President George W. Bush evaluated a rule restricting emissions from nonroad diesel engines based on "consideration of all benefits and costs expected to result from the new standards, not just those benefits and costs which could be expressed here in dollar terms."[30]

Recognizing the potential significance of unquantified effects, Executive Order No. 12,866 explicitly instructs agencies to consider such effects when analyzing proposed rules.[31] Similarly, in 2003 guidance to agency heads, the Office of Management and Budget cautioned agencies against ignoring the potential magnitude of unquantified benefits, because the most efficient rule may not have the "largest quantified and monetized . . . estimate."[32]

Thus, EPA's consideration of unquantified benefits to support promulgating the Risk Management Amendments was consistent with agency practice and executive guidance on regulatory review and provides no basis for reconsideration.

Now, in this proposed delay, EPA has not explained, whether—or even if—any costs of implementing the Risk Management Rule outweigh these substantial and important benefits for the period of this postponement. Because EPA's analysis in issuing the rule showed that important overall benefits, including saved lives, reduced injuries, fewer evacuations and property damage, reduced damages to the environment, and substantial benefits to first responders and neighboring communities,[33] justify the costs of the rule, it is not rational to assume that any financial benefit that regulated industry may enjoy from this postponement will outweigh all of those benefits. In order to justify this delay, EPA must address whether denying the public of the benefits of the rule now is worth it and why.[34] Without an adequate explanation, this delay is arbitrary and capricious.

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[28] 55 Fed. Reg. 8292, 8302 (Mar. 7, 1990).
[29] 64 Fed. Reg. 52,828, 53,023 (Sept. 30, 1999).
[30] 69 Fed. Reg. 38,958, 39,138 (June 29, 2004).
[31] *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.").
[32] Circular A-4 at 2, 68 Fed. Reg. 58366.
[33] 82 Fed. Reg. at 4684.
[34] *See e.g.*, *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (upholding reasonableness of agency's analysis of costs and benefits in the rescission of an exemption); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (holding that agency failed to explain bases for the model underlying cost-benefit analysis in revising regulations governing the hours of

In addition, in the Risk Management Amendments, EPA found that the rule was "economically significant."[35] Now in this proposal, EPA has stated that indefinitely postponing the compliance deadlines is "not a significant regulatory action."[36] But EPA provided no reasoning for that decision. In reality, it is not possible for a significant rule to become suddenly insignificant when suspended. EPA must explain how and why this proposed suspension of a significant rule is not significant.

II. The Proposed Twenty-Month Delay Would Violate the Clean Air Act and Is Procedurally Improper.

The proposed twenty-month delay is impermissible for two reasons: (1) the Clean Air Act does not allow the agency to delay the rule for longer than three months and (2) EPA cannot proceed with this long delay without seeking comments on the delay *before* the rule is suspended.

EPA delayed this rule two times before publishing this proposed delay. A timeline is necessary to understanding the problems with this third one:

- The Risk Management Amendments were finalized on January 13, 2017, and scheduled to go into effect on March 14, 2017.[37]

- On January 20, 2017, the White House ordered the heads of executive departments to "temporarily postpone" the effective dates of all regulations that have yet to take effect "for the purpose of reviewing questions of fact, law, and policy they raise."[38] But that Regulatory Freeze Memo made clear that agencies should postpone effective dates only "as permitted by applicable law."[39]

- On January 26, 2017, in response to the Regulatory Freeze Memo, EPA postponed the effective date of the Risk Management Amendments for the first time, without notice and comment, citing the "good cause" exception in 5 U.S.C. § 553(b)(B) and

commercial motor vehicle operators); *Center for Science in the Pub. Interest v. Dep't of the Treasury*, 573 F. Supp. 1168, 1176-77 (D.D.C. 1983), *appeal dismissed*, 727 F.2d 1161 (D.C. Cir. 1984) ("Treasury has not met its burden of providing a reasoned explanation for its decision on the ground that the costs of the regulations outweigh the benefits.").

[35] 82 Fed. Reg. at 4681.

[36] 82 Fed. Reg. at 16149.

[37] 82 Fed. Reg. at 4594.

[38] Memorandum for the Heads of Executive Departments and Agencies ¶ 3 (Jan. 20, 2017) ("Regulatory Freeze Memo"), *available at* https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies.

[39] *Id.*

553(d)(3).[40] The first delay postponed the effective date for a week, from March 14 to March 21, 2017.[41]

- On February 28, 2017, several industry groups petitioned for reconsideration of the rule and requested a stay.[42]

- On March 16, 2017, after the rule's original effective date, but prior to the expiration of the first delay, EPA announced that it would reconsider the rule under 42 U.S.C. § 7607(d)(7)(B).[43] EPA also announced that it would stay the effective date for ninety days from March 21, 2017 to June 19, 2017.[44] EPA did not seek public comment on the second delay.

- On April 3, 2017, EPA proposed this third postponement, of twenty months, and explained that it would push off the compliance dates in the rule indefinitely.[45] As EPA stated in this proposed delay, "[c]ompliance with all of the rule provisions is not required as long as the rule does not become effective. The EPA is not proposing any action on any compliance dates at this time, as EPA plans to amend the compliance dates as necessary when considering future regulatory action."[46]

A. The proposed twenty-month delay here violates the Clean Air Act.

This twenty-month delay is not permitted by the Clean Air Act. The Clean Air Act is clear. Under section 307, EPA may not "postpone the effectiveness" of a rule pending reconsideration for longer than three months. 42 U.S.C. § 7607(d)(7)(B).

In this proposal, EPA has asserted that changing the effectiveness date of a rule "is consistent with [EPA's] rulemaking authority under CAA 307(d), which generally allows the EPA to set effective dates."[47] But, as EPA recognizes, that authority is subject to any other specific provisions of the Clean Air Act that might control.[48] Here, EPA has already finalized the effective date and is seeking to postpone it while reconsidering the rule under section 307(d)(7)(B). In these circumstances, there is a specific provision that controls and

[40] 82 Fed. Reg. 8500-01.
[41] *Id.* at 8501.
[42] RMP Coalition Petition, *supra*. The industry groups are: American Chemistry Council, the American Forest & Paper Association, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the Utility Air Regulatory Group.
[43] 82 Fed. Reg. at 13969.
[44] 82 Fed. Reg. at 13969.
[45] 82 Fed. Reg. at 16146.
[46] 82 Fed. Reg. at 16149.
[47] 82 Fed. Reg. at 16148-49.
[48] 82 Fed. Reg. at 16148.

overrides any general authority EPA may have had to "set effective dates." That specific provision is section 307(d)(7)(B) itself, which states that any postponement of the effectiveness date pending reconsideration may not "exceed three months." 42 U.S.C. § 7607(d)(7)(B). Section 307 "limits any stay that may be issued by EPA or a court during such reconsideration to a period of no longer than three months."[49] As the D.C. Circuit has explained, in section 307, Congress "permitted a stay only under carefully defined circumstances; and even then, it did so for a single period not to exceed three months."[50]

EPA already postponed the rule for the maximum of three months that is allowed by the Clean Air Act[51] and has no authority to stay the rule for a further twenty months.

B. The proposed twenty-month delay is impermissible because EPA failed to seek notice and comment before the delay began.

Even if section 307 provided authority to delay the rule for longer than three months (and it does not), EPA proposes to substantively change the rule and push off the compliance dates indefinitely. [52] As a result, EPA must seek public comment on the proposed stay.[53] Indeed, by issuing this proposal and inviting public comment, EPA acknowledges that it must seek public comment before postponing the effective date for twenty more months and indefinitely postponing the compliance dates.

The problem is that EPA already delayed the rule's effective date two times without public comment and EPA plans to roll those two stays into this third stay, thus keeping the rule's compliance dates from ever coming into effect—all without receiving public comment on delaying the rule in the first place.

EPA had no excuse for not seeking comment on the previous delays in this rule. In the first delay, EPA stated that it had "good cause" to delay the rule, without notice and comment, because officials needed an "opportunity for further review and consideration of new regulations, consistent" with the Regulatory Freeze Memo.[54] But the Regulatory Freeze Memo did not provide good cause because EPA could have complied with both the memo and the notice-and-comment requirements. Indeed, just like in *NRDC v. EPA*, where EPA's attempt to use a nearly identical excuse was rejected,[55] the Regulatory Freeze Memo

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[49] *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1184, 1186 (D.C. Cir. 1980).
[50] *NRDC v. Reilly*, 976 F.2d 36, 40 (D.C. Cir. 1992).
[51] 82 Fed. Reg. at 13969.
[52] 82 Fed. Reg. at 16149.
[53] *Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983) ("suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking" unless an agency can satisfy the "good cause" exception); *Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric.*, 566 F. Supp. 2d 995, 1004 (D.S.D. 2008) (collecting cases). *See* 42 U.S.C. § 7607(d)(3) (requiring EPA to comply with notice provisions in section 553(b) of the APA); *id.* § 7607(d)(5), (6) (requiring EPA to accept and respond to public comments).
[54] 82 Fed. Reg. at 8500.
[55] *NRDC v. EPA*, 683 F.2d 752, 765, n. 24 (3d Cir. 1982).

"specifically stated that agencies should comply with all applicable law."[56] Moreover, once the Regulatory Freeze Memo was issued, the agency had almost two months in which to solicit comments and finalize a delay before the effective date of March 14, 2017. That should have been more than enough time[57] to both freeze the rule and allow the public to comment on the proposed freeze.[58]

The other reason given by the agency was also insufficient. The agency claimed that it needed to delay this rule without notice and comment so that it could "focus[] its attention on the substance" of the rule rather than on soliciting and reviewing comments in time for March effective date.[59] But an agency cannot rely on an "emergency of [its] own making" in order to invoke the good cause exception.[60] And the imminence of a deadline does not give the agency "good cause" to suspend a rule without complying with the notice and comment requirements.[61]

The second delay here also does not help EPA because that delay simply continued the first invalid postponement—again without notice and comment. That delay was problematic in its own right, because EPA stated that it was delaying the rule under its authority to reconsider the rule. But that delay notice provided no information about the grounds for reconsideration.

As a result, public comment on *this* proposal for a "further delay" is not sufficient to comply with the notice and comment requirement or to cure EPA's previous failures to seek public comment.[62] EPA is required to ask the public whether the delay should be "authorized in the first place," not whether a delay should be continued.[63] In other words, a rulemaking on a "further postponement" cannot serve as the mechanism for suspending the rule indefinitely.[64] As the Third Circuit in *NRDC v. EPA* made clear, a proposal for further postponement cannot "substitute" for "procedures in connection with an initial

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[56] Regulatory Freeze Memo ¶ 3.
[57] *See, e.g.*, 82 Fed. Reg. 16902 (Department of Labor's decision finalizing a 60-day delay of the Fiduciary Rule five weeks after proposing the delay).
[58] *See NRDC,* 683 F.2d at 765.
[59] *Id.*
[60] *NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004).
[61] *Envt'l Def. Fund, Inc. v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983).
[62] *NRDC*, 683 F.2d at 768. Though *NRDC v. EPA* was decided under the Administrative Procedure Act, the analysis is equally applicable to the notice and comment 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.").
[63] *NRDC*, 683 F.2d at 768.
[64] *Id.*

postponement," because that would allow EPA to circumvent the notice-and-comment requirement to seek public comments on its proposal *prior* to promulgation.[65]

EPA should lift the illegal stay and reinstate the Rule's effective date of March 14, 2017.

Respectfully,

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[65] *Id*. *See also Union of Concerned Scientists v. Nuclear Reg. Comm.*, 711 F.2d 370 (D.C. Cir. 1983) (challenge to the interim rule is not mooted by the subsequent rulemaking proceedings); *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (post-promulgation comments are not a substitute for comment before promulgation).