



January 3, 2019

To: Andrew Wheeler, Acting Administrator, EPA

Subject: Failure to Assess the Forgone Benefits of the Proposal to Delay the Timing of State and Federal Plans to Implement the Emission Guidelines for Municipal Solid Waste Landfills, 83 Fed. Reg. 54,527 (Oct. 30, 2018).

Docket: EPA-HQ-OAR-2018-0696

In 2016, EPA finalized Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills¹ (“2016 rule”) that, once implemented, will deliver significant net benefits—\$400 million in the year 2025 alone—from reducing pollution that contributes to climate change and other harmful impacts to human health and the environment, and by capturing otherwise wasted landfill gas and redirecting it to productive use to generate electricity.² Now, just a little over two years later, EPA proposes substantially delaying implementation of those important protections: delaying the deadline for submission of state implementation plans (from 9 months to 3 years), delaying the deadline for EPA review of state plans (from 4 months to 12 months, after a 6-month review period for completeness), and delaying the deadline for EPA to propose any necessary federal implementation plans (from 6 months to 2 years).³

The Institute for Policy Integrity at New York University School of Law⁴—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—submits the following comments on why the proposed delay is entirely unjustified.

When an agency decides to change course by delaying a regulation, the agency must “cogently explain” the basis for breaking from its prior regulatory positions, under the same standards of rationality that apply to ordinary rulemaking.⁵ In particular, these standards of rationality demand that agencies 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.”⁶ An important category of “relevant data” and an “important aspect of the problem” that EPA must account for is the proposed delay’s social costs, in the form of the forgone benefits of the original 2016 emission guidelines.⁷

¹ 80 Fed. Reg. 59,276 (Aug. 29, 2016).

² EPA, *Regulatory Impact Analysis for the Final Revisions to the Emission Guidelines for Existing Sources and the New Source Performance Standards in the Municipal Solid Waste Landfills Sector* at ES-5 (2016) (hereinafter 2016 RIA) (summarizing the net benefits for the emission guidelines for existing landfills in the year 2025).

³ 83 Fed. Reg. 54,527 (Oct. 30, 2018).

⁴ No part of these comments purports to present the views, if any, of New York University.

⁵ *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.* (“*State Farm*”), 463 U.S. 29, 48 (1983)); *accord*, *Air Alliance Houston v. Environmental Protection Agency*, 906 F.3d 1049, 1066 (D.C. Cir. 2018) (reviewing a delay under the *State Farm* standard).

⁶ *State Farm*, 463 U.S. at 43 (internal quotation marks omitted); *see also* *F.C.C. v. Fox Television Stations, Inc.* (“*Fox*”), 556 U.S. 502, 514-515 (2009) (explaining that the agency has to show that “there are good reasons for the new policy”); *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2013) (explaining that conclusory or unsupported assertions are not enough).

⁷ *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 during the suspension were now only “speculative”).

Here, EPA fails both to explain why its proposed delay is justified by the facts before it and to assess in any meaningful way the likely social costs of the proposed delay. As such, the proposal is unjustified.

I. EPA Provides No Rational Justification for the Proposed Departure from the 2016 Rule

EPA has provided no evidence of changed circumstances justifying this departure from the 2016 rule, other than circumstances of the agency's own creation. Most notably, while in 2016 EPA had believed that a majority of states would be able to submit plans within the prescribed 9-month period, EPA now implicitly and misleadingly concludes that, because "almost all of the states" in fact did not submit plans before May 30, 2017, the 9-month period must therefore be infeasibly short and so a 3-year timeline is now more "appropriate."⁸ Of course this implicit conclusion ignores how, in the run-up to the May 2017 deadline, EPA signaled its intent to stay and reconsider the 2016 rule and told regulated entities that they "need not comply with these requirements."⁹ EPA's own preemptive suspension of the May 2017 deadline hardly constitutes proof that states could not otherwise comply with the May 2017 deadline. Moreover, even if states were unable to make the May 2017 deadline, EPA never explains why that justifies a 300% increase in the deadline, from 9 to 36 months.

In fact, during the 2016 rulemaking, even among the few commenters asking for an extension, none asked for a timeline anywhere near as long as 3 years. The National Association of Clean Air Agencies, the Iowa Department of Natural Resources, and the Pennsylvania Department of Environmental Protection all asked for 1 year; the Idaho Department of Environmental Quality asked for up to 2 years; and the State of New Mexico asked for up to 18 months.¹⁰ Interestingly, despite its insistence in comments that "a minimum of 12 months will be required for . . . rule development, public outreach, public notice, and to hold a public hearing,"¹¹ New Mexico in fact "submitted [its] approved State Plan implementing the Emission Guidelines in early May, 2017."¹² Not only is a 3-year timeline unsupported by comments from the 2016 rulemaking, but even some of those requests for extensions are belied by the reality that states like New Mexico did in fact comply within the 9-month period.

In 2016, EPA fully considered but ultimately rejected this handful of requests for a slightly extended deadline for states to submit plans, explaining that while a few states may have special legal obligations under their rulemaking processes that will take longer than 9 months, "such circumstances will be the exception rather than the rule."¹³ Yet in proposing the delayed timeline, EPA now never adequately explains why the agency's sound reasoning from 2016, which drew on EPA's historic experience with states navigating their own rulemaking processes to develop implementation plans, no longer holds true.¹⁴

EPA also now misconstrues part of its reasoning from 2016 for rejecting a deadline extension. EPA now implicitly claims that, back in 2016, the agency knew that most states would not be able to meet a 9-

⁸ 83 Fed. Reg. at 54,530.

⁹ Letter from E. Scott Pruitt to Carroll W. McGuffey et al., on Convening a Proceeding for Reconsideration of Final Rules, May 5, 2017, available at https://www.epa.gov/sites/production/files/2017-05/documents/signed_-_letter_-_municipal_solid_waste_landfills.pdf; see also 82 Fed. Reg. 24,878 (May 31, 2017).

¹⁰ EPA, *Response to Public Comments on Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times* at 30-33 (2016), available at <https://www.epa.gov/sites/production/files/2016-12/documents/landfill-nsp-eg-2016-rtc.pdf>.

¹¹ *Id.* at 33.

¹² <https://www.env.nm.gov/air-quality/proposed-regs/> (last visited Jan. 2, 2019) (describing the history of its implementation plans in a section on "Municipal Solid Waste Landfills – New Source Performance Standards and Emission Guidelines").

¹³ EPA, *Response to Public Comments*, at 31.

¹⁴ *Fox*, 556 U.S. at 514-15 (explaining that the agency must show that "there are good reasons for the new policy").

month deadline but was unconcerned because “the existence of federal backstop authority” would allow the agency to step in with federal implemental plans.¹⁵ EPA now says that it has reconsidered congressional intent and found that because the emission guidelines process must be “state-driven,” a longer timeline is necessary.¹⁶ Yet that entire explanation misstates the agency’s reasoning from 2016. In 2016, EPA first firmly stated its belief “that the majority of states will be able to complete the process within the prescribed 9 months,”¹⁷ and only separately mentioned its authority to construct federal implementation plans as a backstop “for states that *do not* submit a state plan”¹⁸—specifically referring to states that *do not* submit a plan, rather than states that are not able to submit a plan by the deadline. EPA knew from history that, however long or short the timeline is, some states may never submit an implementation plan, and it is principally for these states that EPA reserves its authority to construct federal implementation plans. Congress specifically gave EPA this authority to issue federal implementation plans to ensure that states could not entirely avoid their obligations by failing to craft adequate state implementation plans. In the 2016 rule, EPA noted that fifteen states and territories had “never submitted a state plan” under the previous guidelines, and that a revised federal plan could apply in those states.¹⁹ In other words, in 2016 EPA did not invoke its authority for federal implementation plans as a justification for the 9-month deadline; rather, EPA set the 9-month deadline because, in 2016, the agency believed that was the most appropriate and feasible deadline.

Because EPA has misconstrued and ignored its prior justifications for the original deadlines set in the 2016 rule, and because the only evidence of changed circumstances that EPA offers resulted directly from EPA’s own actions, EPA has failed to provide any rational justification for the proposed departure from the 2016 rule. Moreover, as the next section explains, in addition to being an irrational change in course from the agency’s prior regulatory positions, the proposed delay fails on its own merits as well, since the supposed benefits are illusory and the significant social costs are inadequately analyzed.

II. EPA Fails to Rationally Weigh the Proposed Delay’s Costs Against Its Supposed Benefit

EPA insists that while “the costs and benefits of harmonizing the timing requirements of state plans cannot be quantified due to inherent uncertainties, the EPA believes that they will be minimal.”²⁰ In fact, while the proposed delay’s supposed benefits likely are minimal or even completely illusory, the agency has failed to assess in any meaningful way what will very likely be substantial costs of the proposal, in the form of forgone climate benefits and other forgone benefits.

EPA’s recounting of the proposed delay’s supposed benefits is flawed. EPA suggests the proposed delay is necessary to “align” the timing requirements for implementation plans for municipal solid waste landfills with the proposed altered timing requirements for all emission guidelines introduced as part of the proposed Affordable Clean Energy (ACE) rule.²¹ But those proposed altered timing requirements have not yet been finalized because ACE has not been finalized, and so there are, in fact, no new final timing requirements to align with as of yet. And even if ACE is finalized as proposed, it is likely to be subject to judicial challenge, and may never come into effect.

¹⁵ 83 Fed. Reg. at 54,530.

¹⁶ *Id.*

¹⁷ EPA, *Response to Public Comments*, at 31.

¹⁸ *Id.* (emphasis added)

¹⁹ 81 Fed. Reg. 59,276, 59,287 (Aug. 29, 2016).

²⁰ 83 Fed. Reg. at 54,531.

²¹ 83 Fed. Reg. at 54,529.

EPA also never clearly articulates the virtue, if any, of alignment. Perhaps EPA believes that alignment is necessary to “avoid confusion regarding deadlines.”²² Yet in the proposed ACE rule, EPA acknowledged that applying “these new implementing regulations . . . to an emission guideline previously promulgated” would *create* (rather than resolve) “confusion”—and “so EPA is proposing that the new implementing regulations are applicable only to emission guidelines . . . developed after promulgation of this regulation.”²³ Given these contemporaneous and contradictory statements from EPA, it is hard to see how the proposed delay would avoid confusion through alignment.

EPA also suggests that extending the timeline for state submission from 9 months to 3 years is necessary to “minimize the chance of unexpected issues arising that could slow down eventual approval of state plans.”²⁴ The implication that an across-the-board and severe delay (a 300% increase) is needed to prevent the remote possibility of some future slowdown due to “unexpected issues” is perverse. The existing process already budgets 10 months (the 4-month review period and the 6-month FIP development period) during which EPA can convey to the states any “unexpected issues” that may arise with approval of the submitted state plans, and during which states can respond with a new proposal before a federal plan would take effect. Even if EPA feels it is occasionally necessary to give some states some additional upfront time during their initial submission period for such back-and-forth discussions with EPA, the agency has failed to explain why an additional 27 months (extending 9 months into 3 years) is warranted in every case and has failed to explain why the benefits of such an extreme delay justify the costs of delay.

EPA claims that extending the timeline for development of the federal implementation plan was necessary to give EPA more time and to allow EPA to craft a single plan that would apply to all states that had failed to submit a plan.²⁵ However, in the 2016 rule, EPA already indicated its intent to begin work “to revise the existing federal plan,” which already covered fifteen states and territories, and may also be needed to cover some tribal lands, and so would have to be revised regardless of any other state’s subsequent failure to submit a satisfactorily revised state implementation plan.²⁶ If EPA has failed to follow through on those intentions and, in the last two and half years, has not yet developed a revised federal implementation plan, that is a problem of EPA’s own creation and is hardly a justification for delaying the timelines for implementation.

EPA’s last remaining justification for the proposed delay is that the “work, effort, and time” that states must put into developing implementation plans warrants a longer timeframe.²⁷ First, it is notable that California, Arizona, and New Mexico were all able to complete their work, hold public hearings, and submit implementation plans even before EPA stayed the original May 2017 deadline.²⁸ This demonstrates that the time originally provided should have been adequate for many if not all states. Even if some states would prefer to have slightly more time (though recall that, as discussed above, no commenters on the 2016 rule asked for anywhere near as long as 3 years) and some states may experience some benefits from a delay, the delay comes with costs. Delay would also enable regulated entities to postpone compliance costs, which those regulated entities would experience as private

²² 83 Fed. Reg. at 54,530 (suggesting that the need to avoid confusion is a reason states to resubmit any plans already submitted prior to this proposed change).

²³ 83 Fed. Reg. 44,746 44,770 (Aug. 31, 2018).

²⁴ 83 Fed. Reg. at 54,530.

²⁵ 83 Fed. Reg. at 54,531.

²⁶ 81 Fed. Reg. at 59,287.

²⁷ 83 Fed. Reg. at 54,530.

²⁸ 83 Fed. Reg. at 54,530 n.5; *see, e.g.*, <https://www.env.nm.gov/air-quality/proposed-regs/> (detailing the notice of public hearing during the New Mexico Environmental Improvement Board’s approval process).

benefits. However, those potential benefits or cost savings from the proposed delays must be weighed against the likely costs and forgone benefits from delay. EPA has failed to weigh those costs and forgone benefits of delay, as discussed next.

EPA failed to assess the forgone benefits of the proposed delay. EPA believes that the costs of its proposed delay are inherently uncertain and unquantifiable, but nevertheless will be “minimal.”²⁹ EPA concedes that if a regulated entity delays installation of controls due to the proposed delay, that would “impact the amount of landfill gas captured over the life of the project and increase the net costs.”³⁰ But EPA also attempts to gainsay this concession by insisting that some other facilities may “have already installed controls” in anticipation of the eventual implementation of the emission guidelines, and for those facilities the proposed delay for plan submission and approval will “not have any impact on the actual collection and control of landfill gas.”³¹

Yet it does not appear that EPA has made any effort to survey which affected facilities may or may not have already installed controls. EPA’s conclusory and unsupported assertions on this front are insufficient to justify the proposal.³² Absent new and concrete information about compliance, the agency’s 2016 RIA provides sufficient information to demonstrate to EPA that the delay is net costly. Ignoring those factual findings now in favor of speculation is arbitrary and capricious.³³

With some reasonable effort, EPA very likely could have identified at least some landfills as either having already installed controls or else waiting for regulatory implementation before installing. Such a survey would have allowed EPA to begin quantifying the impacts of its proposed delay. Failure to investigate a quantifiable effect does not make the effect unquantifiable.

Even if EPA could not fully quantify the likely emissions increase that will result from the proposed delay, that does not mean the proposal’s forgone benefits will be, to use EPA’s term, “minimal.” Uncertainty about an effect does not excuse an agency for assuming the effect is worthless.³⁴ EPA could have, for example, conducted a kind of breakeven analysis³⁵ to assess how many landfills could postpone installation of controls as a result of this proposed delay before the proposal no longer seemed cost-benefit justified.

For example, in 2016, EPA estimated that, if implemented, the emission guidelines would affect 92 landfills in the year 2019, and together those 92 landfills would reduce 330,000 metric tons of methane as a result of the regulation.³⁶ Therefore, on average, each landfill covered by the regulation in 2019 would reduce about 3580 tons of methane. If even one of those landfills now chooses to postpone installation of controls for even just one year due to the proposed delay of implementation plans, the result will be an additional 3580 tons of methane emitted in 2019 by that one landfill. The marginal climate damages from each additional ton of methane released can be monetized using a tool called the

²⁹ 83 Fed. Reg. at 54,531.

³⁰ 83 Fed. Reg. at 54,531.

³¹ 83 Fed. Reg. at 54,531.

³² *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2013).

³³ *Fox*, 556 U.S. at 514-15.

³⁴ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008) (explaining that while there may be a “range of values” for a climate effect, the value is “certainly not zero,” and it was arbitrary for the agency to fail to value the climate effect).

³⁵ See Office of Mgmt. & Budget, *Circular A-4* (2003) (recommending agency use of breakeven analysis); see also Richard Revesz, *Quantifying Regulatory Benefits*, 102 Calif. L. Rev. 1423, 1426 (2014) (describing breakeven analysis).

³⁶ 2016 RIA at 3-26.

Social Cost of Methane, just as EPA did in its 2016 regulator impact analysis.³⁷ The central estimate of the Social Cost of Methane for emissions released in 2019 is \$1200 (in 2007\$³⁸; it is about \$1490 once inflated to 2018\$³⁹). Therefore, if a single, average landfill postpones its installation of controls as a result of the proposed delay, and so releases an additional 3580 tons of methane in 2019, the result will be at least over \$5 million in forgone climate benefits, to say nothing of additional un-monetized impacts to health and the environment from the release of methane and non-methane organic compounds. Each additional landfill that postpones will generate another \$5 million per year in monetized climate damages, plus un-monetized impacts.

Even if EPA cannot definitively quantify the number of landfills that will postpone installing controls or quantify the total emissions increase, the social costs of the proposed delay are clearly not zero, and EPA can and should assess how many landfills could postpone installation of controls before this proposal is no longer cost-benefit justified. Given EPA's weak case for the supposed benefits of the proposed delay (see above), if one or more landfills will likely delay installation of controls by one or more years each as a result of this proposed delay, then the proposed delay is almost surely not cost-benefit justified, but rather will likely result in millions of dollars in net social costs. And EPA has failed to provide "good reasons" for imposing those costs.⁴⁰

Finally, EPA must describe and assess the actual real-world costs of the proposed delay; its vague reference to an "impact" to the amount of landfill gas captured that will result in a "net cost"⁴¹ provides no detail on the real-world effects that the net cost would entail, and even leaves unclear whether EPA expects the impact on landfill gas to increase or decrease pollution. EPA must provide more detail. If even a single landfill postpones installation of controls for a single day as a result of this proposed delay, the "impact" will be an *increase* in the emission of methane and non-methane organic compounds. Those emissions have real-world consequences, which EPA must describe and assess. Many of methane's contributions to climate damages—such as property damage, lost agricultural productivity, human health impacts, changes in energy demand, changes in fresh water availability, and so forth—are monetizable as part of the social cost of methane; others—like impacts to ecosystem services, wildfires, catastrophic impacts, and many others—cannot currently be fully monetized, but nevertheless are significant and deserve attention,⁴² along with health, visibility, and vegetation effects from reducing

³⁷ 2016 RIA at 4-6 to 4-20.

³⁸ Interagency Working Group, *Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide* at 16 (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/august_2016_sc_ch4_sc_n2o_addendum_final_8_26_16.pdf. Compare 2016 RIA at 4-15 (using the Marten et al. methodology, on which the Interagency Working Group's estimates were also based). See also Joint Comments of the Institute for Policy Integrity et al., to EPA, on Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills (submitted Oct. 26, 2015) (supporting use of the social cost of carbon and social cost of methane), available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0451-0196>; see also Joint Comments of the Institute for Policy Integrity et al., to EPA, on Flawed Monetization of Forgone Benefits in the Proposed Reconsideration of Oil and Natural Gas Sector Emission Standards (submitted Dec. 17, 2018) (explaining why the Interagency Working Group's estimates of the social cost of methane are still the most appropriate for regulatory analysis), available at https://policyintegrity.org/documents/Oil_Gas_NSPS_Joint_SCC_Comments.pdf.

³⁹ Using the CPI inflation calculator.

⁴⁰ Fox, 556 U.S. at 514-15.

⁴¹ 83 Fed. Reg. at 54,531.

⁴² See Joint Comments of the Institute for Policy Integrity et al., to EPA, on Flawed Monetization of Forgone Benefits in the Proposed Reconsideration of Oil and Natural Gas Sector Emission Standards (submitted Dec. 17, 2018), available at https://policyintegrity.org/documents/Oil_Gas_NSPS_Joint_SCC_Comments.pdf.

non-methane organic compounds.⁴³ Delaying the capture of landfill gas will also delay its redirection to be used in the generation of electricity, and the revenue from electricity sales (along with the secondary emissions reductions achieved when landfill gas-generated electricity substitutes for other fossil fuel-fired electricity)⁴⁴ is yet another forgone benefit from the proposed delay. EPA has failed to describe any of these forgone benefits in a way that will meaningfully inform the public of the likely consequences of the proposed delay. It is clear that EPA has failed to assess an important aspect of the problem. Consequently, the justification for the proposed delay is irrational, and the proposal should not be finalized.

Respectfully submitted,

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Attached:

Interagency Working Group, *Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide* at 16 (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/august_2016_sc_ch4_sc_n2o_addendum_final_8_26_16.pdf.

Joint Comments of the Institute for Policy Integrity et al., to EPA, on Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills (submitted Oct. 26, 2015), available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0451-0196>

Joint Comments of the Institute for Policy Integrity et al., to EPA, on Flawed Monetization of Forgone Benefits in the Proposed Reconsideration of Oil and Natural Gas Sector Emission Standards (submitted Dec. 17, 2018), available at https://policyintegrity.org/documents/Oil_Gas_NSPS_Joint_SCC_Comments.pdf.

⁴³ 2016 RIA at ES-5 (describing non-monetized benefits).

⁴⁴ *Id.* (describing the revenue and secondary emissions benefits).