

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 19-1222 (consolidated with Case No. 19-1227)

ENVIRONMENTAL DEFENSE FUND,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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 AND VACATUR**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for the present *amicus curiae*, all parties, intervenors, and amici appearing in this case to date are listed in the Petitioners' Proof Brief. References to the rulings at issue appear in the Petitioners' Proof Brief. Counsel is not aware of any related cases.

STATEMENT REGARDING AUTHORSHIP AND MONETARY CONTRIBUTIONS

Policy Integrity is not aware of any other organization that plans to file an amicus brief in support of petitioners. 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 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.

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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:

2016 RIA	EPA, Regulatory Impact Analysis for the Final Revisions to the Emission Guidelines for Existing Sources and the Final New Source Performance Standards in the Municipal Solid Waste Landfills Sector (July 2016), Dkt No. EPA-HQ-OAR-2014-0451-0225
Delay Rule	Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 84 Fed. Reg. 44,547 (Aug. 26, 2019)
EPA	Respondent U.S. Environmental Protection Agency
FCC	Federal Communications Commission
Landfill Methane Rule	Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276 (Aug. 29, 2016)
Policy Integrity	The Institute for Policy Integrity at New York University School of Law
Pet'rs' Br.	Petitioners' Proof Brief, <i>Envtl. Def. Fund v. EPA</i> , No. 19-1222 (D.C. Cir. Aug. 12, 2020)

INTEREST OF AMICUS CURIAE

The Institute for Policy Integrity at New York University School of Law¹ (“Policy Integrity”) submits this *amicus* brief in support of petitioners’ challenge to the Environmental Protection Agency’s (“EPA”) “Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills” Rule, 84 Fed. Reg. 44,547 (Aug. 26, 2019) (“Delay Rule”). All parties have consented to the filing of this brief.

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 economic issues. Policy Integrity consists of a team of legal and economic experts, trained in regulatory cost-benefit analysis and the proper application of economic principles to agency decisionmaking. Our director, Richard L. Revesz, has published more than eighty articles and books on environmental and administrative law, including several works that address the legal and economic principles that inform rational agency decisions.²

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

² A full list of publications can be found in Prof. Revesz’s online faculty profile, https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&per_sonid=20228.

The Delay Rule puts off the compliance deadlines for the “Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills” Rule, 81 Fed. Reg. 59,276 (Aug. 29, 2016) (“Landfill Methane Rule”). This delay is part of a broad pattern of illegal attempts, by agencies across the Trump Administration, to suspend or reverse duly promulgated regulations.³ In furtherance of its mission to promote rational decisionmaking, Policy Integrity has filed several amicus briefs and comment letters regarding these suspensions and reversals, focusing on agencies’ failure to consider the costs, in the form of forgone benefits, of their actions. *See, e.g.*, Br. for Inst. for Policy Integrity as Amicus Curiae, *Air All. Hous. v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018) (addressing EPA’s delay of a rule designed to prevent accidents at chemical facilities); Br. for Inst. for Policy Integrity as Amicus Curiae, *Nat. Res. Def. Council v. Nat’l Highway Traffic Admin.*, No. 19-2395(L) (2d Cir. Dec. 16, 2019) (addressing National Highway Traffic Safety Administration’s failure to consider the forgone benefits of repealing a rule).

In many of the cases decided thus far, courts have agreed that mischaracterizing or ignoring the forgone benefits of a regulatory delay is arbitrary

³ For a review of regulatory delays and reversals undertaken by the Trump Administration using a variety of methods, and the legal problems with these approaches, see Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 37-41 (2019). *See also* Pet’rs’ Br. 11-12 (describing the agency’s multiple attempts to delay the Landfill Methane Rule as part of a “campaign to evade” the agency’s “mandatory duties”).

and capricious. *Air All. Hous.*, 906 F.3d at 1067 (vacating rule for irrationally dismissing forgone benefits of delayed rule as “speculative” despite “detailed factual findings regarding the harm that would be prevented” by the delayed rule); *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (holding failure to consider forgone benefits arbitrary).

In addition, Policy Integrity has long been involved in the proceedings surrounding this rule. Policy Integrity submitted comments on the original proposal to issue the Landfill Methane Rule, explaining the value of monetizing the rule’s benefits using the Social Cost of Methane.⁴ And Policy Integrity submitted comments critiquing the agency’s proposal to delay the rule without an adequate assessment of the Delay Rule’s forgone benefits.⁵

Here, petitioners claim that EPA failed to adequately consider the Delay Rule’s negative consequences. *See* Pet’rs’ Proof Br. (“Pet’rs’ Br.”) 38-40. Policy Integrity’s expertise in cost-benefit analysis and experience with other regulatory delays give it a unique perspective from which to evaluate that claim.

⁴ Inst. for Policy Integrity et al., Comment Letter on Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills (Proposed Rule) (Oct. 26, 2015), Dkt No. EPA-HQ-OAR-2014-0451-0196; *see also infra* at notes 10-11 and accompanying text (describing the Social Cost of Methane). Documents cited by docket number can be located on <https://www.regulations.gov/>.

⁵ Inst. for Policy Integrity, Comment Letter on Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills (Proposed Rule) (Jan. 3, 2019) (“Policy Integrity Comments”), Dkt No. EPA-HQ-OAR-2018-0696-0028.

SUMMARY OF ARGUMENT

As petitioners have explained, the Delay Rule postpones, without providing a reasoned explanation, the realization of the Landfill Methane Rule's benefits and ultimately reduces the rule's aggregate benefits. *See Pet'rs' Br.* 42-43.

This brief focuses on EPA's failure to assess adequately the forgone benefits of this delay. First, EPA's claim that forgone benefits will be "minimal," 84 Fed. Reg. at 44,552, because facilities may have incentives to voluntarily control emissions or may be subject to similar state laws, fails on every front. For example, in 2016, EPA found that the Landfill Methane Rule would provide significant net benefits by causing emissions cuts at specific facilities, even after identifying those same incentives to voluntarily control emissions, and EPA provides no explanation for reaching a contrary conclusion now. Further, EPA fails to point to a single example of a facility that would have cut emissions under the Landfill Methane Rule but now has voluntarily controlled its emissions or done so subject to a similar state law. EPA's advancement of conclusory assertions devoid of evidentiary support here is arbitrary and capricious.

Second, EPA's assertion that the delay is needed because states had dragged their feet in submitting plans is unreasonable. EPA actively discouraged submission of state plans before and after the original deadline, and thus any delays on the part

of some states is not proof that the prior deadlines were difficult or needed to be changed. Instead, state delays were a problem of EPA's creation.

For these reasons, the Delay Rule violates established legal principles for rational rulemaking embodied in the Administrative Procedure Act.

ARGUMENT

EPA FAILS TO PROVIDE A REASONED EXPLANATION FOR DELAYING THE LANDFILL METHANE RULE

In the Delay Rule, EPA fails to provide a reasoned explanation for dismissing the rule's forgone benefits as "minimal." 84 Fed. Reg. at 44,552. In addition, the justification that EPA gives for the delay, that states had difficulty meeting the Landfill Methane Rule's original deadlines, *id.* at 44,551, ignores the fact that EPA actively discouraged compliance.

The Administrative Procedure Act requires EPA to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" when issuing any new regulation. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). These principles apply to rule amendments just as they apply to new regulations. *Id.*; 5 U.S.C. § 551(5). Specifically, when amending, suspending, or repealing a rule, the agency must provide a "reasoned

explanation” for dismissing the “facts and circumstances that underlay” the original rule. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). EPA’s arguments fail to meet this burden.

A. EPA Unreasonably Dismisses the Delay Rule’s Substantial Harms

For all regulatory actions, including a delay such as the one at issue here, one important factor that an agency is required to consider is the cost that the decision imposes on society. Executive Order 12,866—the main executive order that has governed regulatory decisionmaking since 1993 and continues to govern today⁶—instructs agencies to consider the costs of the decision, including “any adverse effects . . . on health, safety and the natural environment” when assessing a regulation’s costs. Exec. Order No. 12,866 § 6(a)(3)(C)(ii), 58 Fed. Reg. 51,735 (Oct. 4, 1993). And courts have consistently required agencies to take the costs of their actions into account. *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (explaining that under 42 U.S.C. § 7412, “[n]o regulation is ‘appropriate’ if it does significantly more harm than good”).

This general requirement to consider costs applies to delays as well. *Air All. Hous.*, 906 F.3d at 1067-68 (D.C. Cir. 2018) (vacating rule where agency failed to

⁶ 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.”).

justify the costs of delaying a rule that it previously found beneficial). Costs include the forgone benefits of delaying the rule, and failure to provide a reasoned explanation for forgoing benefits renders the rule arbitrary and capricious. *Id.*; *California*, 277 F. Supp. 3d at 1122 (holding that failure to consider forgone benefits was arbitrary and capricious); *cf. Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir. 2012) (finding that the agency properly calculated the costs of amending a regulation).⁷

Here, EPA concluded in 2016 that the Landfill Methane Rule provided significant net benefits, and EPA’s attempts to dismiss the forgone benefits of delaying the rule now do not pass muster.

1. The Landfill Methane Rule Provided Net Benefits, and the Delay Rule Postpones These Benefits and Reduces Them

The Landfill Methane Rule provided benefits by requiring landfills to install controls to reduce gas emissions, which can include methane and other non-methane organic compounds. EPA also expected the Landfill Methane Rule to provide secondary carbon dioxide benefits “associated with reduced electricity demand” at landfills capturing methane for on-site electricity generation. EPA, Regulatory Impact Analysis for the Final Revisions to the Emission Guidelines for Existing

⁷ 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.”).

Sources and the Final New Source Performance Standards in the Municipal Solid Waste Landfills Sector 4-1 (2016) (“2016 RIA”), Dkt No. EPA-HQ-OAR-2014-0451-0225. The Landfill Methane Rule’s regulatory impact analysis monetized the benefits of reducing methane and secondary carbon dioxide emissions, and provided a qualitative analysis of reducing non-methane organic compounds, improving visibility, and providing ecosystem benefits. *Id.* at 4-1 to 4-4.

Most of the Landfill Methane Rule’s monetized benefits come from reducing an estimated 285,000 metric tons in annual methane emissions, as calculated for year 2025. 81 Fed. Reg. at 59,308; *id.* at 59,304 (explaining that “EPA is assessing impacts in year 2025 as a representative year”). Methane is a very potent greenhouse gas: over a 20-year timeframe, one metric ton of methane contributes as much to climate change as 84 metric tons of carbon dioxide. *See* EPA, *Greenhouse Gas Emissions: Understanding Global Warming Potentials*.⁸ Avoiding those emissions thus helps avoid significant damages caused by climate change.

A tool known as the Social Cost of Methane, which was developed by a federal interagency working group composed of multiple agencies, can be used to measure the value of avoiding each additional ton of methane emissions.⁹ The mean

⁸ Available at <https://www.epa.gov/ghgemissions/understanding-global-warming-potentials#Learn%20why> (last visited Aug. 10, 2020).

⁹ Interagency Working Group on Social Cost of Greenhouse Gases, Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to

estimate of the Social Cost of Methane for emissions released in 2025, the year for which EPA calculated the Landfill Methane Rule's annual benefits, is \$1500 per ton.¹⁰ 81 Fed. Reg. at 59,308. EPA used that figure to determine that avoiding 285,000 metric tons of methane emissions, when monetized, provides mean benefits of \$430 million in 2025. *Id.*

In addition, the Landfill Methane Rule was also estimated to reduce carbon dioxide emissions by 277,000 metric tons in 2025. *Id.* at 59,306. Employing a similar methodology as that used to calculate methane reduction benefits, EPA valued each

Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide 16 (2016), Dkt No. EPA-HQ-OAR-2018-0696-0028. *Cf.* 2016 RIA at 4-15 (using the Marten et al. methodology, on which the Interagency Working Group's estimates were also based). Though the Trump administration disbanded the interagency working group and withdrew its technical documents, *see* Exec. Order. No. 13,783 § 5(b), 82 Fed. Reg. 16,093 (Mar. 28, 2017), those actions had "no legal impact on the consensus that [the interagency working group's] estimates constitute the best available science about monetizing the impacts of greenhouse gas emissions." *California v. Bernhardt*, —F. Supp. 3d—, 2020 WL 4001480, at *25 (N.D. Cal. July 15, 2020) (vacating repeal where the agency had rejected the interagency working group's model in favor of an "interim" model that failed to accurately quantify the damages from methane emissions).

¹⁰ While a valid and useful metric, *see* Richard L. Revesz et al., *Best Cost Estimate of Greenhouse Gases*, 357 *Sci.* 655, 655 (2017), this figure also likely underestimates the harm caused by carbon dioxide and other greenhouse gas emissions. The Social Cost of Carbon, from which the Social Cost of Methane is calculated, is broadly understood as a lower bound of the damage caused, because it ignores many important costs traceable to greenhouse gas emissions such as wildfires and agricultural damages from pests and diseases. *See* Inst. for Policy Integrity, *A Lower Bound: Why the Social Cost of Carbon Does Not Capture Critical Climate Damages and What That Means for Policymakers* (2019), https://policyintegrity.org/files/publications/Lower_Bound_Issue_Brief.pdf.

ton of avoided carbon emissions using the Social Cost of Carbon and found that those carbon dioxide emissions reductions would provide \$14 million in benefits in year 2025. 2016 RIA at 4-18. In total, EPA estimated the reductions in methane and carbon dioxide emissions would, in 2025, provide annual monetized benefits of approximately \$440 million, 81 Fed. Reg. at 59,309, and costs of \$54 million, *id.* at 59,306.¹¹ Accordingly, the monetized net benefits of the Landfill Methane Rule were expected to be roughly \$390 million in 2025. *Id.* at 59,309.

The Landfill Methane Rule's nonmonetized benefits include reductions in non-methane organic compounds, better visibility, and ecosystem benefits. *Id.* The non-methane organic compounds can include both volatile organic compounds, which are a precursor to fine particulate matter and ozone, as well as over thirty hazardous air pollutants, including benzene, ethylbenzene, toluene, and vinyl chloride. 2016 RIA at 4-2. EPA further explained that both fine particulate matter and ozone exposure are associated with premature mortality and respiratory morbidity. *Id.* at 4-24, 4-29. Particulate matter also impairs visibility, *id.* at 4-28, while ozone is a short-lived greenhouse gas that can impair ecosystems, *id.* at 4-30 to 4-31. Hazardous air pollutants cause many adverse health effects: benzene and vinyl chloride are known carcinogens, toluene damages the central nervous system,

¹¹ EPA calculated these figures using a 3% discount rate to value the benefits and a 7% discount rate to value the costs. 81 Fed. Reg. at 59,309.

and ethylbenzene causes respiratory distress, eye irritation, and potential blood problems. *Id.* at 4-36 to 4-40.

After looking at both categories of benefits in the Landfill Methane Rule, monetized and nonmonetized, EPA found that the substantial monetized benefits of the rule alone were sufficient to justify the modest costs of the rule, and that a qualitative assessment of the additional, nonmonetized benefits only further demonstrated the significance of the rule's important environmental and health protections. *Id.* at 6-1, 7-16.

The Delay Rule, on the other hand, substantially delays every step in the regulatory process and so postpones the realization of benefits from the Landfill Methane Rule. The rule delays the deadline for submission of state implementation plans from 9 months to 3 years; the deadline for EPA review of state plans from 4 months to 18 months, including a 6-month review period for completeness; and the deadline for EPA to propose any necessary federal implementation plans from 6 months to 2 years. 84 Fed. Reg. at 44,549. Because of these implementation delays, the benefits will be delayed by four to six years from the initial compliance dates. This will ultimately reduce the total benefits provided by the Landfill Methane Rule, causing harm.

To illustrate, delaying compliance by a single landfill can cause significant forgone benefits. For example, in 2016, EPA estimated that, if implemented, the

emission guidelines would affect 95 landfills in the year 2020, 2016 RIA at 3-25, and together those 95 landfills would reduce 310,000 metric tons of methane in year 2020 because of the regulation, *id.* at 4-42. Therefore, on average, each landfill covered by the regulation in 2020 would reduce about 3260 tons of methane annually. If one of those landfills chooses to postpone installation of controls for even one year due to the proposed delay of implementation plans, the result will be an additional 3260 tons of methane emitted in 2020 by that individual landfill.

EPA claims that the forgone benefits “cannot be quantified due to inherent uncertainty,” 84 Fed. Reg. at 44,554, but, using the same methodology that EPA applied in 2016, the Social Cost of Methane for each additional ton emitted in the year 2020 is \$1300, 81 Fed. Reg. at 59,308. Using that estimate, if a single, average landfill postpones installation of controls because of the proposed delay, and so releases an additional 3260 tons of methane in 2020, the result will be at least \$4.2 million in forgone climate benefits. Each additional landfill that postpones controlling emissions will generate another \$4.2 million per year in monetized climate damages, in addition to forgoing significant nonmonetized benefits. In sum, by postponing the requirements of the Landfill Methane Rule, the Delay Rule will cause significant monetizable harm, along with nonmonetized harms.

2. EPA's Assertion that the Delay Rule's Forgone Benefits Are "Minimal" Is Unreasonable

Because EPA failed to conduct a regulatory impact assessment to analyze the Delay Rule, the agency advances no quantitative support for disregarding the significant annual forgone benefits identified in 2016. Rather than evaluate and assess the forgone emission benefits of the Delay Rule, EPA instead argues that the Delay Rule will not result in "significant foregone economic and climate benefits." 84 Fed. Reg. at 44,553. To support that statement, EPA asserts that many facilities "are already well controlled" and that some may install emission controls to recover methane for energy production, may participate in carbon offset programs, or may comply with equivalent state laws. *Id.* But EPA fails to provide adequate support for these assertions.

In assessing whether a regulation is supported by the reasoned explanation required under the Administrative Procedure Act, courts "do not defer to the agency's conclusory or unsupported suppositions." *United Techs. Corp. v. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) (internal quotation marks omitted); *see also United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1285 (D.C. Cir. 2019) (finding agency's reliance on "unsupported explanation" arbitrary and capricious). And here it is "inaccurate and thus unreasonable" to claim that delaying the compliance requirements of the Landfill Methane Rule will not result in significant forgone benefits. *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017).

a) EPA Mischaracterizes Its Ability to Evaluate the Costs and Benefits of Delaying the Landfill Methane Rule

EPA's first justification for dismissing the forgone benefits of the Delay Rule is the claim that the rule is a "procedural change" and that the Delay Rule's "impacts cannot be characterized due to inherent uncertainties." 84 Fed. Reg. at 44,554. But as petitioners have explained, characterizing the changed deadlines here as a mere procedural change is inaccurate. *See* Pet'rs' Br. 45-46. And the fact that the Delay Rule amends only the deadlines of the Landfill Methane Rule does not relieve EPA of the duty to provide a reasoned explanation for the material impact of those new deadlines. *See Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 762 & n.23 (3d Cir. 1982) (explaining that changing a rule's effective dates is a "material alteration[]"). Delaying a rule can have "significant deleterious effects" on the environment. *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1458 (D.C. Cir. 1997). Indeed, even EPA admits that the Delay Rule may delay benefits and increase net costs. 84 Fed. Reg. at 44,554 (acknowledging that "some sources may choose to wait until requirements are enacted prior to installing controls," which "could impact the amount of landfill gas captured over the life of the project and increase the net cost" of the rule). As such, EPA cannot evade the duty to assess the rule's forgone benefits by characterizing the delay as "procedural."

Moreover, the citation to "inherent uncertainties" ignores the record. The agency is analyzing the Delay Rule with access to the same information that the

agency had when evaluating the Landfill Methane Rule. As discussed, see *supra* section A.1, the Landfill Methane Rule monetized the benefits of reducing methane and carbon dioxide emissions and the costs of installing controls, while also qualitatively discussing additional benefits that could not be monetized. The “baseline for measuring the impact of a change . . . of a final rule” is the status quo of the rule with “ongoing compliance efforts by regulated parties” to meet the rule’s deadlines and other requirements. *Air All. Hous.*, 906 F.3d at 1068. Because the Delay Rule is a delay of the Landfill Methane Rule, EPA can use the conclusions of the Landfill Methane Rule’s regulatory impact analysis as the baseline. EPA does not identify any problems with the 2016 RIA; the agency gives no reason why it cannot adapt its earlier analysis to assess the effects of postponing the implementation deadlines.

By shirking its analytic responsibilities, EPA avoids identifying the forgone benefits that will result from the Delay Rule. And EPA advances specious claims for why it does not expect more than minimal forgone benefits. Because EPA mischaracterizes its capabilities in order to withhold information about the Delay Rule’s effects, the Delay Rule is arbitrary and capricious.

b) The Fact that Some Landfills May Have a Financial Incentive to Recover Gas Does Not Justify EPA’s Decision to Dismiss the Forgone Benefits of the Delay Rule

EPA also dismisses the possibility of forgone benefits by claiming that “some facilities may have an incentive to install landfill gas collection systems, such as to recover and use landfill gas as an energy source to offset existing energy costs or to provide a source of revenue prior to regulatory requirement dates.” 84 Fed. Reg. at 44,554. However, in the Landfill Methane Rule, EPA identified these financial incentives, 2016 RIA at 2-24, and still concluded that the Landfill Methane Rule would provide net benefits after identifying specific facilities that would not control emissions at the level of the Landfill Methane Rule absent a regulatory mandate, *id.* at 3-13. EPA’s failure to reconcile its new conclusion with that prior decision is arbitrary and capricious. *See United Steel*, 925 F.3d at 1284 (holding that the explanation was arbitrary and capricious because it could not be “reconciled with factual findings” that the agency had made in the Obama-era rule); *Becerra v. U.S. Dep’t of the Interior*, 381 F. Supp. 3d 1153, 1168 n.12 (N.D. Cal. 2019) (holding that the agency had failed to “reconcile” its decision with the findings in the rule it was repealing). Because EPA does not argue that facilities’ financial incentives to control emissions have changed since 2016, the mere possibility that some landfills may install controls to recover methane for electricity generation does not prove that the Delay Rule is harmless.

EPA also fails to take into account the fact that even if facilities have an incentive to recover gas, that incentive would not address all of the external harms of methane emissions that the Landfill Methane Rule was designed to address. The harm caused by landfill gas emissions is a negative externality, which occurs when the manufacture or consumption of a good imposes uncompensated costs on a third party to the transaction. *See* EPA, Guidelines for Preparing Economic Analyses, at A-5 to A-6 (2010).¹² Because neither the buyer nor seller of the good is forced to take this cost into account, the good will be consumed at a higher-than-optimal level. *Id.* The Office of Management and Budget has long recognized that environmental harms like air pollution are a “classic case of externality”—and a justification for promulgating regulation. Office of Mgmt. & Budget, Exec. Office of the President, Circular A-4, at 4 (2003).¹³

Accordingly, because the air pollution harm caused by landfill gas emissions is a negative externality, landfills have a financial incentive to recover gas only to the extent that the costs of the control technology are less than the value of the gas they would recover. Landfills have no financial incentive to reduce emissions when the value of the gas is less than the cost of controls, even when the value of the

¹² Available at <https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf>.

¹³ Available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

recovered gas plus the harm caused by the emissions is greater than the cost. Indeed, in the Landfill Methane Rule, EPA found that specific facilities would not control methane emissions absent the rule. 2016 RIA at 3-13. As such, facilities' financial incentives to recover gas will not address the external harms of methane emissions that the Landfill Methane Rule was designed to tackle.

c) The Fact that Some Landfills May Participate in Carbon Offset Programs Does Not Justify Dismissing the Forgone Benefits of the Delay Rule

EPA also dismisses the possibility of forgone benefits by claiming that many facilities already voluntarily control emissions to participate in carbon credit programs.¹⁴ 84 Fed. Reg. at 44,553. Specifically, the agency identifies “over 100 U.S. landfill gas capture/combustion projects” that have registered for credits through two major carbon offset registries. *Id.* EPA notes, “[i]n comparison,” that the 2016 Landfill Methane Rule estimated that only “93 landfills would need to install controls due to the change in emissions threshold.” *Id.* at 44,553-54.

¹⁴ Like carbon dioxide, methane is a greenhouse gas. EPA, *Overview of Greenhouse Gases* (May 28, 2020), <https://www.epa.gov/ghgemissions/overview-greenhouse-gases>. Accordingly, many carbon offset programs accept applications from projects that reduce methane emissions. *See, e.g.*, American Carbon Registry, *American Carbon Registry Approves Methodology for Landfill Gas Destruction and Beneficial Use* (Mar. 28, 2017), <https://americancarbonregistry.org/news-events/news/american-carbon-registry-approves-methodology-for-landfill-gas-destruction-and-beneficial-use>.

But this statement is misleading. The significant emission reduction benefits of the Landfill Methane Rule, as calculated for year 2025, derive from the prediction that 93 landfills will install controls as a result of the Landfill Methane Rule. *See* 2016 RIA at 3-13; 81 Fed. Reg. at 59,309 (estimating that the Landfill Methane Rule’s restrictions at those facilities would lead to \$390 million in monetized net benefits in 2025).¹⁵ By drawing a “comparison” to the “over 100” facilities participating in offset programs, 84 Fed. Reg. at 44,553, EPA suggests that there may be overlap between the 93 facilities that will operate controls under the Landfill Methane Rule and the facilities that already participate in offset programs. The agency uses this comparison to support its claim that the Delay Rule will not cause significant forgone economic benefits. *Id.*

¹⁵ In 2016, EPA identified landfills required to install controls under the Landfill Methane Rule using a data set constructed primarily from data collected through EPA’s Greenhouse Gas Reporting Program and Landfill Methane Outreach Program. *See* Eastern Research Group, Summary of Updated Landfill Dataset Used in the Cost and Emission Impacts Analysis of Landfill Regulations (June 2016), Dkt No. EPA-HQ-OAR-2014-0451-0209. Out of the 1,988 landfills in the data set, 16 are not real. *See id.* at 5. Instead, they are “model landfills . . . created to represent landfills” about which analysts had insufficient information: landfills that opened in the years immediately before the data set’s finalization and those that were expected to open in the years following. *Id.* at 5-6. Policy Integrity could not locate a list of the 93 facilities expected to operate controls in 2025 pursuant to the Landfill Methane Rule. Accordingly, some of the 93 landfills expected to provide benefits under the Landfill Methane Rule *may* be model landfills. However, because at least 77 of the landfills projected in 2016 to provide benefits must be identifiable, operating landfills, EPA’s failure to provide information about whether any of these specific facilities are operating controls pursuant to the theories advanced in the Delay Rule renders the rule misleading.

But EPA provides no information to indicate that any of the 93 landfills required to install controls under the Landfill Methane Rule are included in the “over 100” facilities receiving credits through carbon offset registries. EPA provides a list of facilities receiving carbon offsets, EPA, Memorandum: Results of Searching Two Carbon Offset Registries, Dkt No. EPA-HQ-OAR-2018-0696-0036, but does not take the next necessary step to demonstrate that any of these facilities were among the 93 facilities that would only operate controls in 2025 because of the Landfill Methane Rule. Because EPA fails to establish any overlap between facilities required to install controls and those that participate in carbon offset programs, the agency’s argument lacks credibility.

Moreover, in 2016, EPA already recognized that some facilities participate in carbon offset programs, 2016 RIA at 2-21, and still found that the Landfill Methane Rule provided net benefits, 2016 RIA at 6-2. EPA provides no information about why carbon offset incentives may have changed since 2016. EPA’s failure to reconcile its position that delaying the rule will cause minimal forgone benefits with its earlier conclusion that the Landfill Methane Rule provided benefits, even though some facilities participate in carbon offset programs, is arbitrary and capricious.

And even if some facilities required to install controls under the Landfill Methane Rule *do* participate in carbon offset programs, EPA provides no information to suggest that controls installed pursuant to these programs achieve the

emissions reductions required under the Landfill Methane Rule. For context, landfills required to install controls under the Landfill Methane Rule are those with a design capacity of over 2.5 million metric tons of waste by mass and non-methane organic compound emissions between 34 and 50 metric tons per year. 81 Fed. Reg. at 59,278-80. These controls are operated until the landfill is closed, the emissions are below the 34 metric tons per year threshold, and the controls have been in place for at least 15 years. *Id.* at 59,287-88.

To demonstrate how the controls at landfills participating in carbon-offset programs could still provide benefits, take, for example, a landfill with annual non-methane organic compound emissions of 49 metric tons that voluntarily participates in a carbon offset program and installs controls to reduce its annual non-methane organic compound emissions by 10 metric tons per year. This landfill now emits 39 metric tons of non-methane organic compounds per year, at least 5 metric tons more than if this facility met the Landfill Methane Rule's requirement that facilities emit no more than 34 metric tons of non-methane organic compounds per year. Accordingly, even if some landfills required to install controls under the Landfill Methane Rule already participate in carbon offset programs, compliance with the Landfill Methane Rule could still reduce emissions. For all these reasons, it is clear that participation in carbon offset programs is not a reason to dismiss as "minimal" the Delay Rule's forgone benefits. 84 Fed. Reg. at 44,554.

d) The Fact that Some States Have Adopted Laws as Required by the Landfill Methane Rule Does Not Justify Dismissing the Forgone Benefits

EPA argues that “some landfills would install controls earlier than required by federal regulations,” because five states have already submitted state plans and these five states “should already have adopted laws incorporating the requirements” of the Landfill Methane Rule. *Id.* However, EPA fails to assert which, if any, of the landfills expected to operate controls in 2025 under the Landfill Methane Rule are in the five states that submitted state plans. As explained, the Landfill Methane Rule’s emission reduction benefits derive from the controls installed and operated at specific landfills. Therefore, the Delay Rule will avoid forgone benefits under this theory only if those facilities are already subject to state laws promulgated pursuant to the Landfill Methane Rule. However, EPA has again failed to provide any information about the location of the relevant facilities to show that any are located in states that should have updated their laws.

* * *

In sum, EPA’s various justifications for dismissing the forgone benefits of the Delay Rule as “minimal” or uncertain are arbitrary and capricious.

B. The Fact that States Failed to Submit Plans under the Landfill Methane Rule Does Not Justify the Delay Rule

Along with improperly dismissing forgone benefits, EPA’s justification for the Delay Rule is wholly lacking. As a major justification for the Delay Rule, EPA

asserts that state delays in submitting plans under the Landfill Methane Rule demonstrate the need for what EPA characterizes as “more reasonable” deadlines. 84 Fed. Reg. at 44,551.¹⁶ But as petitioners have explained, “EPA provides no evidence that states needed until August 29, 2019, to submit their plans, or that giving states additional time would materially increase the number of plans submitted.” Pet’rs Br. 30. Indeed, states may have been opting to await the promulgation of federal plans, as allowed under the rules. *See* Policy Integrity Comments at 3.

In addition, EPA disregards that it is entirely possible that states failed to submit plans because EPA discouraged them from doing so, rather than because the deadlines were unrealistic. *See* Policy Integrity Comments at 2. When there is no enforcement of a requirement, the probability of noncompliance is likely to be high. *See* Jay P. Shimshack, *The Economics of Environmental Monitoring and Enforcement*, 6 Ann. Rev. Res. Econ. 339, 339 (2014) (“Without monitoring and enforcement, environmental laws are largely nonbinding guidance.”). And here, not only did EPA fail to enforce the rule, but it strongly signaled that it planned not to enforce the rule. These signals began on May 5, 2017, when EPA promised to grant

¹⁶ EPA also asserts that the federal government needs more “realistic” deadlines to comply with the rule, 84 Fed. Reg. at 44,551-52, but as petitioners have explained, that assertion is belied by the fact that EPA was already preparing to finalize a federal plan within months of finalizing the Delay Rule, Pet’rs’ Br. 33.

reconsideration and stay the Landfill Methane Rule in a letter to industry—twenty-five days before the deadline for state plans and twenty-six days before officially announcing these actions. *See* Stay of Standards of Performance for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878, 24,878 (May 31, 2017). In letters to states, both before and after issuing the stay, EPA promised that states would face no sanctions for failing to submit plans. *Envtl. Def. Fund et al., Comment Letter on Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills (Proposed Rule) at 9-11 & App. at 105-19, 355-56, 401-404 (Jan. 3, 2019) (attaching letters), Dkt No. EPA-HQ-OAR-2018-0696-0029.*

Once these letters were sent out, at least seven states that had begun taking steps to comply by submitting draft plans to EPA, and eight more that were seeking advice from the agency on their plans, never finalized a plan. *Id.* at 10-11. These states include Montana, where a state official explained that the state had delayed its rulemaking “out of concerns for changes at the national administrative level.” *Id.* at 11. Because of EPA’s vocal disavowal of the Landfill Methane Rule’s requirements, state failure to submit plans is best ascribed to the agency’s own actions, not to the complexity of preparing plans. Indeed, as proof that the original deadlines for state plans were likely perfectly feasible, California and New Mexico were able to complete their work, hold public hearings, and submit implementation plans even before the original May 2017 deadline. *See* 84 Fed. Reg. at 44,552.

Moreover, agencies are bound by a promulgated rule “until that rule is amended or revoked,” *Clean Air Council v. Pruitt*, 862 F.3d at 9, and allowing an agency to signal that noncompliance is acceptable and then use that noncompliance to justify a delay sets a poor precedent that is likely to undermine regulatory certainty and stability. The Administrative Procedure Act’s requirements that govern amendments and revocations, including notice and comment requirements and the reasoned explanation requirement, all help promote regulatory certainty. *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85, 116 (2018) (explaining how the rules governing regulatory change make such change more difficult and thus promote regulatory certainty, innovation, and investment); *cf.* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. Rev. 112, 156-57 (2011) (explaining that erratic legal change carries its own costs). If agencies could refuse to enforce validly promulgated rules, the ability of these procedural restrictions to promote certainty and stability would diminish significantly. Stated differently, to promote regulatory stability and certainty, it is crucial that agencies not only go through the procedures to promulgate any amendments but that they enforce the promulgated rules until the rules are amended.

Here, EPA has admitted “that it has failed to meet its nondiscretionary obligations to implement” the Landfill Methane Rule, requiring a court to set deadlines to ensure compliance. *California v. EPA*, 385 F. Supp. 3d 903, 909 (N.D.

Cal. 2019). And allowing EPA to use the evidence of state delays to justify the Delay Rule improperly incentivizes the agency to engage in behavior that violates the agency's statutory duty.

In other circumstances, courts have taken a dim view of agency attempts to characterize deadlines as unreasonable or impossible to meet, when the agencies' own actions led to the compliance difficulties. For example, courts have rebuffed agency claims that they qualify for the "good cause" exception to the Administrative Procedure Act's notice and comment requirement where the problem—the agency's inability to meet an imminent statutory rulemaking deadline—is of the agency's "own making." *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004) (finding that "an emergency of [the agency's] own making" cannot constitute good cause, even if a statutory deadline for promulgation approaches); *see also Env'tl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 921 (D.C. 1983). In that scenario, conducting notice and comment while meeting a statutory deadline is only impracticable because of the agency's failure to prioritize the rulemaking. And that does not satisfy the "good cause" exception. *Abraham*, 355 F.3d at 205.

Here too, the Court should rebuff EPA's attempt to justify the Delay Rule on the grounds that states had not submitted plans yet. The Administrative Procedure Act requires that agencies provide a "reasoned explanation" for changing policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). And a justification

that exists likely in large part because the agency telegraphed that it would not enforce a validly promulgated rule does not meet that standard.

CONCLUSION

The Court should vacate the Delay Rule.

DATED: August 19, 2020

Respectfully submitted,

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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 6,395 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, I filed the foregoing *Amicus Curiae* Brief in Support of Petitioners and Rule 26.1 Disclosure Statement through the Court's CM/ECF system, which will send a notice of filing to all registered CM/ECF users.

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