ORAL ARGUMENT NOT YET SCHEDULED

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

AIR ALLIANCE HOUSTON, *et al.*, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*.	Case No. 17-1155

JOINT REPLY OF PETITIONERS AIR ALLIANCE HOUSTON *ET AL.* AND PETITIONER-INTERVENOR UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION TO RESPONSES IN OPPOSITION TO MOTION FOR A STAY OR, IN THE ALTERNATIVE, SUMMARY VACATUR

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SUMMARY OF ARGUMENT

The Clean Air Act expressly prohibits using reconsideration as a reason to postpone the effectiveness of a final rule for longer than three months. Yet in this case, EPA has postponed the effective date of chemical disaster prevention regulations for far longer, until February 2019. *See* 82 Fed. Reg. 27,133 (June 14, 2017) ("Delay Rule") (postponing 82 Fed. Reg. 4594 (Jan. 13, 2017) ("Chemical Disaster Rule")). EPA may not flout the clear three-month restriction in 42 U.S.C. § 7607(d)(7)(B) by characterizing its action as a revision rule that changes only the effective date. In postponing the effective date by twenty months EPA in essence repeals the Chemical Disaster Rule, while trying to evade the agency's obligation to show why its preferred new course is both lawful and better. The ability to consider changing a policy does not allow EPA to put a final rule embodying that policy in purgatory for however long a reconsideration process may take. A new administration may not postpone a rule as a shortcut around binding legal constraints on its authority. In light of EPA's clear violations of the Clean Air Act and reasoned decisionmaking, and the irreparable harm caused by the Delay Rule, this Court should grant summary vacatur, or in the alternative, a stay and expedited briefing.

ARGUMENT

I. SUMMARY VACATUR SHOULD BE GRANTED.

A. EPA's Postponement of the Effective Date Contravenes the Clean Air Act's Text and Purpose.

1. § 7607(d)(7)(B) Plainly Prohibits Delays Based on Reconsideration.

The text of the Clean Air Act means what it says: a reconsideration proceeding "shall not postpone the effectiveness of the rule" except "for a period not to exceed three months." 42 U.S.C. § 7607(d)(7)(B); *see Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("When the words of a statute are unambiguous, … 'judicial inquiry is complete.'") (citations omitted). Section 7607(d)(7)(B) specifically prohibits using a reconsideration proceeding as a reason for postponing a final rule. *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1184, 1186 (D.C. Cir. 1980). The text implements Congress's clear intent to prevent the use of reconsideration as a "delay tactic." S. Rep. No. 101-228, at 312 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3755. The clarity of the statute should be the end of the matter: the Delay Rule is prohibited under *Chevron* step one, because it cannot be reconciled with the statute's plain language. *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

To avoid the Act's plain language, EPA asks the Court to transmogrify the phrase "shall not postpone" into "does not itself automatically postpone," such that the three-month stay allowed under § 7607(d)(7)(B) "merely provides one option"

for a stay. EPA Br. 24-25, DN1683338. But treating this provision as optional writes the phrase "shall not postpone" out of the statute entirely. *Cf. Council for Urological Interests v. Burwell*, 790 F.3d 212, 228 (D.C. Cir. 2015) ("[O]nly Congress can rewrite [a] statute."). EPA cannot turn an unambiguous prohibition into an "option." EPA Br. 24; *see Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (courts must "give effect to every provision of the statute"). Congress's objective is not served if all EPA had to do to circumvent this limit was take comment on a delay pending reconsideration. The only way to read § 7607(d)(7)(B) is as a blanket prohibition on postponement based on reconsideration.

EPA's alternative assertion that the three-month restriction in § 7607(d)(7)(B) is limited to mandatory reconsiderations is also belied by the Act's text. The constraint that such proceedings "shall not postpone the effectiveness of the rule" would mean little if EPA could evade this restriction simply by saying the agency is doing a mandatory reconsideration plus maybe more. The Act directs that "[s]uch reconsideration [*i.e.*, under § 7607(d)(7)(B)] shall not postpone" a rule, no matter how much else EPA might do. *Cf. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."). EPA identifies no ambiguity in the text of § 7607(d)(7)(B); regardless, its skewed interpretation is impermissible. There is just one way to read § 7607(d)(7)(B) that makes any

sense: as a binding constraint on EPA's authority to postpone rules based upon reconsideration, with a narrow three-month exception. *Cf. TRW v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied."). Even if there were any ambiguity, EPA's own confusion about the meaning of § 7607(d) and what authority it is relying on would negate any claim of deference.[1]

2. EPA Cannot Circumvent The Specific Statutory Prohibition On Postponement By Citing General Authority.

As the three-month limit on any reconsideration delay is not optional, EPA cannot evade § 7607(d)(7)(B)'s plain prohibition on the action contained in the Delay Rule. EPA cannot contort "discretion to reconsider a regulation" into a claimed ability to reset an effective date however it likes. EPA Br. 23-25 (citing *Clean Air Council v. EPA*, No. 17-1145, 2017 WL 2838112, at *4 (D.C. Cir. July 3, 2017)) ("*CAC*"). Whether EPA cites § 7412(r)(7) or some unmoored "inherent authority to reconsider," EPA Br. 17, 24, EPA may not put a Clean Air Act rule in its entirety on hold for however long that proceeding may take, through a sleight-of-hand change to its effective date.

[1] The proposed rule cites only § 7607(d). 82 Fed. Reg. 16,146, 16,148 (Apr. 3, 2017). The final rule cites § 7607(d), and a fleeting reference to § 7412(r)(7), 82 Fed. Reg. at 27,135. Now EPA abandons § 7607(d) and focuses on § 7412(r)(7) as "fundamental regulatory authority." EPA Br. 17, 23.

This Court did not decide otherwise in *Clean Air Council*, as opposing parties contend, EPA Br. 24-25; RMP Br. 16, DN1683358. The Court held that EPA's three-month stay of a final rule pending reconsideration was unlawful because it had not satisfied § 7607(d)(7)(B)'s mandatory reconsideration test. 2017 WL 2838112, at *4. In vacating that stay, the Court acknowledged that its opinion did not "limit[] EPA's authority to reconsider the final rule." *Id.* at *9. *Clean Air Council* did not prematurely review or decide the legality of the outcome of a notice-and-comment process that was not yet final, or preauthorize further delay. *Cf. In re Murray Energy*, 788 F.3d 330, 334 (D.C. Cir. 2015) ("a proposed … rule is not final agency action subject to judicial review")).[2]

3. Section 7412(r)(7) Does Not Authorize The Delay Rule.

EPA cannot avoid the plain text of § 7607(d)(7)(B) by turning to § 7412(r)(7). Even assuming that EPA may select an effective date when promulgating § 7412(r)(7) regulations, this provision does not give it "broad discretion" for the "selection of [a] new effective date" due to reconsideration, EPA Br. 17, 23 (emphasis added). Instead, it "is 'axiomatic' that 'administrative

[2] The extent of the APA § 705 stay authority EPA mentions in passing through reference to a dissent of this Court was explicitly disclaimed by EPA and is not at issue here. 82 Fed. Reg. at 27,137; *see Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 558 (D.C. Cir. 2015) (denying stay without determining whether § 7607(d)(7)(B) limits APA stay authority); *id.* at 562 (Kavanaugh, J., dissenting) ("To be sure, the Clean Air Act imposes a 3-month limit on stays pending agency reconsideration.") (emphasis removed).

agencies may act only pursuant to authority delegated to them by Congress.'" *CAC*, 2017 WL 2838112, at *4 (citation omitted); *see also Nat'l Min. Ass'n v. Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997) ("*NMA*") ("the power to issue regulations is not the power to issue any regulations" (quotation omitted)).

First, as EPA admits, any authority under § 7412(r)(7)(A) is limited to setting effective dates "assuring compliance as expeditiously as practicable" with promulgated regulations. EPA Br. 19-20 (quoting § 7412(r)(7)(A)). But the Delay Rule was promulgated precisely to prevent the obligation to start achieving compliance with the "Chemical Disaster Rule, not to "assure compliance." 82 Fed. Reg. at 27,139; EPA-HQ-OEM-2015-0725-0881 at 19-21 ("RTC-2"). The Delay Rule is not authorized by § 7412(r)(7) when it removes compliance obligations rather than assuring compliance.

Second, an effective date that is 20 months out – 11 months past an essential compliance deadline – does not deserve the label given; it is a "non-effective" date. 82 Fed. Reg. at 27,142 ("Compliance with all of the rule provisions is not required as long as the rule does not become effective."). A § 7412(r)(7) effective date is intended to provide a short window of notice before facilities are required to comply or prepare to comply. *See* 42 U.S.C. § 7412(r)(7)(E) (describing § 7412(r) effective dates). The transparent purpose of the Delay Rule, however, is to stall the rule during reconsideration. *See* 82 Fed. Reg. at 27,133 (stating purpose is "to

consider petitions for reconsideration … and take further regulatory action … which could include … to revise or rescind"). EPA Br. 3, 20; 82 Fed. Reg. at 16,149 (limiting comment to postponement for reconsideration); RTC-2 at 21, 24 (same). Comparing the Chemical Disaster Rule's effective date, which EPA set in conjunction with the rule's compliance dates to give "necessary" time to achieve full compliance, with the Delay Rule, calculated to match EPA's reconsideration timing instead, plainly illustrates the difference between selecting an effective date and postponing one. *Compare* 82 Fed. Reg. at 4676, 4678 tbl.6, *with* 82 Fed. Reg. 16,149; 82 Fed. Reg. at 27,133, 27,142. EPA's action is a delay pending reconsideration prohibited by § 7607(d)(7)(B) – not a rule amendment that might otherwise be authorized by § 7412(r)(7).

This Court has repeatedly held that agencies may not use their general rulemaking authority to override a more specific statutory directive. *NMA*, 105 F.3d at 694 ("general rulemaking provisions … do not … permit [agency] to trump Congress's specific statutory directive"). In *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992), the court applied this principle to § 7607(d)(7)(B) and held that "the EPA had no authority to stay the effectiveness of a promulgated standard except for the single, three-month period authorized by section 307(d)(7)(B)." Although § 7412(r)(7) contains no date-certain deadline, *Reilly*'s fundamental logic is no less applicable here, as this Court has repeatedly cited *Reilly* for its

broader holding. *See, e.g.*, *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) ("API") (holding that EPA may not use general rulemaking authority to override a more specific statutory directive constraining EPA's authority) (citing *Reilly*, 976 F.2d at 41); *NMA*, 105 F.3d at 694 (same). If the prohibition in § 7607(d)(7)(B) could be overridden by § 7412(r)(7) (or any general rulemaking authority), this prohibition would be a nullity. Moreover, timeliness does matter in § 7412(r)(7), as it includes a clear directive that "requires 'an effective date … assuring compliance as expeditiously as practicable.'" EPA Br. 19-20 (emphasis changed).

Thus, EPA's belated attempt to rely on § 7412(r)(7) as authorizing an end-run around § 7607(d)(7)(B) fails under *Chevron* step one, as well, because it is inconsistent with the statutory scheme and basic canons of statutory construction. The only way to harmonize the two provisions is to recognize one contains a general rulemaking power and one contains a specific limit that narrows that general power and "defines the relevant functions of EPA in [the] particular area" of reconsideration. *API*, 52 F.3d at 1119. Even if there were any ambiguity, EPA has provided no permissible interpretation of its claimed authority that reconciles both provisions. The confusing evolution of its claimed authority (still unexplained in the Final Rule) shows that, even if it had done so, such a position would receive no deference. *Supra n.*1; *see Bowen v. Georgetown Univ. Hosp.*,

488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *see also* *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding that interpretation with an "unexplained inconsistency" deserves no deference).

Regardless, even if it were EPA's first word on the effective date, the Delay Rule violates, and is not authorized by, § 7412(r)(7). As EPA admits, "the statute requires 'an effective date … assuring compliance as expeditiously as practicable,'" EPA Br. 19-20 (quoting § 7412(r)(7)(A), and EPA must satisfy certain requirements under §§ 7412(r)(7)(A) and (B), EPA Br. 17-18, 22. The Delay Rule did not meet these requirements, nor could it when designed to assure non-compliance with protections originally promulgated under § 7412(r)(7). Mot. 18-21. Moreover, the Delay Rule does not satisfy § 7412(r)(7) as the agency contends, simply because it has left the pre-existing regulations in place. EPA Br. 19, 22. EPA determined the Chemical Disaster Rule would better protect workers and communities from the significant ongoing threat of chemical disasters than those rules. *See infra* Pt. II; Mot. 9, 23; *see also*, *e.g.*, 81 Fed. Reg. 13,638, 13,671-72 (Mar. 14, 2016). As EPA contends it has not changed these factual conclusions in the Delay Rule, they remain in force. *E.g.*, 82 Fed. Reg. at 27,141; EPA Br.at 21-22; *see also* EPA, Risk Management Program Final Rule Q&A at 1 (June 2017) ("Fact Sheet") ("EPA's changes to the RMP rule will help protect

local first responders, community members and employees from death or injury due to chemical facility accidents.").[3] Concerns about uncertainty or what is "practicable" while awaiting a reconsideration decision, EPA Br. 18-20, are not concerns about assuring expeditious compliance, but about delaying it while EPA reconsiders. None of the alleged "security risks" or other hypotheticals cited is an actual finding. EPA Br. 19; 82 Fed. Reg. at 27,141 ("EPA has not concluded [the Chemical Disaster Rule] would increase such risks"); *see also* EPA-HQ-OEM-2015-0725-0729 at 195-96, 199-200, 247-48 ("RTC-1") (rejecting security risk allegations).

B. The Delay Rule Is A Textbook Example Of Arbitrary And Capricious Agency Action.

1. EPA Must Provide A "More Detailed Justification" For Disregarding Fact Findings.

EPA cannot dispute that the Delay Rule contradicts core fact-findings in the Chemical Disaster Rule. EPA previously found the Chemical Disaster Rule would achieve a long list of health and safety benefits; it now describes the lives saved and people protected to be "speculative but likely minimal." *Compare* EPA Br. 29 *with* 82 Fed. Reg. at 4683, 4684 tbl.18; RTC-1 at 246-47; *infra* Pt. II.A. The

[3] https://www.epa.gov/sites/production/files/2017-06/documents/rmp_final_rule_qs_and_as_6-12-17_0.pdf (agency fact sheet amended June 2017 to note delayed effective date) (Attachment 1).

record[4] is replete with examples of how the Delay Rule disregards and contradicts facts the agency previously found, including the core fact that the Chemical Disaster Rule would prevent and reduce harm from accidents like those that have been occurring at a rate of at least eight per month. *See, e.g.*, Mot. 21-24, 27-29 & fig.1; Petrs' Comments 27-28, EPA-HQ-OEM-2015-0725-0861. In "disagree[ing] that further delaying the final rule's effective date will cause such harm," 82 Fed. Reg. at 27,138, EPA flatly contradicts the agency's prior findings that (1) the Chemical Disaster Rule was indeed necessary to prevent serious harm to life, health, and welfare, *see, e.g.*, 82 Fed. Reg. at 4597-98, 4684 (describing benefits); Regulatory Impact Analysis 73-77 (Dec. 16, 2016), EPA-HQ-OEM-2015-0725-0734 (benefits); 82 Fed. Reg. at 4604, 4607, 4616, 4656, 4665 (describing new requirements as "needed" and "necessary"); *id.* at 4600 (describing final rule as "advanc[ing] process safety where needed"); Fact Sheet, *supra* n.3 at 1 (Chemical Disaster Rule "necessary" because so many disasters still occurring); Mot. 6-10; and (2) that all the time EPA allowed for the compliance deadlines was "necessary" for facilities to be able to achieve full compliance. 82 Fed. Reg. at 4676. Contradicting these findings, the Delay Rule "defers the obligation to comply with … emergency response coordination" requirements, EPA Br. 9, and

[4] EPA promulgated the Delay Rule as part of the same docket in which it promulgated the Chemical Disaster Rule, EPA-HQ-OEM-2015-0725.

removes the obligation for all other immediate compliance steps needed to ensure full compliance by other deadlines. 82 Fed. Reg. at 27,136, 27,142 (describing purpose and effect). EPA cannot abandon its prior determinations in favor of speculation about regulatory uncertainty, costs or risks not shown to be present and, regardless, that EPA already rejected. *See supra* Pt. I.A.3, *infra* Pt. I.B.3 (discussing speculative nature of alleged concerns).

EPA must provide a "more detailed justification" here, because the Delay Rule "disregard[s] facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox*, 556 U.S. 502, 515-16 (2009); Mot. 21-23. EPA acknowledges the "analysis that Movants demand may be appropriate," and admits the record does not contain it. EPA Br. 30. But EPA tries to punt, promising that justification in "subsequent regulatory action" upon completion of reconsideration. *Id.* at 31.

If EPA were reconsidering the Chemical Disaster Rule without postponing the Rule, the agency could undertake this analysis later. But in postponing the effective date, EPA renders the rule a "nullity" now, so it cannot put off justifying such a change. *EDF v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983); *Encino*, 136 S. Ct. at 2126. The effective date "is all the Delay Rule" formally changes, EPA Br. 31, but this change means everything. It nullifies the entire Chemical Disaster Rule through 2019. "Suspension" of a regulation "until the agency completes a

full notice and comment rulemaking proceeding" is "a paradigm of a revocation" and requires scrutiny now, as well as in the future if EPA indeed makes further changes. *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984).

2. The Delay Rule Also Fails Regular Requirements For Reasoned Decisionmaking By Nullifying A Rule Now Because It Might Change In The Future.

EPA's action also fails the well-established test for reasoned decisionmaking because EPA has nullified an entire "old policy," (the Chemical Disaster Rule), "[w]ithout showing that the old policy is unreasonable." *Pub. Citizen*, 733 F.2d at 102. It is arbitrary and capricious for an agency "to say that no policy is better than the old policy solely because a new policy might be put into place in the indefinite future." *Id.* The Delay Rule suspends the Chemical Disaster Rule for 20 months even though EPA "has not concluded" there is anything wrong with it. 82 Fed. Reg. at 27,141. None of the laundry list of supposed "good reasons" EPA cites for the delay (EPA Br. 27-28) is a factual conclusion, supported by the record, that nullification of the Chemical Disaster Rule is "better" than having that rule in place. *Id.*

The mere possibility of change in the future and some "uncertainty" in the meantime, *id.*, cannot justify suspending a final rule that has robust record support showing it is necessary to prevent and reduce serious harm. *Pub. Citizen*, 733 F.2d at 102 ("Without showing that the old policy is unreasonable, for [an agency] to

say that no policy is better than the old policy solely because a new policy might be put into place in the indefinite future is as silly as it sounds."). If this were lawful, EPA could suspend almost any rule it wanted by the rationale that the agency might someday change it, without addressing the record or the original basis for that rule, and even further delay this rule indefinitely. Such a power of *de facto* repeal would contravene fundamental tenets of reasoned decisionmaking. *See, e.g.*, *Pub. Citizen*, 733 F.2d at 98 ("agency must cogently explain why it has exercised its discretion in a given manner.") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)).

3. The Delay Rule Is Arbitrary Because It Is Based On Hypothetical Concerns.

The "allegations of potential security risks" and the hypothetical that the Chemical Disaster Rule "may, inadvertently, create harms," are just that: allegations. EPA Br. 27. EPA "has not concluded that [the Chemical Disaster Rule] would increase [security] risks." 82 Fed. Reg. at 27,141. Nor has it found any other actual defect in that rule that justifies delaying it. *See* EPA Br. 20 & n.11 (EPA does not "know whether or how the RMP Amendments will be revised."); 82 Fed. Reg. at 27,136, 27,140.

The sole objection EPA cites as grounds for reconsideration, the announcement of possible arson at West, Texas, before the end of the Chemical Disaster Rule comment period, provides no basis to sideline the rule. EPA

promulgated broadly-applicable updates to its RMP framework. Mot. 6-10; RTC-1 at 247-48 (rejecting contentions that EPA should "address the specific issues raised by the West Fertilizer Company incident" because rule was based on "numerous chemical facility incidents."). The one set of targeted requirements focuses on industry sectors found to have the worst accident records (including petroleum refineries and chemical manufacturers), not fertilizer manufacturers. 82 Fed. Reg. at 4632. EPA designed the rule to protect Movants' members and other vulnerable members of the public from all kinds of chemical disasters. *See, e.g.*, 81 Fed. Reg. at 13,648, 13,655, 13,663, 13,671, 13,673, 13,675, 13,677–78 (each discussing defects and failures of pre-existing RMP rule); *see also id.* at 13,648–49, 13,655–56, 13,671, 13,674–75, 13-678 (each listing examples of disasters that prior rule failed to prevent because of these defects).[5] Bare "allegations" cannot rationally justify delaying a rule that contained final, well-supported fact-findings based on the record at all, much less for the extraordinary period of 20 months.

C. Summary Vacatur Is A Proper And Efficient Remedy.

The Clean Air Act is clear and EPA's action is so far outside the bounds of its authority, as shown by the motions briefing, that summary vacatur is appropriate. *See, e.g.*, *CAC*, 2017 WL 2838112, at *4; *see also United States v.*

[5] EPA previously rejected intervenors' contention that non-compliance was the sole cause of prior accidents and that regulatory improvements were not needed. RTC-2 at 246.

Ron Pair Enters., 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (quotations omitted). Harm from EPA's delay cannot be remedied later. Lengthy review "would hand the agency, in all practical effect, the very delay in implementation" it seeks. Order, *CAC* (D.C. Cir. July 13, 2017), DN1683944 (recalling mandate for fourteen days).

II. A STAY PENDING LITIGATION IS WARRANTED.

A. EPA's Delay Irreparably Harms Movants

No party contests that the grave harm EPA found the Chemical Disaster Rule would prevent and reduce – *e.g.*, death, injury, toxic exposure, and life disruption to industrial workers and fenceline community members, such as Movants' members – is "irreparable." Mot. 26-32; 82 Fed. Reg. at 4684 tbl.18; *see, e.g.*, *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) ("*LWV*"). Each way in which EPA and Intervenors question Movants' showing of irreparable harm should be rejected, as each requires ignoring EPA's own findings in the record that these harms would be prevented by the Chemical Disaster Rule and that record stands unless and until changed. *E.g.*, EPA Br. 35-38.

Contrary to opposing parties' arguments, EPA determined the Chemical Disaster Rule would reduce the "frequency and magnitude" of releases, including "fires and explosions, property damage, acute and chronic exposures or workers

and nearby residents to hazardous materials, and resultant damages to health," and would thereby reduce fatalities, injuries, and many other types of harm resulting from such incidents. 82 Fed. Reg. at 4683, 4684 tbl.18; RTC-1 at 246-47. As EPA also found, "[t]he record reflects that the likelihood of severe accidents is greater in the sectors that must conduct [safer technology and alternatives analysis ("STAA")]," including petroleum refineries and chemical manufacturers, which are sources that particularly threaten many of Movants' members. 82 Fed. Reg. at 4631; *id.* at 4632; Fendley Decl. ¶¶ 2-3, 19; Kelley Decl. ¶ 2; Lilienfeld Decl. ¶¶ 8-10; Marquez Decl. ¶ 6; Medina Decl. ¶¶ 2-3; Moench Decl. ¶ 6; Nibarger Decl. ¶¶ 9-18, 21; Nixon Decl. ¶ 1. These remain the agency's findings as EPA has not duly revised its conclusions, nor shown it could do so. *See* RTC-2 at 21, 24 (stating "it is not necessary [now] for EPA to address the substance"). EPA's findings are consistent with those of other experts, such as the Chemical Safety Board, which has documented significant evidence of problems underlying past accidents that provisions of the Chemical Disaster Rule would prevent or mitigate. Mot. 33 (citing comments); Petrs' Comments 14-22 (summarizing information on accidents, CSB investigations, and findings). Thus, although opposing parties contend the Delay Rule will not "cause" the harms Movants describe, the record demonstrates that removing a rule designed to prevent and reduce those very harms will do just that.

In the Chemical Disaster Rule, EPA gave facilities just the time it found "necessary" to come into compliance after the March 14, 2017, effective date. 82 Fed. Reg. at 4676. EPA concluded that meeting the compliance deadlines would require immediate steps that would prevent and reduce harm and which are necessary to assure compliance by each of the Rule's deadlines, including one in March 2018. 82 Fed. Reg. at 4676, 4678. Delaying the protective actions required by the rule deprives Movants' members of these protections and also irremediably puts off the day when full compliance, and so fewer chemical accidents, deaths, injuries, shelter-in-place and evacuation days, will finally be achieved at and near their workplaces and their homes. Removing the Delay Rule would prevent irreparable harm to Movants because ensuring all compliance deadlines in the rule take effect now would ensure compliance steps begin now. 82 Fed. Reg. at 4676 (describing compliance time provided as "necessary" for a long list of tasks leading ultimately to full compliance by the deadlines, including training, research, changing risk management and information protocols); *see also* 82 Fed. Reg. at 27,139 (EPA "does not wish to … requir[e] [regulated parties] to prepare …, or … immediately comply with, rule provisions").

As EPA and intervenors concede, if the Delay Rule were lifted, protections would begin immediately: facilities would start implementing requirements now to meet the rule's deadlines for expeditious compliance. RMP Mot. to Intv. at 3,

DN1682346 (absent Delay Rule, "facilities would be forced to incur costs immediately to comply with certain aspects of the [Chemical Disaster Rule]," *e.g.*, training, changing manuals and operating procedures and conducting additional audits to prevent accidents); CSAG Br. 14-15, 20, DN1683392 ("facilities and local responders must begin implementing the requirements [of the Chemical Disaster Rule] well before the deadlines, and having the [Rule] become effective means these requirements are applicable and that planning and steps to achieve them must occur"); *see also* State of Louisiana *et al.* Br. at 8, DN1683820 (noting "significant effort" will be required "as an immediate matter … to ensure compliance upon the effective date."). Implementation of the Chemical Disaster Rule would thus begin in the imminent near-term, providing the health and safety protections it contains immediately, far sooner than February 19, 2019, and thereby achieve reductions in the frequency and magnitude of harm to Movants' members sooner.

Even if all that is considered is the total removal of the March 2018 compliance deadline for emergency response coordination, which the "new effective date" changes to be at least 11 months later, EPA Br. 17-18, these requirements are needed immediately to ensure first-responders "com[e] home at night." Mot. 32 (quoting emergency response officials' comments); 82 Fed. Reg. 4678 tbl.6; Louisiana *et al.* Br. 8 ("States will be required to immediately divert

training and support resources to LEPCs."). Lack of adequate emergency coordination endangers Movants' members and the general public and creates a strong likelihood of irreparable harm to Movants' members. *See, e.g.*, *State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) (finding "irreparable harm" after applying D.C. Circuit test for this factor, because "in the event of [an] … accident the allegedly inadequate emergency evacuation plans would present an actual danger to the … public").

The fact that EPA did not determine the specific number of chemical accidents, deaths, injuries, and other types of harm that would occur within a given time period (such as 20 months) does not negate EPA's finding that such harms would continue absent the Chemical Disaster Rule. There is no requirement that irreparable harm be precisely quantified. *See, e.g.*, *LWV*, 838 F.3d at 9 (finding irreparable harm without quantifying number of voters affected). Movants have personal experience of these incidents that shows the certainty of them occurring during this 20-month period and beyond, as a result of the Delay Rule, just as these accidents have happened incessantly for years. *See, e.g.*, Land ¶¶ 4-5; Lilienfeld Decl. ¶¶ 9-10; Marquez ¶¶ 7-14; Moench Decl. ¶ 11; Nibarger Decl. ¶¶ 15-18; Parras Decl. ¶¶ 3, 10-11; 82 Fed. Reg. at 4599; Mot. 28 fig.1. The record also shows these accidents occurring like clockwork, with no month documented in the record containing fewer than 8 such accidents, and with accidents causing injury

on average every 4 days. Mot. 7, 27-28 (citing RMP Facility Accident Data, 2004-13 (Feb. 2016), EPA-HQ-OEM-2015-0725-0002 ("Accident Data"). EPA determined the Chemical Disaster Rule would reduce these accidents and make them less severe. 82 Fed. Reg. at 4597-99, 4683.

Although EPA attempts to rely on the pre-Chemical Disaster Rule regulations to prevent harm during its 20-month delay, EPA Br. 19, 27-28, the agency found that thousands of accidents have occurred under the pre-existing framework. That disasters have been occurring unchecked for "over twenty years," CSAG Br. 11, only highlights the need for the Chemical Disaster Rule and demonstrates that the pre-existing framework on which EPA now relies is the opposite of "evergreen," RMP Br. 3. EPA determined that the new requirements were "necessary" and would "further protect human health and the environment from chemical hazards," and prevent and reduce more death, injury, and other serious harm. 82 Fed. Reg. at 4595, 4599 (describing extant threat to workers and communities as "significant"), 4683-84 (identifying benefits of implementing Chemical Disaster Rule), 4681; 82 Fed. Reg. at 4604, 4607, 4616, 4656, 4665 (describing new requirements as "needed" and "necessary"); *id.* at 4600 (describing final rule as "advanc[ing] process safety where needed"); Fact Sheet, *supra* n.3 at 1 (summarizing need); *see also, e.g.*, Mot. 8-10 (discussing findings of ineffectiveness and updates made in response); 81 Fed. Reg. at 13,671-72

(describing failings of pre-existing emergency coordination requirements). The compliance steps EPA and Intervenors complain of are the same ones EPA determined would correct these deficiencies and protect communities and workers from disasters. In addition to causing imminent harm, each day of delay now further extends the timeline and means protections that would save lives will not take effect. *See, e.g.*, CSAG Br. 17 ("given the lengthy timeline" needed to implement STAA requirements "companies will need to initiate the process now"); CSAG Decl. of Shannon Broome at 2 (STAA will require "a multi-year effort"), DN1683392.

B. All Stay Factors Weigh in Favor of Movants' Requested Relief.

Movants meet all four parts of the stay test, Mot. 3, because, in addition to showing a likelihood of success on the merits, *supra* Pt. I, and irreparable harm, Pt. II.A, a stay will not harm other parties or the public interest, but will prevent and reduce harm from chemical disasters that threaten millions of people. Mot. 33-34.

EPA's brief shows any "interest" it may have faces no harm from staying the Delay Rule because this would have no impact on its ability to perform the pending reconsideration process. Regarding other interests, after an ample public comment process, EPA found that the costs of implementing the Chemical Disaster Rule pursuant to the original effective date and compliance deadlines are "reasonable" to protect public health and safety, and those remain the facts before

this Court. 82 Fed. Reg. at 4598-99; Mot. 34. Complaints about compliance with a regulatory framework that might possibly change in the future are at most speculative. *See Mexichem*, 787 F.3d at 556 (finding implementation of policy that might "shift[]" after reconsideration is "harmless" where industry may well "have to make the same investments and incur the same costs to comply with EPA's ultimate Rule as … under the current Rule"). Similarly, EPA "has not concluded" any of the alleged risks to other groups indicated by EPA or intervenors exist, and they are not supported by evidence. EPA Br. 40; *but see* 82 Fed. Reg. at 27,141.

The public interest factor and balance of harms favor a stay, as well. EPA's record shows a likelihood of severe harm from not implementing the Chemical Disaster Rule, as summarized above. *See, e.g.*, 82 Fed. Reg. at 4599; EPA-HQ-OEM-2015-0725-0778 (describing national security risks of delaying Chemical Disaster Rule). EPA itself determined the Rule's benefits outweighed any costs of compliance. 82 Fed. Reg. at 4599; RTC-1 at 247, 248; *see also Mexichem*, 787 F.3d at 555 (denying stay where only economic harms to industry were alleged, because it is "well settled that economic loss does not, in and of itself, constitute irreparable harm"); *Ohio*, 812 F.2d at 291 (irreparable harm to public outweighed economic costs.).

III. STANDING

For the same reasons they have shown that they face irreparable harm, Movants also demonstrate Article III standing, a matter EPA and most intervenors do not dispute.[6] The record shows that, absent the Chemical Disaster Rule, preventable accidents will occur. *See supra* Pt. II.A; Mot. 27-29 (citing Accident Data). Movants' members are within the groups EPA found most vulnerable to harm from these accidents – including workers and nearby residents – and EPA finalized that rule with them in mind, and to reduce injuries to them. *See, e.g.*, 82 Fed. Reg. at 4597; 81 Fed. Reg. at 13,695 & tbl.19; Fact Sheet at 1. Death, physical injury, exposure to toxic releases, disruption to Movants' members' lives, and other harm identified in the record and in Movants' declarations as a result of such preventable disasters all constitute Article III injuries. *See, e.g.*, *NRDC v. EPA*, 489 F.3d 1364, 1370-71 (D.C. Cir. 2007) (finding associational standing for groups whose members used or lived in areas affected by emissions of facilities exempted from air rule); *see also Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 74 (1978) ("emission of non-natural radiation into appellees' environment would also seem a direct and present injury"). These harms are imminent because if the Delay Rule is vacated, covered facilities will immediately

[6] This Court previously granted Movant USW's unopposed motion to intervene, presumably determining that it has standing as a petitioner-intervenor. DN1681504.

begin to comply with its protective requirements, providing safer communities and workplaces to Movants' members now, and more as these facilities continue to take additional steps required by the deadlines for total compliance. *See supra* Pt. II.A (citing EPA and intervenors' descriptions of immediately-required compliance actions the Delay Rule would delay).

Contrary to the contention that Movants' injuries are too "general," RMP Br. 10, that chemical disasters also threaten millions of other Americans does not remove Movants' Article III injuries. Movants' members are inside regulated chemical facilities and living along their fence-lines, facing the immediate and gravest consequences of accidental releases at these facilities. *FEC v. Akins*, 524 U.S. 11, 24-25 (1998) (finding injury "where a harm is concrete, though widely shared"). EPA found that the likelihood of severe harm is greatest for the types of facilities where Movants' members work and near which they live (*e.g.*, petroleum refineries and chemical plants), 82 Fed. Reg. at 4631-32, showing they have a particularized and greater threat than other members of the public. *See also, e.g.*, Fendley Decl. ¶¶ 2-3; Lilienfeld Decl. ¶¶ 2-3, 5-6, 9-10; Nibarger Decl. ¶ 2, 7, 10-11, 14-18; Wright Decl. ¶¶ 2-3; Fontenot Decl. ¶ 4; Hays Decl. ¶ 4; Kelley Decl. ¶ 1; Land Decl. ¶ 1; Marquez Decl. ¶ 6; Medina Decl. ¶ 3; Moench Decl. ¶ 6; Nelson Decl. ¶ 2; Nixon Decl. ¶ 1; Parras Decl. ¶¶ 8-12. Movant USW's members have been and will be "hurt first and worst" from accidents that occur, *e.g.*, Nibarger

Decl. ¶¶ 7, 14-18, and many of Movants' members similarly have suffered first-hand during such incidents in the past and are particularly vulnerable to the irreparable harm caused by the Delay Rule, *e.g.*, Kelley Decl. ¶¶ 7-11; Lilienfeld Decl. ¶¶ 9-10; Marquez Decl. ¶¶ 4-14; Nixon Decl. ¶ 5-6; Parras Decl. ¶¶ 10-11; Nibarger Decl. ¶¶ 7, 11, 13-18.

Movants' members also suffer procedural and informational injuries. *See, e.g.*, Fendley Decl. ¶ 21; Fontenot Decl. ¶¶ 6, 8-10; Kelley Decl. ¶¶ 12, 17, 20; Lilienfeld Decl. ¶ 11; Marquez Decl. ¶¶ 19-20; Moench Decl. ¶ 22; Nibarger Decl. ¶ 22; Parras Decl. ¶¶ 13-14; Nixon Decl. ¶ 13. The Delay Rule removes requirements to take compliance steps that would otherwise begin now, including the March 2018 emergency response preparedness requirements, and postpones full compliance that would require information to be made available to Movants' members and to first responders whose job it is to protect them. 40 C.F.R. § 68.210; Mot. 9-10; *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006) (plaintiffs have informational standing when action denies them access to information they would otherwise be entitled to "even if the information is available to them through other channels"). Movants experience procedural injury as well, because facilities will delay required procedures designed to protect safety, such as emergency coordination, root-cause investigations, and STAA, among others. Mot. 7-11; *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 674 (D.C.

Cir. 1996) (party had standing to challenge omission of environmental impact statement, regardless of whether it would affect outcome of decision).

That the Delay Rule causes these injuries is clear and not "attenuated," RMP Br. 10, because EPA itself "link[ed]," *id.* at 11, the Chemical Disaster Rule to the harms the Delay Rule causes by postponing and implicitly repealing that rule. *See* Pt. II.A; *see also Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012) (finding standing where members "live within zones they claim are exposed to [pollutants]," after assuming they are correct on the merits "as we must assume for standing purposes"). As a result, the Delay Rule causes Movants to face more and worse chemical accidents and related harms that EPA itself found the original rule would reduce. Mot. 7, 27-32; 82 Fed. Reg. at 4597. Nullifying the Chemical Disaster Rule and all of the safety requirements, procedures, and other requirements it contains thus causes Movants, its intended beneficiaries, to lose these protections and suffer these substantive, procedural, and informational injuries to their legally protected interests. *See, e.g.*, *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015) (party who "benefits" from agency action has standing to defend it). Vacatur of the Delay Rule will require facilities to start complying now with emergency response preparedness, safer alternatives assessments, and other measures EPA found would protect Movants' members from harm, and ensure they receive the benefits of full compliance with

all disaster prevention and response measures by the original deadlines, including March 14, 2018.

CONCLUSION

Therefore, this Court should either vacate the Delay Rule, or stay it pending judicial review and order expedition.

DATED: July 20, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies, in accordance with Federal Rules of Appellate Procedure 32(g)(1) and 27(d)(2)(C) and the Court's July 14, 2017 Order, that the foregoing **Joint Reply of Petitioners Air Alliance Houston *et al.* and Petitioner-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union to Responses in Opposition to Motion for a Stay or, in the Alternative, Summary Vacatur** contains 6,489 words, as counted by counsel's word processing system, and thus complies with the 6,500 word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** using **size 14 Times New Roman** font.

DATED: July 20, 2017

/s/ Gordon Sommers
Gordon Sommers

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2017, I have served the foregoing **Joint Reply of Petitioners Air Alliance Houston *et al.* and Petitioner-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union to Responses in Opposition to Motion for a Stay or, in the Alternative, Summary Vacatur** on all registered counsel through the court's electronic filing system (ECF).

/s/ Gordon Sommers
Gordon Sommers

Attachment 1

EPA ACTIVITES UNDER EO 13650:

Risk Management Program (RMP) Final Rule

Questions & Answers

Q. Why are changes to the RMP rule necessary? What are the impacts from accidents at RMP facilities?

A. While numerous chemical plants are operating safely, in the last 10 years, RMP data show that there have been more than 1,517 reportable accidents, 473 of which had offsite impacts. The reportable accidents were responsible for 58 deaths, 17,099 people were injured or sought medical treatment, almost 500,000 people evacuated or sheltered-in-place, and over $2 billion in property damages.

EPA's changes to the RMP rule will help protect local first responders, community members and employees from death or injury due to chemical facility accidents.

Q. What outreach did EPA do?

A. The final rule is based on extensive outreach, including Executive Order listening sessions, the solicitation of public comment through the "Request for Information" (RFI) and the Notice of Proposed Rule-Making (NPRM), the SBAR panel, and a public hearing.

Between November 2013 and January 2014, nine Executive Order 13650 Improving Chemical Facility Safety and Security listening sessions and webinars were held, which were led by EPA, DHS, and OSHA. On July 31, 2014, EPA published the RFI that solicited comments and information from the public regarding potential changes to the Risk Management Program regulations (79 FR 44604).

While developing the proposed rule, EPA convened a SBAR panel, consisting of the U.S. Small Business Administration (SBA), Office of Management and Budget (OMB), and EPA, and solicited advice and recommendations from Small Entity Representatives (SERs) that potentially would be subject to the rule's requirements. Prior to convening the SBAR panel, EPA invited SBA, OMB, and 32 potentially affected small entity representatives to a conference call and solicited comments from them on preliminary information sent to them. EPA shared the small entities' written comments with the SBAR Panel as part of the Panel's convening document. After the SBAR Panel was convened, the Panel distributed additional information to the SERs for their review and comment and in preparation for another outreach meeting. The Panel received written comments from the SERs in response to the discussions at this meeting and the outreach materials.

EPA again solicited input from the public in the NPRM published on March 14, 2016 (81 FR 13637).

Over the course of two years of outreach, EPA received a total of 61,555 public comments on the proposed rule. Several public comments were the result of various mass mail campaigns and contained numerous copies of letters or petition signatures. EPA held a public hearing on March 29, 2016, to provide interested parties the opportunity to present data, views, or arguments concerning the proposed action.

Q. How did EPA incorporate feedback when developing the final rule?

A. In developing the final rule, EPA took into consideration feedback and comments received from listening sessions, the request for information (RFI), and the proposed rule. For example, changes were made based on feedback from industry who asked that we consider operational impact and costs; from both industry and security professionals that asked that we strike a balance between information sharing and security; and from local government officials that asked us to factor in the burden to local government, especially in rural cities and towns.

Ensuring Local Responders and Community Residents Are Prepared for an Accident

Q. What Local Coordination requirements are included in the final rule?

A. The final rule increases coordination with Local Emergency Planning Committees (LEPCs) to enhance local emergency preparedness and response planning by requiring facilities to conduct annual coordination with LEPCs or local emergency response officials to clarify response needs, emergency plans, roles, and responsibilities.

Instances of poor coordination between RMP facilities and local planners and responders have been identified by States, local communities, and first responders to EPA and by U.S. Chemical Safety and Hazard Investigation Board (CSB) in accident investigations. States and locals have indicated that some RMP facilities do not adequately engage in meaningful coordination with LEPCs and local emergency responders, leaving the local planners and responders unaware of, or unprepared for, the chemical risks associated with the facility.

The lack of good coordination between facilities and responders can result in increased risk to responders due to inadequate situational awareness, confusion as to who has the lead responsibilities, inadequate or lack of equipment, insufficiently trained personnel arriving on site and ultimately, potential fatalities/injuries. For example, following the August 2008 explosion and fire at the Bayer CropScience facility in Institute, West Virginia, the CSB found that lack of effective coordination between facility and local responders prevented responding agencies from receiving timely information updates about the continually changing conditions at the scene, prevented a public shelter-in-place order from reaching the local community, and may have resulted in toxic exposure to on-scene public emergency responders.

In response to several commenters that supported regular meetings with local authorities, EPA requires qualifying facility owners or operators to request an opportunity to meet with the local emergency planning committee (or equivalent) and/or local fire department, but is not requiring a

meeting to be held if local authorities determine that a meeting is not required. In addition, EPA is requiring the owner or operator to consult with local emergency response official to establish appropriate frequencies and plans for tabletop and field exercises.

Qualifying facilities must develop an emergency response plan, develop procedures for the use, inspection, and testing of emergency response equipment, conduct training for employees in relevant procedures, and update the emergency response plan to reflect changes at the facility.

The final rule modifies the emergency response plan provision that requires the plan to include procedures for informing the public and local emergency response agencies about accidental releases, to also require these procedures to inform appropriate Federal and state emergency response agencies about accidental releases. This provision will be complementary to notification requirements under EPCRA and CERCLA, however the lists of regulated substances and notification triggers are not identical.

EPA had originally proposed to require the owner or operator to review and update the emergency response plan annually, or more frequently if necessary, to incorporate recommendations and lessons learned from emergency response exercises, incident investigations, or other available information. Several commenters stated that annual updates are unnecessary. Taking into consideration the comments received, the final rule requires the owner or operator to review and update the emergency response plan as appropriate based on changes at the facility or new information obtained from coordination activities, emergency response exercises, incident investigations, or other available information, and ensure that employees are informed of the changes.

Q. How are changes to local coordination requirements advancing local preparedness and assisting local response officials?

A. The emergency response coordination requirements in the final rule improve the information available to emergency planners and responders, making it more relevant and accessible, to help ensure responders understand the risks at the facility so they can better prepare for a safe and timely response.

The final rule includes revised language to avoid the implication that 'local coordination' means that the facility and LEPCs are assessing capabilities. EPA removed this provision because numerous commenters expressed concern that there is no accepted standard for community emergency response capability applicable nationwide, and that response resources and capabilities can only be evaluated in the context of the overall community's response plan.

The owner or operator of a facility must coordinate response needs with local emergency planning and response organizations to determine how the facility is addressed in the community-wide emergency response plan and to ensure that local response organizations are fully aware of the regulated substances at the facility; their quantities; the risks presented by covered processes; and the resources and capabilities at the facility to respond to an accidental release of those substance. Coordination will also clarify the roles and responsibilities of local, state and federal responders and facility personnel in the case of an accidental release.

The final rule requires qualifying facilities to perform notification exercises and to perform tabletop and field exercises. Such exercises are widely acknowledged as a 'best practice' among public and private emergency response professionals. Exercises can increase emergency response readiness, both for facility owners or operators and local responders, by testing emergency plans and communications systems, and by ensuring local and facility response personnel know what actions to take during various accident scenarios.

The final rule includes additional language as part of the coordination with local emergency response officials, specifying that the owner or operator must consult with local officials to establish an appropriate frequency for field and tabletop exercises, with a minimum timeframe of one notification exercise per year, one tabletop exercise every three years, and at least one field exercise every 10 years.

The changes to the rule can help advance local preparedness and assist local response officials by improving the ability of planners and responders to make appropriate decisions concerning equipment, training, and procedures, and improve local contingency planning which may result in more efficient allocation of community public response resources and training.

Public comments generally supported EPA's proposal for annual notification exercises, and therefore EPA is finalizing these provisions as proposed. Many commenters also supported incorporating requirements for field and tabletop exercises into the RMP rule, but some of these commenters also recommended various changes to the proposed provisions. The greatest number of comments related to the required frequency for exercises. These commenters stated that requiring field exercises every five years and tabletop exercises every year would be overly burdensome on facilities and local responders. In response to these comments, the final rule allows owners and operators to work with local authorities to establish field and tabletop exercise schedules that work for both parties. EPA decided to leave the timing and level of complexity of these exercises to the discretion of the facilities and first responders so as not to pose a potential burden of undue costs, time or stresses on resources.

Q. What Information Sharing requirements are included in the final rule?

A. The rule will preserve security and help enable local communities to protect themselves. It requires facilities to share emergency planning information with LEPCs during annual coordination activities.

The rule also requires facilities to provide certain, existing chemical information to the public upon request. The information includes: chemical hazard information, accident history, dates of past emergency response exercises, emergency response program information, and LEPC contact information. In response to comments received regarding security concerns, the rule does not require that this information be posted on the internet.

The rule also requires all facilities to hold a public meeting for the local community within 90 days of an RMP reportable accident. The information and level of detail shared at a public meeting is for the facility to decide.

Q. What Information Sharing requirements are changed from the proposed to final rule?

A. For LEPCs, the final rule eliminated the proposed requirements for information sharing with LEPCs and instead added language to the emergency response coordination section (provisions under § 68.93) to emphasize existing Emergency Planning and Community Right-to-Know Act (EPCRA) authority.

For the public, the final rule eliminated the proposed requirement to share chemical hazard information on the facility's website. Instead the requirement is to provide existing public information directly to community members that request the information so that they can plan to properly protect themselves by ensuring plans are in place to effectively shelter in place, and evacuate.

As proposed, EPA is requiring facilities to hold a public meeting after a reportable accident, but, in response to comments received, changed the timeframe for the public meeting from within 30 days of the accident, to 90 days. It is for the facility to determine the agenda and depth of detail to be discussed at the public meeting(s).

Q. What information does the final rule require sharing with the LEPC and emergency response officials?

A. As part of the local coordination activities, the final rule specifies what information must be provided to local emergency planning and response organizations, including:

- emergency response plan if one exists;
- emergency action plan;
- updated emergency contact information;
- and any other information that local emergency planning and response organizations identify as relevant to local emergency response planning.

EPA proposed that owners and operators of all RMP-regulated facilities provide certain information to LEPCs or local emergency response officials upon request. Many commenters did not support the requirement, citing various reasons such as: a lack of data supporting the Agency's concern that LEPCs are not receiving the information they need to develop local emergency response plans; unnecessary redundancy with existing requirements, such as data reported under the Emergency Planning Community Right-to-Know Act (EPCRA); data proposed is too broad and does not provide useful information pertinent to emergency response planning; the data may overwhelm LEPCs with technical information with concern that most LEPCs lack the expertise needed to use this information to develop local emergency response plans; and security concerns regarding how the information is maintained and handled by the LEPC or emergency response officials.

Based on these comments, EPA decided NOT to finalize the proposed requirement and instead added language to the emergency response coordination provisions of the rule, which requires the

owner or operator to provide "any other information that local emergency planning and response organizations identify as relevant to local emergency planning." This allows LEPCs and other local emergency officials to obtain the information they require to meet their emergency response planning needs. It also allows local emergency planners and response officials to ask questions of facility personnel about the risks associated with the chemical hazards at the facility and about appropriate mitigation and response techniques to use in the event of a chemical release. Additionally, it further allows the facility owner or operator and the LEPC to identify information that may need to be maintained securely and discuss strategies to secure the information or to provide only information that is pertinent to emergency response planning without revealing security vulnerabilities.

Q. How does EPA's final rule preserve security while enhancing the ability to local communities to be prepared for an accident?

A. The current rule requires that the risk management plan (also referred to as an RMP) be available to the public; however, access to this information is currently restricted to Federal Reading Rooms or through Freedom of Information Act (FOIA) requests. EPA proposed, and is finalizing with modifications, a requirement for information relevant to public awareness of safety risks to be available to the public upon request. Residents of the nearby community will need relevant information for their emergency preparedness including effective notification of accidental release, and evacuation and shelter-in-place information. The information required to be provided under the final rule includes publicly available information that community residents, owners and managers of health and day care facilities, and other community members need in order to properly respond to chemical plant accidents with appropriate actions such as evacuation or sheltering-in-place. EPA believes that this approach to notifying the public that information is available upon request strikes an appropriate balance between various concerns, including information availability, community right-to-know, minimizing facility burden, and minimizing information security risks.

EPA is also requiring owners or operators to provide instructions for requesting the information elements and the location of other available information related to community emergency preparedness.

The final rule will uphold security, increase relevant, shared knowledge for first responders and improve accessibility for community awareness and self-protection. The final rule will not jeopardize security and/or CBI by utilizing the internet as a means of information sharing.

Q. What is the process for responding to information requests from the public?

A. The facility owner or operator must provide ongoing notification that certain chemical hazard information is available upon request and provide instructions on how to submit a request for information. After receiving a request, the facility owner or operator must provide the information to the requestor within 45 days of the request.

Preventing Catastrophic Accidents

Q. What Incident Investigations and Root Cause Analysis requirements are included in the final rule?

A. The final rule requires additional reporting elements to investigations that are required after any incident that resulted in or could reasonably have resulted in a catastrophic release. The facility must identify the fundamental reason ("root cause analysis") for the incident, and prepare a report within 12 months of the incident that includes consequences of the accident and any emergency response actions taken.

EPA modified the proposed definition of "root cause" to eliminate the phrase "that identifies a correctable failure(s) in management of systems" so there would be no implication that all incidents include a correctable management system failure.

Also, in the final rule, EPA clarifies which near-miss incidents (i.e., incidents that could reasonably have resulted in a catastrophic release) must be investigated.

Q. What Incident Investigations and Root Cause Analysis requirement have changed from the proposed to final rule?

A. Changes to the proposed rule regarding incident investigations and root cause analysis requirements include:

- eliminating the proposed revisions to the definition of catastrophic release;
- requiring the incident investigation report to include the consequences/impacts of the incident and emergency response actions taken;
- modifying the definition of "root cause" to eliminate the phrase "that identifies a correctable failure(s) in management systems."
- adding to the Preamble, guidance on the meaning of "near-misses" and
- conveying deference to industry practices.

As part of this effort, EPA had proposed to clarify the definition of catastrophic release. The RMP rule (see 40 CFR 68.60(a) and 40 CFR 68.81(a)) currently requires investigation of an incident that "…resulted in, or could reasonably have resulted in a catastrophic release." EPA had proposed to modify the definition of catastrophic release to be identical to reportable accidents under the five-year accident history requirement. Public comments received stated that the proposed definition created a potential burden by inadvertently expanding the number of investigated accidental releases. Subsequently, in the final rule EPA retained the existing definition of catastrophic release based on public comments describing the burden created by the revised definition.

Q. What is Safer Technology and Alternatives Analysis (STAA)?

A. "Safer technology and alternatives" refer to risk reduction strategies developed using a hierarchy of controls that are considered *inherent*, *passive*, *active*, and *procedural*. This strategy can be applied initially to all design phases and then continuously throughout a process's life cycle. STAA includes concepts known as inherently safer technologies (IST) or inherently safer design (ISD), which reduce or eliminate the hazards associated with materials and operations used in a

process. IST, ISD, and inherent safety are interchangeable terms that are used in the literature and in the field. The four major inherently safer strategies are:

- Minimization–using smaller quantities of hazardous substances;
- Substitution–replacing a material with a less hazardous substance;
- Moderation–using less hazardous conditions or a less hazardous form, or designing facilities that minimize the impact of a release of hazardous material or energy; and
- Simplification–design facilities to eliminate unnecessary complexity and make operating errors less likely.

Process Hazard Analyses (PHAs) are already part of the existing rule requirements. As part of the PHA, qualifying programs in three industry categories (paper manufacturing; coal and petroleum products manufacturing; and chemical manufacturing) are required to thoroughly evaluate safer technology and alternatives when conducting their Process Hazard Analysis, however implementation is not mandatory. These categories were selected because of highest frequency of accidents.

Third Party Audits

Q. What are the third-party audit requirements?

A. This provision requires an independent third-party to conduct a compliance audit at a facility if there has been a reportable accident, or if an implementing agency determines that a third-party audit is necessary, based on information about the facility or about a prior third-party audit at the facility. The final rule contains criteria for auditor competence and independence.

The owner or operator must also engage a third-party auditor, and complete the audit within 12 months of when:

- an implementing agency determines that conditions at the facility could lead to an accidental release of a regulated substance; or
- when a previous third-party audit failed to meet the competency or independence criteria specified in the rule.

The third-party audit may be conducted by a third-party auditor or a team of auditors led by a third-party auditor. This final rule requirement brings a level of independence to the audit process while the audit team flexibility provides due consideration to a facility's professional personnel involvement in the audit. The team must be led by an independent third-party but may include experts from the company who understand the chemical plant design and processes.

The benefit of the third-party audit is to provide the owners and operators information to determine whether or not facility procedures and practices to comply with the prevention program requirements of the RMP rule, are adequate and being followed.

EPA notes that some qualifying facilities are already required to conduct compliance audits every three years. The rule does not change the requirement that RMP facilities regularly conduct RMP

compliance audits. It does, however specify that, in specific situations, those audits be performed by a third-party or a team led by a third-party (pursuant to the schedule in §§ 68.58(h) and/or 68.79(h) of the rule).

Q. What Third Party Audit requirements are changes from the proposed to final rule?

A. In response to comments, EPA changed the third-party audit criterion for determining the implementation to be based on conditions at the facility that could lead to an accidental release of a regulated substance, rather than on non-compliance. An implementing agency may determine that a third-party audit is necessary following inspections, audits, or facility visits, if conditions are observed at the facility that could lead to an accidental release of a regulated substance.

Other changes to this provision of the final rule include:

- allows third-party audit teams to be comprised of third-party auditor personnel as well as other personnel, including facility staff;
- revising the proposed auditor qualification criteria by removing the Professional Engineer (PE) requirement;
- eliminating the requirement to submit all auditor reports and third-party audit findings response reports to implementing agencies; and
- reducing the required timeframe for independence from three years, to two years.

In an effort to reduce the burden for facility owners and operators and to increase the availability of potential independent third-party auditors, EPA reduced the timeframe that limits the relationship between the owner/operator and the third-party auditor from three years to two years, and provides that retired employees may qualify as independent third parties.

Additional Information

Q. When does the rule become effective?

A. The effective date of this action has been delayed to February 19, 2019.

Q. When do I have to comply with the new rule provisions?

A. EPA has established the following dates for facility owners and operators to comply with the revised rule requirements:

- Comply with emergency response coordination activities within one year of the effective date of the final rule;
- Within three years of when the owner or operator determines that the facility is subject to the emergency response program requirements of § 68.95, the owner or operator of a qualifying facility must develop an emergency response program in accordance with § 68.95;
- Correct or resubmit RMPs to reflect new and revised data elements within five years of the effective date of the final rule; and

- Comply with the following new provisions within four years of the effective date of the final rule,
  - Third-party compliance audits,
  - Root cause analysis as part of incident investigations,
  - STAA,
  - Emergency response exercises,
  - Information availability provisions, and
  - Public meetings.

Q. How did EPA coordinate with the Department of Homeland Security and the Occupational Safety and Health Administration?

A. President Obama's Executive Order 13650, "Improving Chemical Facility Safety and Security," established the Chemical Facility Safety and Security Working Group ("Working Group"), that was co-chaired by the Assistant Secretary of Homeland Security, the Assistant Administrator of EPA, and the Deputy Administrator of OSHA. The Working Group conducted extensive inter-agency coordination. EPA's coordination efforts included discussions with DHS and OSHA on potential changes to the Risk Management Program rule. Additionally, DHS and OSHA had representatives attend the SBAR panel, which discussed the development of the proposed rule.

Q. Why didn't EPA revise the RMP list of regulated substances to include Ammonium Nitrate?

A. Because of the hazardous nature of ammonium nitrate (AN), there are existing federal regulations for its safe handling and storage. The Occupational Safety and Health Administration's (OSHA) Explosives and Blasting Agents Standard (29 CFR 1910.109) includes coverage of fertilizer grade AN. OSHA is considering whether or not to modify this standard or to add AN to their list of chemicals subject to their Process Safety Management (PSM) standard, which could result in the standard applying to processes at fertilizer mixers, distributors and wholesalers who store and handle AN. The DHS is also considering potential modifications of its CFATS regulation involving modification of screening threshold quantities (TQs) for chemicals of interest, which includes AN.

Given these factors, EPA will continue to work closely with OSHA and DHS to determine whether additional EPA action is necessary. Although EPA is not proposing to add AN to the list of substances subject to the RMP rule at this time, the Agency may elect to propose such a listing at a later date.

Q. What has EPA done to further the safe storage and handling of Ammonium Nitrate?

A. The EPA has taken a number of actions to further the safe storage and handling of AN.

- Under Emergency Planning and Community Right-to-Know Act (EPCRA), facilities storing AN must submit a Safety Data Sheet (SDS) and annually report inventories to state and local entities and first responder organizations for emergency preparedness and planning. Facilities, local entities (such as LEPCs), and first responders are obligated to work together to understand facility hazards and to prepare for, and respond to, emergencies in that community.

- Under Executive Order (EO) 13650 Improving Chemical Facility Safety and Security, EPA is actively working to enhance local emergency preparedness and first responder capabilities.

- EPA, OSHA, DHS and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued a comprehensive safety advisory August 2013, and a follow-up Advisory June 2015 on safe storage and handling of AN with additional details on emergency response practices. These advisories detail AN's physical and chemical properties, hazards, recommended bulk storage practices, hazard reduction, pre-incident and emergency action planning, and appropriate fire emergency response.

  The advisories, along with:

  - Chapter 11 of the National Fire Protection Association (NFPA) 400-2016 Hazardous Materials Code which contains comprehensive information on AN hazards and hazard mitigation techniques;

  - Safety and Security Guidelines for AN from the Institute for Makers of Explosives (IME); and

  - Safety and Security Guidelines for the Storage and Transportation of Fertilizer Grade AN at Fertilizer Retail Facilities from the Agricultural Retailers Association and the Fertilizer Institute;

  serve to make facility owners and operators; emergency planners and first responders; and communities aware of AN's hazards, appropriate storage and handling practices, and appropriate emergency response.

Q. What has EPA done to further the safe storage and handling of reactives?

A. The Agency has taken a number of actions to improve the safe storage and handling of reactive chemicals.

- EPA worked with the American Institute for Chemical Engineers (AIChE) Center for Chemical Process Safety (CCPS) to develop guidance on the safe handling of reactive materials. CCPS issued a safety alert entitled Reactive Material Hazards, which describes what facilities should do to fully understand the reactive properties of chemicals. CCPS also published Essential Practices for Managing Chemical Reactivity Hazards, which provides guidance on management systems and hazard assessment protocols for reactive materials. EPA staff not only participated in both of these efforts but also worked to make the guideline widely available to chemical facilities.

- EPA worked with the National Oceanic and Atmospheric Administration (NOAA) to produce the Chemical Reactivity Worksheet (CRW), a free software program that allows users to identify most chemical reactivity hazards associated with their chemical processing and support operations. A recently released update of the program was downloaded more than 30,000 times on the first day of release. With the release of CRW 4.0 in March 2016, the ongoing management and distribution of the CRW has been transitioned to Center for

Chemical Process Safety (CCPS). The CRW can be obtained at: http://www.aiche.org/ccps/resources/chemical-reactivity-worksheet-40.

- EPA also collaborated with OSHA and various industry associations to form the Chemical Reactivity Hazards Management Alliance. The Alliance provided education and outreach materials and conducted safety workshops for reactive chemical users with the objective to improve the overall safety of reactive chemical hazards within U.S. industry. Our work with CCPS, NOAA, OSHA, and various industry groups has helped increase public knowledge of reactive hazards and the means to abate those hazards. These efforts promote the design and maintenance of safer facilities as addressed by the Clean Air Act General Duty Clause (CAA GDC).

Q. How will the RMP rule impact changes to OSHA's PSM update?

A. It won't. Both the OSHA PSM standard and the EPA RMP rule aim to prevent or minimize the consequences of accidental chemical releases through implementation of management program elements that integrate technologies, procedures, and management practices. In addition to requiring implementation of management program elements, the RMP rule requires covered sources to submit (to EPA) a document summarizing the source's risk management program – called a Risk Management Plan (or RMP). The OSHA PSM standard and EPA RMP regulation are closely aligned in content, policy interpretations, Agency guidance, and enforcement. Since the inception of these regulations, EPA and OSHA have coordinated closely on their implementation in order to minimize regulatory burden and avoid conflicting requirements for regulated facilities. This coordination has continued throughout the development of this rule and on OSHA's initial steps toward proposing potential changes to the PSM standard. The preamble to the final rule describes topics where EPA's approach was specifically coordinated with other agencies including OSHA, such as the regulation of AN and the use of the term "practicability" in lieu of "feasibility" for the STAA provision.

EPA received several comments requesting that EPA withdraw its rulemaking and coordinate more closely with OSHA. EPA has coordinated with OSHA in the development of the proposed and final rules, in which OSHA participated in EPA's Small Business Advocacy Review (SBAR) panel and EPA participated in OSHA's SBAR panel. OSHA has completed this SBAR panel as an initial step toward proposing potential changes to the PSM standard, which may include some changes that are similar to those in the final RMP rule. However, EPA does not believe it is necessary to conduct its rulemaking on exactly the same timeline as OSHA. The 1990 CAA Amendments contained separate timelines for the initial OSHA and EPA rulemakings and has no provisions restricting timeframes for either agency amending its rules.