ORAL ARGUMENT NOT YET SCHEDULED

Nos. 17-1155, 17-1181

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AIR ALLIANCE HOUSTON, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Petition for Review of Final Administrative Action of the United States Environmental Protection Agency

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PROOF BRIEF OF INTERVENORS IN SUPPORT OF RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a), RMP Coalition and Chemical Safety Advocacy Group certify:

(A) Parties and Amici.

Except for the following, all parties, intervenors, and amici appearing before this Court are listed in the Brief for Interest-Group Petitioners.

Amici

No. 17-1155:

Former Regulatory Officials Beth Rosenberg, David Michaels, and Jordan Barab; Institute for Policy Integrity at New York University School of Law (for petitioners).

No. 17-1181:

Former Regulatory Officials Beth Rosenberg, David Michaels, and Jordan Barab; Institute for Policy Integrity at New York University School of Law (for petitioners).

(B) Rulings Under Review.

References to the rulings at issue appear in the Brief for Interest-Group Petitioners.

(C) Related Cases.

RMP Coalition and Chemical Safety Advocacy Group are aware of the following related cases pending before this Court:

No. 17-1181 New York et al. v. EPA. This case is consolidated with the lead case here, No. 17-1155.

No. 17-1085, American Chemistry Council et al. v. EPA; No. 17-1087, Chemical Safety Advocacy Group v. EPA et al.; No. 17-1088, Utility Air Regulatory Group v. EPA. These cases seek judicial review of the EPA action entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," which is found at 82 Fed. Reg. 4594 (Jan. 13, 2017). This EPA action has been postponed by the EPA action at issue in this case.

/S/ RYAN C. MORRIS
RYAN C. MORRIS

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and the Chamber of Commerce of the United States of America submit this disclosure statement.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $797 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for fourteen percent of all U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working

closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure. ACC certifies that it is a "trade association" for purposes of Circuit Rule 26.1(b).

American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association representing approximately 400 companies that encompass virtually all U.S. refining and petrochemical manufacturing capacity. AFPM states that it is a trade association for purposes of Circuit Rule 26.1(b); that it has no parent company; and that no publicly traded corporation owns ten percent or more of its stock.

The American Petroleum Institute ("API") is a national trade association with 625 corporate members that represents all aspects of America's oil and natural gas industry, including producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API's mission is to promote safety across the industry globally and to influence public policy in support of a strong, viable U.S. oil and natural gas industry. API negotiates with regulatory agencies, represents the industry in legal proceedings, participates in

coalitions, and works in partnership with other associations to achieve its members' public policy goals. API certifies that it is a "trade association" for purposes of Circuit Rule 26.1(b).

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber certifies that it is a "trade association" for purposes of Circuit Rule 26.1(b).

Pursuant to 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Chemical Safety Advocacy Group ("CSAG") submits this disclosure statement.

CSAG, a "trade association" within the meaning of Circuit Rule 26.1(b), is an *ad hoc* coalition of companies subject to regulation under federal and state regulations related to risk management planning and process safety management. As relevant to this litigation, CSAG's function is to participate collectively in rulemaking and litigation that arises from administrative proceedings under the Clean Air Act and in

associated administrative proceedings before EPA that affect the interests of its members.

CSAG members include companies in the refining, oil and gas, chemicals, and general manufacturing sectors with operations throughout the United States that are subject to the final rule at issue in this case. CSAG has participated in EPA's proceedings leading to issuance of the final rule.

CSAG has not issued shares or debt securities to the public and has no parent company, subsidiary or affiliate that has issued such shares or debt securities. No publicly-held company has a 10% (percent) or greater ownership interest in CSAG.

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Statutes and Regulations

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GLOSSARY

ATF:	Bureau of Alcohol, Tobacco, Firearms and Explosives
CAA:	Clean Air Act
CSAG:	Respondent Intervenor Chemical Safety Advisory Group
CSAG Petition:	Chemical Safety Advisory Group Petition for Reconsideration, Docket No. EPA-HQ-OEM-0725 (March 13, 2017)
Delay Rule:	*Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date*, 82 Fed. Reg. 27,133 (June 14, 2017)
EPA:	U.S. Environmental Protection Agency
EPCRA:	Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050
FCC:	Federal Communications Commission
Industry Intervenors:	RMP Coalition and CSAG
Interest Group Petitioners:	Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union

	of Concerned Scientists, and Utah Physicians for a Healthy Environment
NRDC:	Natural Resources Defense Council
OSHA:	Occupational Safety and Health Administration
PSM:	Process Safety Management
PSM Rule:	*Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents*, 57 Fed. Reg. 6356 (Feb. 24, 1992)
RIA:	*Regulatory Impact Analysis Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)* (Feb. 24, 2016), EPA-HQ-OEM-2015-0725-0037
RMP:	Risk Management Program
RMP Amendments:	*Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 82 Fed. Reg. 4594 (Jan. 13, 2017)
RMP Coalition:	Respondent-Intervenors American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Chamber of Commerce of the United States
RMP Coalition Petition:	RMP Coalition Petition for Reconsideration, Docket No. EPA-HQ-OEM-0725 (Feb. 28, 2017)
RMP Rule:	*Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act Section 112(r)*, 61 Fed. Reg. 31668 (June 20, 1996)

STAA:	Safer Technology and Alternatives Analysis
State Petitioners:	New York, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, and Washington

STATUTES AND REGULATIONS

Except for excerpts of 29 C.F.R. §§ 1910.119, 1910.120, which appear in the addendum to this brief, all applicable statutes and regulations are contained in the addendum of the Brief for the Interest Group Petitioners or the addendum of the Brief for Respondent.

INTRODUCTION

Petitioners fundamentally misapprehend the Delay Rule. The Delay Rule does *not* rescind EPA's amendments ("RMP Amendments") to the pre-existing Risk Management Program ("RMP"). Nor does it displace any robust protections of that program or otherwise disturb the many other pre-existing safety regulations that apply to industrial facilities. The Delay Rule simply postpones for a relatively short period—20 months—a single substantive requirement from the RMP Amendments that imposes obligations similar to those already mandated by other existing regulations. That narrow action falls well within EPA's authority and was eminently reasonable in light of concerns that the RMP Amendments could jeopardize the security of regulated facilities and otherwise lead to unwelcome effects. Petitioners' failure to appreciate the true nature of the Delay Rule sinks their petitions for review, both jurisdictionally and on the merits.

COUNTERSTATEMENT OF THE CASE

Petitioners' claims fail in large part because they rest on a distorted depiction of the regulatory context.

A. Present Regulation

Under Section 112(r) of the Clean Air Act ("CAA"), 42 U.S.C. § 7412(r), Congress tasked EPA with issuing regulations to prevent and mitigate the accidental release of hazardous substances. EPA issued comprehensive regulations in response to this mandate in 1996. *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act Section 112(r)*, 61 Fed. Reg. 31,668 (June 20, 1996) ("RMP Rule") (JA__); *see also* 40 C.F.R. § 68 (codifying RMP Rule, as amended). The RMP Rule's comprehensive suite of regulations includes requirements relating to "process hazards analysis," "training," "compliance audits," "incident investigations," and "hazard assessment[s]," among others. *See Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 82 Fed. Reg. 4594, 4600-4604 (Jan. 13, 2017) ("RMP Amendments") (JA__, __-__) (summarizing regulatory background). As EPA concluded when it issued the RMP Amendments, the pre-existing RMP Rule "has been effective in preventing and mitigating chemical accidents." *Id.* at 4600 (JA__).

Congress also directed OSHA to issue regulations to prevent accidents involving "highly hazardous" chemicals, and OSHA has issued Process Safety Management ("PSM") regulations pursuant to that mandate. *See Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents*, 57 Fed. Reg. 6356 (Feb. 24, 1992) ("PSM Rule"). This rule "establishes procedures … that will protect employees by preventing or minimizing the consequences of chemical accidents involving highly hazardous chemicals." *Id.* at 6356.

Relevant here, both EPA's RMP Rule and OSHA's PSM Rule include emergency-response coordination provisions that are unaffected by the Delay Rule. The RMP Rule directs regulated entities to maintain an "emergency response plan" that contains "procedures for informing the public and local emergency response agencies," and that must be "coordinated with the community emergency response plan" mandated by provisions of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"). 40 C.F.R. § 68.95. The PSM Rule similarly incorporates requirements providing that employers shall develop emergency response plans and activities that, among other things, involve "planning and coordination with outside parties." 29

C.F.R. § 1910.120(p)(8)(i)-(ii)(A); *see also id.* § 1910.120(q); *id.* § 1910.119(n). In addition, other federal regulators have promulgated analogous emergency-response provisions. *See* EPA, *General RMP Guidance – Chapter 8: Emergency Response*, 8-8, Exh. 8-2 (Apr. 2004) (listing several other federal emergency planning regulations).[1]

B. The RMP Amendments

In the wake of an explosion at a West, Texas fertilizer warehouse and distribution facility in 2013, President Obama issued an Executive Order directing EPA to "expand, implement and enforce the Risk Management Program to address any additional hazards." RMP Amendments, 82 Fed. Reg. at 4594 (JA__). In response, EPA issued the RMP Amendments. They include a number of "Major Provisions" that EPA described as "enhancements" or "improvements" to similar provisions in the current RMP Rule. *Id.* at 4595-96 (JA__-__).

A week before the change in administration, EPA finalized the RMP Amendments. *Id.* at 4594 (JA__). While the final rule set a March 14, 2017 *effective date*, virtually all the *compliance dates* are well in the future, *id.* at 4678 (JA__), beyond the delay issued here. As Table 6 from

[1] https://www.epa.gov/rmp/general-rmp-guidance-chapter-8-emergency-response-program.

the final rule (included just below) shows, only one of the RMP Amendments' substantive elements has a compliance date before March 2021. *Id.* That provision directs emergency-response coordination and has a compliance date of March 14, 2018. *Id.* These additional coordination activities only need occur "annually." *Id.* at 4701.

TABLE 6—FINAL RULE PROVISIONS AND CORRESPONDING COMPLIANCE DATES

Rule provision	Compliance date	Initiated after an RMP reportable accident?
Third-party audit	March 15, 2021	Yes.
Root cause analysis	March 15, 2021	Yes (also required after near misses).
STAA	March 15, 2021	No.
Emergency response coordination activities	March 14, 2018	No.
Owner/operator determines that the facility is subject to the emergency response program requirements of § 68.95.	Within three years of the determination	No.
Emergency response exercises	March 15, 2021	No.
Information sharing	March 15, 2021	Partially-public meeting within 90 days.
Update RMP	March 14, 2022	No (but previously existing correction require-8.195 still apply).

C. The Delay Rule

Following issuance of the RMP Amendments, numerous entities, including the intervenors here ("Industry Intervenors"), filed petitions for reconsideration noting the finding by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") that the West, Texas incident was the result of arson, not an accidental release as previously thought. RMP Coalition Petition for Reconsideration, Docket No. EPA-HQ-OEM-0725, at 15-16 (Feb. 28, 2017) ("RMP Coalition Petition") (JA__-__). ATF's finding materially undermined the impetus for the RMP Amendments, but because it was not disclosed until one day

before the close of the comment period for the proposed RMP Amendments, Industry Intervenors did not have sufficient time to fully understand or adequately explain its relevance. In addition, Industry Intervenors raised numerous substantive concerns with the RMP Amendments, including that they created potential security risks and introduced regulatory uncertainty, and that EPA omitted key information in its cost-benefit analysis. *Id.* at 6-11 (JA__-__); *see also* Chemical Safety Advisory Group Petition for Reconsideration, Docket No. EPA-HQ-OEM-0725 (Mar. 13, 2017) ("CSAG Petition") (JA__-__).

A coalition of States also sought reconsideration, questioning the RMP Amendments' effect on first-responders and echoing Industry Intervenors' concern that the release of security-sensitive information mandated by the RMP Amendments would endanger the public and first-responders. Louisiana et al. Petition for Reconsideration and Stay, Docket No. EPA-HQ-OEM-0725, at 3-5 (Mar. 14, 2017) (JA__-__).

Given these concerns, EPA issued a three-month administrative stay under 42 U.S.C. § 7607(d)(7)(B). *See Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act;*

Further Delay of Effective Date, 82 Fed. Reg. 13,968 (Mar. 16, 2017) (JA__). No one challenged that administrative stay.

Separately, EPA published for comment a proposed rule to delay the RMP Amendments by 20 months. *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective* Date, 82 Fed. Reg. 16,146 (proposed Apr. 3, 2017) (JA__). EPA explained that it was considering this delay not only to give due consideration to the pending reconsideration petitions, but also to allow EPA the opportunity to consider the broader policy implications of the RMP Amendments. *Id.* at 16,148-49 (JA__-__).

After considering the comments, EPA issued a final rule moving the effective date of the RMP Amendments to February 19, 2019. *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date*, 82 Fed. Reg. 27,133 (June 14, 2017) ("Delay Rule") (JA__). The Delay Rule leaves undisturbed the preexisting RMP Rule and OSHA's PSM Rule, and it has no effect on the compliance dates for all but one of the RMP Amendments' substantive provisions. Other than minor definitional and related changes, the Delay Rule extends the deadline only for the RMP

Amendments' additional emergency-response coordination provisions, which commenters, including Industry Intervenors, had explained were redundant and imposed additional burdens due to their structure. 82 Fed. Reg. 4653-54, 4673-75, 4696 (JA__-__, __-__, __).

SUMMARY OF ARGUMENT

Petitioners lack standing because they cannot demonstrate injury from the short postponement of the additional emergency-response coordination provision affected by the Delay Rule. Petitioners claim standing based on how chemical accidents may harm them or their members. I.G. Br. 23-29; S. Br. 21-24. But Petitioners ignore the extensive, overlapping regulatory protections currently in force. As EPA explained, the existing RMP Rule has "been effective in preventing and mitigating chemical accidents." RMP Amendments, 82 Fed. Reg. at 4595 (JA__). Petitioners must demonstrate particularized harm that flows from the Delay Rule in light of these extensive regulatory protections, but Petitioners fail to address this threshold issue.

The deficiency of Petitioners' standing is underscored by the fact that the Delay Rule does not affect most of the RMP Amendments' substantive provisions: the only significant aspect of the RMP

Amendments touched by the Delay Rule is the roughly one-year postponement of a provision directing additional emergency-response coordination. Petitioners offer nothing to explain how or why a short postponement of this provision will imminently cause them an injury that could be redressed by a judicial order—particularly given that EPA's and OSHA's pre-existing emergency-response coordination provisions remain in place.

Nor do Petitioners' claims fare any better on the merits. Petitioners argue that Congress intended to deprive EPA of its direct rulemaking authority under § 7412(r)(7), by giving EPA the authority under § 7607(d)(7) to administratively stay certain types of rules in certain circumstances. While a narrow provision may prevail over a broader one when the two conflict, that principle is not applicable here. First, Petitioners offer no reason why § 7412(r)(7), which deals with effective dates, is not the narrower provision. And, second, there is no conflict between these two provisions in any event. The Delay Rule was a proper exercise of EPA's authority.

Finally, EPA engaged in reasoned decision-making in issuing the Delay Rule, providing a detailed justification for its determination that

a modest delay of effectiveness will not compromise safety. In doing so, EPA reasonably relied on its inherent and statutory authority to set effective dates for its RMP regulations based on both a need to reassess the rulemaking record in light of its current policies and considerations of practicability in implementation.

ARGUMENT

I. PETITIONERS LACK STANDING.

The Court should dismiss the petitions for review because both groups of Petitioners lack Article III standing.

A. Legal Standards

A "petitioner invoking federal-court jurisdiction has the burden to establish that she has suffered an injury in fact that is fairly traceable to the challenged action of the defendant and 'likely' to be redressed by a favorable judicial decision." *Sierra Club v. FERC*, 867 F.3d 1357, 1365 (D.C. Cir. 2017). The injury alleged must amount to an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017).

Like the injury requirement, the causation and redressability prongs of Article III standing must be rooted in facts, not speculation—

the party invoking federal jurisdiction must "demonstrate a causal connection between the injury and the conduct complained of," and that a favorable decision is "likely to redress the alleged injury; where conjecture is necessary, redressability is lacking." *Id*.

These irreducible components of federal jurisdiction become "considerably harder to show" when they are predicated on the "anticipated action" of "unrelated third parties" in the future. *Arpaio v. Obama*, 797 F.3d 11, 20 (D.C. Cir. 2015). For this reason, it is "substantially more difficult" to establish standing in the context of a regulatory challenge when the "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 513 F.3d 234, 237 (D.C. Cir. 2008) (per curiam). And, ultimately, any standing claim that "relies on a highly attenuated chain of possibilities" will "not satisfy" Article III. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013).

B. Interest-Group Petitioners Fail to Establish Standing.

Interest-Group Petitioners cannot establish standing because they fail to demonstrate any particularized harm traceable to the Delay Rule.

Contrary to Interest-Group Petitioners' overheated presentation, the scope of the Delay Rule is modest. *See supra*, pp. 7-8. The RMP Amendments revised an existing, comprehensive regulatory regime, and in most cases, these amendments were not scheduled to become effective for several years in the future. The Delay Rule simply postponed one substantive part of the RMP Amendments dealing with emergency-response coordination. With respect to that provision, the Delay Rule "maintains the status quo, which means that the existing RMP Rule remains in effect." Delay Rule, 82 Fed. Reg. at 27,138 (JA__).

Thus, Petitioners must show that the specific delay of this affected provision in the RMP Amendments causes them an injury that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; that there is a clear "causal connection" between the Delay Rule and their alleged injury; and that a court order would be "likely to redress" this injury, *Ctr. for Biological Diversity*, 861

F.3d at 182, and they must make this showing relative to the status quo in which EPA's existing RMP provisions—along with OSHA's PSM rule and other regulations—continue to regulate coordination with emergency responders. Petitioners fail to make this showing.

1. Interest-Group Petitioners' Standing Arguments Rest On RMP Amendment Provisions Unaffected by the Delay Rule.

As an initial matter, Interest-Group Petitioners fail to show any harm from the Delay Rule because they focus on RMP Amendments undisturbed by the Delay Rule.

Of the RMP Amendments' substantive provisions, all but one have compliance dates more than three years away—*i.e.*, after the Delay Rule's new effective date of March 19, 2019. *See supra*, p. 4-5. The compliance dates for the root cause analysis, the third-party audit, and the Safer Technologies Alternatives Analysis ("STAA") are not until March 15, 2021. RMP Amendments, 82 Fed. Reg. at 4678 (JA__). Likewise, two out of the three emergency-response provisions—the notification exercises and the field and tabletop exercises—have a compliance date of March 15, 2021. *Id.* The provision requiring enhancement to the public availability of information also has the same

compliance date. *Id.* And the provision requiring regulated entities to update their RMP to reflect the RMP Amendments has a compliance date of March 14, 2022. *Id.* The only substantive provision in the RMP Amendments with a compliance date before the Delay Rule's new effective date of March 19, 2019 is the provision requiring additional emergency-response coordination. *Id.* at 4678, 4701 (JA__, __).

Interest-Group Petitioners advance standing arguments that ignore these far-off compliance dates. I.G. Br. at 23-29. For instance, one declarant claims to be harmed because "[t]he facilities nearby will no longer be required to conduct third-party audits or root cause analyses when they have accidents." DEC0030 ¶ 38. Another declarant likewise claims that he would "feel safer" if he knew that nearby facilities had to "engage a third party for its next compliance audit." DEC0012 ¶¶ 9-10. However, the Delay Rule does not affect when regulated facilities engage in root-cause analyses or when third-party audits must occur.

Similarly flawed are other declarations that focus on the RMP Amendments' information-sharing provisions. One declarant, for example, states "that delaying the [RMP Amendments] delays my

ability to gain access to chemical facility information." DEC0003 ¶ 13. But under the RMP Amendments, the compliance deadline—and therefore date at which the declarant may gain access to this information—is March 15, 2021, a deadline unaffected by the Delay Rule.

Another declarant asserts that "[i]f the delay is ended, then the [RMP Amendments] will go into effect" and he will have "easier access to information about the risks" he purportedly faces. DEC0008 ¶ 14. Regardless of the merits and risks associated with providing broader access to security-sensitive chemical information, the Delay Rule does not affect this compliance date, which would not be imposed until March 3, 2015, long after the Delay Rule expires. Other of Interest-Group Petitioners' declarations commit similar errors. *See, e.g.*, DEC0025 ¶ 17; DEC0027 ¶ 25; DEC0039-40 ¶17; DEC0067-68 ¶ 24. Declarations that focus on regulatory requirements unaffected by the Delay Rule cannot establish standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Ctr. for Biological Diversity*, 861 F.3d at 182.[2]

[2] To be sure, the RMP Amendments imposed other changes, such as adjustments to certain audit process procedures, which called for immediate compliance. *See* 82 Fed. Reg. at 4697-99 (JA__-__). However,

2. Interest-Group Petitioners Show No Harm From The Only Substantive Provision Delayed By The Delay Rule.

Interest-Group Petitioners say nothing in their brief about how a delay to the emergency-response coordination provision of the RMP Amendments harms their members. Interest-Group Petitioners have therefore waived any attempt to make this connection. *See Novak*, 570 F.3d at 316 n.5 ("to prevent sandbagging of appellees and respondents, the court treats an argument as waived when the petitioners … only warmed to the issue in their reply brief").

Even if Interest-Group Petitioners had attempted to connect their standing claim to the additional emergency-response coordination requirements, the few, conclusory assertions in their members' declarations are insufficient. One declarant, for instance, complains of the delay in emergency-response coordination requirements because it purportedly denies first responders' "basic information" about incidents. DEC0038–39 ¶ 15. But that assertion ignores the existing, overlapping regulations governing emergency-response coordination and information disclosure, including the existing RMP, PSM, and EPCRA

Petitioners identify no injury from these changes, *see infra* Section B.3, and it is too late on reply to do so. *See Novak v. Capital Mgmt. & Dev. Corp.*, 570 F.3d 305, 316 n.5 (D.C. Cir. 2009).

requirements. *See* 42 U.S.C. § 11003(a), (c); 29 C.F.R. §§ 1910.119(n), 1910.120(p)(8)(i)-(ii)(A), (q); 40 C.F.R. § 68.95 (requiring an emergency-response plan that has "[p]rocedures for informing the public and local emergency response agencies about accidental releases" and that is "coordinated with the community emergency response plan" mandated by EPCRA). And it assumes without any basis that the addition of the RMP Amendments' new emergency-response coordination provisions alone would avoid an incident that would otherwise arise during the period of delay. Because this is pure "conjecture," the declarant does not have a concrete injury that is redressable through a judicial order. *Ctr. for Biological Diversity*, 861 F.3d at 182.

Other declarations submitted by Interest-Group Petitioners similarly fail to show a concrete injury. A declarant notes that the RMP Amendments would require the covered "facilities to coordinate more with local first responders," which would reduce her "concerns" and "fear" of being harmed. DEC0073 ¶ 8. Even if this general fear were sufficient to constitute an injury-in-fact (and it is not), this declarant does nothing to explain why a one-year postponement of the emergency-response coordination provisions will cause an injury that is

distinguishable from her general fears. Accordingly, the declarant has not shown that the Delay Rule causes an injury that is "concrete" or "particularized." *Ctr. for Biological Diversity*, 861 F.3d at 182 (quoting *Lujan*, 504 U.S. at 560); *See Sierra Club v. EPA*, 873 F.3d 946, 950 (D.C. Cir. 2017) (holding interest groups lack standing to challenge EPA's slightly changed ambient air quality standard because they could not show that "the change will have any effect" on the relevant projects).

3. Interest-Group Petitioners' Alleged General Increase in the Risk of Future Injury Is Insufficient to Establish Standing.

Finally, any harm that Interest-Group Petitioners or their members could allege for any of the RMP Amendments would be, in any event, too speculative to establish standing. In promulgating the RMP Amendments, EPA found that it was "unable to quantify what specific reductions [in adverse events] may occur as a result of these revisions." RMP Amendments, 82 Fed. Reg. at 4597 (JA__). The most that EPA could say was it "expects [that] some portion of future damages would be prevented through implementation of this final rule." *Id.* EPA confirmed the speculative benefits from the RMP Amendments when, in

promulgating the Delay Rule, it found that a "quantification of forgone benefits during the period of delay" would be "speculative at best." Delay Rule, 82 Fed. Reg. at 27,139 (JA__).

Despite EPA's undisputed finding, Interest-Group Petitioners devote several pages to standing that amount to a single refrain: the RMP Amendments likely will reduce the risk of harm to their members and, therefore, the Delay Rule likely will increase the risk of harm to their members. *See, e.g.*, I.G. Br. 24 ("EPA's delay is prolonging and increasing their exposure and harm"); *accord id.* at 26, 29 (same).

Even putting aside the fact that such claims do not account for the limited nature of the Delay Rule and the extensive regulatory protections that remain in effect, such assertions of a general increase in the risk of future harm cannot demonstrate standing. Fundamentally, such assertions do not constitute an injury that is "actual or imminent," *Pub. Citizen, Inc.*, 513 F.3d at 237, because they establish only that EPA's "'allegedly unlawful regulation (or lack of regulation) of *someone else*'" *might* lead to an increase in the risk to their members that *might*, at some point in the future, materialize and then injure those members. *Id.* (quoting *Lujan*, 504 U.S. at 562).

This Court has repeatedly held that such "remote and speculative claims of possible future harm" are insufficient for standing. *Id.*; *see also Sierra Club v. EPA*, 292 F.3d 895, 902 (D.C. Cir. 2002). These "kinds of increased-risk claims" are almost always insufficient to demonstrate standing because otherwise "virtually *any* citizen" could claim an injury based on the "fractional chance of benefit from alternative action." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295 (D.C. Cir. 2007).

Increased-risk claims are permitted to move forward only when "there [i]s at least *both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account." *Id.* Interest-Group Petitioners nowhere even attempt to satisfy this narrow exception.

Interest-Group Petitioners suggest, I.G. Br. 24, that the Delay Rule will cause regulated entities to halt their compliance preparations for the RMP Amendments, intimating that this will cause a ripple effect that gives them standing to sue. DEC0170-71 ¶ 16; DEC0199 ¶ 21. It does not. The suggestion that a regulated entity might not be able to satisfy the compliance deadline more than two years away is the very

definition of speculative. Furthermore, even if Interest-Group Petitioners were right and the Delay Rule does have some remote, indirect effect on how or when regulated parties begin compliance preparations, any injury tied to this slight change in the state of affairs would be the result of "a highly attenuated chain of possibilities," which the Supreme Court has confirmed does not satisfy Article III. *Clapper*, 568 U.S. at 410.

C. State Petitioners Also Lack Standing.

State Petitioners likewise lack standing. States must establish standing like any other litigant. *See North Carolina v. EPA*, 587 F.3d 422, 426 (D.C. Cir. 2009) ("notwithstanding any 'special solicitude' to which it may be entitled as a sovereign state, [North Carolina] must demonstrate Article III standing"). State Petitioners fail to shoulder that burden.

1. State Petitioners' Quasi-Sovereign Interest Does Not Give Them Standing.

In *Massachusetts v. EPA*, the Supreme Court recognized that, while a State may have a "quasi-sovereign interest[]" in filing suit, 549 U.S. 497, 520 (2007), that interest does not obviate the need for the State to demonstrate standing.

Like Interest-Group Petitioners, however, State Petitioners simply relate the general harms that may result from accidents, S. Br. 22-23, and then claim that the "delay in implementing the [RMP] Amendments will thus likely harm the health and safety of State Petitioners' residents," *id.* at 24. State Petitioners nowhere explain how or why this is so. In particular, State Petitioners do not explain how the RMP Amendments affected by the Delay Rule would, if not delayed, decrease the general risk of harm from a possible future chemical accident. Indeed, one of the State Petitioners' two declarants does not even mention the RMP Amendments or the Delay Rule, let alone explain their effect, if any, on her state of residence, or any other state. State Declarations 3-5. For much the same reasons discussed above, (*see supra* pp. 12-21), therefore, State Petitioners do not have standing to assert their quasi-sovereign interest.[3]

[3] The Supreme Court in *Massachusetts v. EPA* gave Massachusetts "special solicitude" because Massachusetts had no power to prevent the alleged injury from climate change because the State could not control the greenhouse-gas emissions of neighboring states or foreign countries. 549 U.S. at 519. Here, in contrast, nothing prevents State Petitioners from passing regulations identical to RMP Amendments, and, in fact, States already have similar rules. *See, e.g.*, Cal. Code Regs. Tit. 19, §§ 2735.1-2785.1; N.J. Admin. Code §§ 7:31-1.1 to -11.5.

2. State Petitioners' Proprietary Interests Do Not Confer Standing.

State Petitioners also attempt to ground standing in their proprietary interests, claiming that they will "bear increased costs to respond to and investigate chemical accidents that likely would have been prevented or mitigated had the Accident Prevention Amendments gone into effect as scheduled." S. Br. 25. But the only support offered for this assertion is that the State of Washington "conservatively spent $370,000 in non-recoverable funds responding to and investigating" a recent chemical accident. *Id.* at 25-26. That may be so, but it does not demonstrate how the Delay Rule has caused State Petitioners a proprietary injury. Neither State Petitioners' brief nor declarations explains why accidents like the one described would not happen—or even would be less likely to happen—without the Delay Rule. Because State Petitioners have not made this showing, they have not demonstrated a harm that is "concrete and particularized" or "actual or imminent"; they have not explained how any such harm has a "causal connection" to the Delay Rule; and they have not given a non-"conjecture[al]" reason why any court order would redress their injury.

Ctr. for Biological Diversity, 861 F.3d at 182. State Petitioners, therefore, do not have standing.

II. EPA LAWFULLY DELAYED THE EFFECTIVE DATE OF THE RMP AMENDMENTS.

A. EPA Had Authority To Issue the Delay Rule.

The Clean Air Act gives EPA the authority to make rules regulating the prevention, detection, and correction of accidental releases of regulated substances as well as the concomitant authority to set the "effective date" of any such regulations. 42 U.S.C. § 7412(r)(7)(A). EPA may exercise its authority through notice-and-comment rulemaking. *See id.* §§ 7412(r)(7)(E), 7607(d). Using its rulemaking authority, EPA may "promulgat[e]" or "revis[e]" rules in select regulatory areas as well as take "such other actions as the Administrator may determine." *Id.* § 7607(d)(1)(V).

One such "other action" is to promulgate a new rule changing the effective date of another rule. *See Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (per curiam). In *Clean Air Council*, interest groups challenged EPA's decision to administratively stay implementation of the methane-emissions rule under § 7607(d)(7). *Id.* at 4. The Court ultimately found that EPA had not met the statutory predicates for a

§ 7607(d)(7) administrative stay. *Id.* at 14. The Court noted, however, that "nothing in [its] opinion in any way limits EPA's authority to reconsider the final rule" and indeed that it was "free to do so" in connection with the NPRM it had recently issued. *Id.* That NPRM announced EPA's "intention to extend the stay for 'two years' and to 'look broadly at the entire 2016 Rule' during the reconsideration proceeding." *Id.* at 5.

EPA's actions here track precisely this Court's guidance in *Clean Air Council*. Along with issuing a valid administrative stay under § 7607(d)(7), EPA issued an NPRM and eventually a final rule delaying the effective date of the RMP Amendments by 20 months while it reviews the RMP Amendments. This was a proper exercise of EPA's authority. *Cf. NRDC v. EPA,* 683 F.2d 752, 764 (3d Cir. 1982) (discussing application of rulemaking procedures to action to postpone effective date of rule); *NRDC v. Abraham,* 355 F.3d 179, 203 (2d Cir. 2004) (discussing amendment of effective date of rule through notice-and- comment process).

B. Petitioners' Argument to the Contrary Fails.

Petitioners do not directly challenge EPA's authority to use the notice-and-comment process to issue a new rule revising the effective date of a previous rule. Instead, they claim that EPA's authority to administratively stay a rule when the "grounds for such objection arose after the period for public comment," 42 U.S.C. § 7607(d)(7), amounts to a *limitation* on EPA's rulemaking authority, including its authority under § 7412(r)(7)(A) to set the "effective date" on any rule that it issues under that section. I.G. Br. 29-32; S. Br. 28-30. This argument misapprehends both the CAA and fundamental principles of administrative law.

"It is true that specific statutory language should control more general language," *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335–36 (2002), but that principle does not help Petitioners. First, Petitioners offer no explanation for why § 7412(r)(7)(A)—which deals in particular with effective dates for rules—is not the specific statutory language that should control.

Second, the principle that a specific statutory provision should govern the general is operative only "when there is a *conflict* between

the two," and where "there is no conflict … [t]he specific controls … only within its self-described scope." *Id.* (emphasis added). Under Petitioners' reading, the purportedly specific provision here—§ 7607(d)(7)—directs that EPA "shall convene a proceeding for reconsideration" of a rule if it was "impracticable" for the person challenging the rule to make an objection during the comment period. 42 U.S.C. § 7607(d)(7). In connection with this obligatory proceeding, the Clean Air Act authorizes EPA *unilaterally* to "postpone" the "effectiveness of the rule" by up to three months "during such reconsideration." *Id.* Nothing in § 7607(d)(7) suggests that this three-month administrative-stay provision limits EPA's authority to set the effective date of its rule through notice-and-comment rulemaking authorized under a separate CAA provision.[4]

NRDC v. Reilly, 976 F.2d 36 (D.C. Cir. 1992), does not hold otherwise. *Cf.* I.G. Br. 35-36; S. Br. 32-33. In *Reilly*, Congress had "mandated a highly circumscribed schedule for the promulgation of

[4] This is particularly so here when EPA elected to invoke § 7607(d), which by its terms does not mandate that EPA follow its dictates for rules under § 7412(r). It would be strange to conclude that Congress intended to restrain EPA's § 7412(r) authority through a provision that is not mandatory.

regulations establishing air pollution standards." 976 F.2d at 41. EPA had to propose standards to govern the pollutants in 180 days and finalize them in another 180 days. *Id.* at 37-38. Given this "clear statutory command," this Court held that EPA lacked general rulemaking authority to "stay regulations that were subject to the deadlines established by" Congress. *Id.* at 41; *see also Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 705 (D.C. Cir. 2011) (explaining that *Reilly* held that "EPA could not use its general grant of rulemaking authority to stay regulations subject to statutory deadlines"). Congress has mandated no deadlines here.

Furthermore, EPA's interpretation is the only reasonable reading of these provisions. Congress gave EPA one tool—§ 7607(d)(7)—through which it quickly can implement a short stay and another tool—its general rulemaking authority under § 7607(d) and § 7412(r)(7)(A)—that gives EPA broader discretion to, among other things, implement a longer delay by setting the effective date for any regulation it issues, but also requires EPA to complete the time- and resource-consuming notice-and-comment process. In contrast, Petitioners' interpretation, I.G. Br. 32; S. Br. 28-33, is illogical: Once EPA has exhausted its limited

power under § 7607(d)(7), as it would for any rule of significance, it finds itself in a straightjacket. If EPA cannot delay the effective date of a rule with another rule, the only way it can have sufficient time to reconsider a pending rule like the RMP Amendments is to rescind the rule. Petitioners offer no reason why Congress would want to prevent an agency from changing the effective date of a rule through the same robust notice-and-comment process that the agency used to create the rule in the first place.

Finally, EPA's interpretation here merely follows the approach taken in similar circumstances when a new administration has delayed the effectiveness of rules issued late in a previous administration. For instance, under President Obama, EPA and other agencies delayed the effective date for numerous regulations promulgated by the Bush Administration.[5] EPA took the same approach as the one here, for example, in delaying a final interpretive rule promulgated on January 15, 2009 under the New Source Review program. *See Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review*

[5] *See* Cong. Research Serv., *"Midnight Rules" Issued Near the End of the Bush Administration: A Status Report* (Aug. 25, 2009), https://www.eenews.net/assets/2017/03/10/document_ gw_07.pdf.

(NSR): Aggregation and Project Netting, 74 Fed. Reg. 2376 (Jan. 15, 2009).[6] The then-newly confirmed EPA Administrator issued a 3-month stay of the effective date, 74 Fed. Reg. 7284 (Feb. 13, 2009), followed by a proposed rule to delay the effective date by 6 or 12 months, 74 Fed. Reg. 11,509, 11,511 (proposed Mar. 18, 2009). In the proposed rule, EPA explained that when EPA has

[6] EPA acted in response to a petition from the Natural Resource Defense Council ("NRDC") that asserted EPA's authority to extend the effective date of the NSR aggregation interpretative rule based on, *inter alia,* the burden on state and local agencies and what NRDC considered "unreasonable judgments about legally relevant policy considerations." Letter from John Walke, Clean Air Director, NRDC, to Lisa Jackson, Administrator, EPA, at 10 (Jan. 30, 2009), https://www.nrdc.org/sites/default/files/air_09021201a.pdf (requesting EPA reconsider the 2009 Final Rule, administratively stay the 2009 Final Rule for three months; in the alternative or in conjunction with an administrative stay, extend the February 17, 2009 effective date, convene a notice-and-comment period following reconsideration; and withdraw and abandon the 2009 Final Rule.).

> issued similar administrative stays in the past, it has often been our practice to also propose an additional extension of the stay of effectiveness through a rulemaking process. An additional extension enables us to take comment on issues that are in question and complete any revisions of the rule that become necessary as a result of the reconsideration process.…
>
> … Recognizing that these issues may be difficult and time consuming to evaluate, and given the expected high level of interest from stakeholders in commenting on these issues, we are proposing additional time to open these issues for review and comment.

Id. After receiving comments, EPA issued a final rule delaying the effective date based on then-pending litigation and a petition for reconsideration. 74 Fed. Reg. 22,693 (May 14, 2009). Shortly before the expiration of that delay, EPA proposed yet another delay of the effective date, and on May 18, 2010 adopted a final rule of the effective date "until the proceeding for judicial review … is completed or EPA completes the reconsideration of the rule." 75 Fed. Reg. 27,643, 27,643 (May 18, 2010). As a result of extended judicial proceedings, which are still ongoing, the delay adopted by EPA in the last administration is virtually indefinite, unlike the finite extension of the effective date in the Delay Rule.

C. EPA Did Not Act Arbitrarily or Capriciously In Issuing the Delay Rule.

"Arbitrary and capricious" review is "narrow." "A court is not to substitute its judgment for that of the agency" and should uphold an agency's decision where "the agency's path may reasonably be discerned." *FCC v. Fox Televisions Stations Inc.*, 556 U.S. 502, 513-14 (2009). Satisfying this standard is not a high bar; agencies need only "set forth [their] reasons" for a decision and establish "a rational connection between the facts found and the choice made." *Tourus Records, Inc. v. DEA*, 259 F. 3d 731, 736-37 (D.C. Cir. 2001).

1. EPA Engaged in Reasoned Decision-Making.

Petitioners' claims that EPA's action is arbitrary and capricious fail because EPA explained that a modest delay in the RMP Amendments will allow it to review "factors in the record that could be rationally assessed in different ways" based upon "policy preferences" as well as more accurate and complete information. Delay Rule, 82 Fed. Reg. at 27,136 (JA__). EPA further explained that delay is "adequate and necessary" for the reconsideration, as it allows for EPA to evaluate objections raised by the reconsideration petitions, provides a sufficient opportunity for public comment on the reconsideration in accordance

with the requirements of § 7607(d), and gives EPA an opportunity to evaluate and respond to comments and take any possible regulatory actions. *Id.* at 27,142 (JA__). EPA also noted that the Delay Rule will allow time for a comprehensive review of objections to the RMP Amendments, which is expected to be "difficult and time consuming" and to garner a "high level of interest." *Id.* at 27,136 (JA__). EPA reasoned that the delay will allow for careful reconsideration "without imposing the rule's substantial compliance and implementation resource burden when the outcome of the review is pending," thereby avoiding confusion among the regulated community and local responders by requiring compliance with rule provisions that are potentially subject to change as a result of reconsideration. *Id.* at 27,136, 27,139 (JA__, __). EPA's decision was also supported in part by a determination that any benefits foregone due to a delay were "speculative at best." *Id.* at 27,139. These and other statements in the Delay Rule constitute a reasoned explanation for EPA's action.

Petitioners' mischaracterization of *Fox* shows how weak their claim is. They state that *Fox* obligates EPA to provide a "more detailed justification" for the Delay Rule because it constitutes a change of

course from previous decisions. I.G. Br. 47; S. Br. 44. That is not what *Fox* holds; but more on that in a paragraph. Even under Petitioners' incorrect reading of *Fox*, it is inapposite to EPA's decision to issue the Delay Rule. At issue in *Fox* was a decision by the Federal Communications Commission ("FCC") to *reverse* a prior policy. Here, unlike the FCC in *Fox*, EPA has not reversed course; it has merely delayed the effectiveness of a previous rule. Any decision to reverse course would come in a subsequent rulemaking pursuant to the protections afforded to stakeholders under the APA.

In any event, *Fox* does *not* stand for the proposition that an agency must provide a "more detailed justification" when doing so. Indeed, the Court in *Fox* held that an agency "need *not* always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox*, 556 U.S. at 515 (emphasis added); *see also Am. Farm Bureau Fed'n v. EPA*, 559 F. 3d 512, 521 (D.C. Cir. 2009) (per curiam) (explaining that "if … EPA has reasonably made a different policy judgment, then it need only explain itself and we will defer"). The Court acknowledged only limited circumstances that may warrant a heightened justification for an agency change of course—such

as where the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Fox*, 556 U.S. at 515. No such circumstances are presented here. EPA has not articulated a "new policy" or made any factual findings that contradict those which underlay its prior policy, nor has its prior policy engendered reliance interests that must be taken into account. Rather, EPA has engaged in notice-and-comment rulemaking to issue a rule that delays compliance with one of the RMP Amendments for a finite period of time.

Finally, EPA provided a reasoned explanation for its conclusion that the Delay Rule will not compromise the safety of covered facilities or cause harm to workers and the public. As an initial matter, the record does not support the conclusion that the RMP Amendments will provide reductions in the frequency and magnitude of chemical facility incidents. Indeed, such a suggestion is speculative at best and information in the record suggests that the amendments will actually create their own safety concerns, including security risks and a state of

confusion regarding response steps given other requirements relating to state and local response organizations. *See infra*, pp. 36-39.

Moreover, as explained, compliance dates for most major provisions of the RMP Amendments were set for four years after the final rule's effective date, such that the Delay Rule "has no immediate effect on the implementation of these requirements." 82 Fed. Reg. at 27,138 (JA__). EPA therefore made a reasoned judgment that the Delay Rule will not cause harm to workers or the public. *See id.*

2. Congress Vested EPA with Discretion to Consider the Practicability of Compliance in Setting Effective Dates for Its RMP Regulations.

Section 7412(r)(7) states that rules "shall have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable." 42 U.S.C. § 7412(r)(7)(A). By allowing for considerations of "practicability" in the effective date determination, Congress granted EPA discretion in determining effective dates for RMP rules. *See Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1220 (9th Cir. 2015) (finding the phrase "maximum extent practicable" suggests agency discretion); *Conservation Law Found. v. Evans*, 360 F.3d 21, 28 (1st Cir. 2004) (concluding that use of "the term 'practicable'

[is] intended … to allow for the application of agency expertise and discretion").

EPA properly exercised its discretion in determining what effective date would make compliance "practicable" in light of the numerous flaws in the RMP Amendments rulemaking proceedings. The record demonstrates that the RMP Amendments pose potential security risks to the public that were not fully considered during the rulemaking process. *See* RMP Coalition Petition, at 7 (JA__); CSAG Petition, at 4-7 (JA__-__). Consistent with the record, EPA explained that security concerns animated the Delay Rule: "EPA does not desire to establish regulations that increase security risks. While EPA has not concluded that the [Amendments] would increase such risks, the petitioners' concerns, which are echoed by many other commenters, require careful consideration and cannot be dismissed out of hand." 82 Fed. Reg. at 27,141 (JA__).

Further, the RMP Amendments were promulgated without following the mandatory procedures of § 7412(r)(7) and the Administrative Procedure Act, which require that EPA consult with its sister federal agencies and provide adequate opportunity for public

notice and comment in promulgating RMP regulations. CSAG Petition at 25, 28 (discussing EPA's insufficient coordination with its sister agencies or proper notice to the regulated community) (JA__, __). It is thus well within EPA's discretion under § 7412(r)(7) to determine that compliance with the RMP Amendments is not "practicable" for regulated entities until these issues have been reviewed.

The delay in effective date is further justified by the need for guidance to elucidate the RMP Amendments' requirements, as EPA acknowledged. *See, e.g.*, RMP Amendments, 82 Fed. Reg. at 4606 (JA__) ("EPA will update existing RMP guidance to reflect the revised RMP requirements and will provide guidance to identify what types of incidents could be considered near misses."); *id.* at 4640 (JA__) ("EPA will develop guidance for complying with RMP [process hazard analysis] and STAA requirements before sources must comply with the STAA provision required in this action."). As explained by several commenters, the absence of a commonly accepted methodology for implementing complex provisions, such as the STAA requirements, would make it extremely challenging, if not impossible, for regulated entities to comply with the RMP Amendments as issued. EPA was thus

within its § 7412(r)(7) authority to set an effective date that "assures compliance as expeditiously as practicable" when it issued the Delay Rule, as it reflects EPA's reasoned judgment that February 19, 2019 is the earliest date by which compliance with the RMP Amendments would be practicable for regulated entities.

3. EPA Has Broad Authority to Re-visit the Record and Make Different Policy Judgments.

Agencies have inherent authority to reconsider past decisions and to repeal a decision to the extent permitted by law and supported by a reasoned explanation, and they may use notice-and-comment rulemaking to do so. *Ctr. for Sci. in the Pub. Interest v. Dep't of Treasury*, 797 F.2d 995, 998-99 (D.C. Cir. 1986); *see also Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 863 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency … must consider varying interpretations and the wisdom of its policy on a continuing basis."). As EPA explained in the Delay Rule, many of the decisions underlying the RMP Amendments reflect policy choices that were made based on factors in the record that could be rationally assessed in different ways. 82 Fed. Reg. at 27,136 (JA__). Petitioners hinge their claims on foregone benefits of the RMP

Amendments, suggesting that the modest delay of effectiveness promulgated will lead to "disasters," mischaracterizing the record by overstating the RMP Amendments' intended benefits (which are disputed), and failing to acknowledge their significant flaws (and detriments that may actually increase the risk to the public). Any objective analysis, however, reveals significant gaps in EPA's claims, particularly for costs and benefits. Indeed, EPA has acknowledged that it could not quantify the benefits it "expected" from the RMP Amendments. *See, e.g.,* EPA, *Regulatory Impact Analysis Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)*, at 138 (Feb. 24, 2016), EPA-HQ-OEM-2015-0725-0037 ("RIA") (JA__). As EPA explained,

> [t]he benefits *analysis* is qualitative. There were no data to connect the specific rule elements with specific reductions in expected probabilities or magnitudes of RMP chemical accidents. In addition, many of the accident impacts expected to be reduced by the rule, such as lost productivity or emergency response costs, could not be quantified even for the 10-year baseline accident record. Lack of data also meant that other benefits of the rule such as improved information could not be quantified.

Id. Based on this record, EPA engaged in reasoned decisionmaking, making a judgment that a closer look at the provisions was warranted before the RMP Amendments go into effect.

Further, the Delay Rule constitutes a permissible exercise of EPA's authority to delay compliance with the RMP Amendments in order to re-visit the record in light of the new administration. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."). An agency may make new policy judgments based upon an existing rulemaking record, so long as there is sufficient material in the record to support the agency's decision. *Ctr. for Sci. in the Pub. Interest*, 797 F.2d at 1000. Interest-Group Petitioners have acknowledged as much in similar circumstances, where EPA has reconsidered a rulemaking record in light of the policies of a new presidential administration. *See, e.g.*, Proof Brief of Environmental Intervenors at 12–13, *Mississippi v. U.S. EPA*, Case No. 08-1204 (D.C. Cir. filed Jul. 23, 2012) (brief filed by EarthJustice in support of EPA revision of previously-determined ozone

NAAQS, noting that "the judgments EPA made in the 1997 NAAQS [did not] lock it into a particular judgment or approach [in revising the NAAQS]" and that "[s]o long as EPA's decision is non-arbitrary, adequately explained, and consistent with the Act, the agency may take a new and different approach to setting the NAAQS, and may reach different conclusions about prior evidence").[7]

[7] The amicus brief filed by the Institute for Policy Integrity alleges that EPA's issuance of the Delay Rule was arbitrary and capricious because EPA did not adequately consider the RMP Rule's benefits. IPI Br. 3-5. This argument is misdirected. The whole reason EPA issued the Delay Rule was to obtain time to more fully consider the RMP Rule's costs and benefits. *See* Delay Rule, 82 Fed. Reg. 27,133-144 (JA__-__).

CONCLUSION

The petitions should be dismissed or denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

This brief complies with the word-count limitation of Fed. R. App. P. 32(e) as modified by this Court's September 26, 2017 order. This brief contains 7,968 words, not counting the parts excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1). This brief and the brief for the State Intervenors together contain less than 11,000 words, as required by this Court's September 26 order.

/S/ RYAN C. MORRIS
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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, I will cause the foregoing document to be electronically filed through this Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/S/ RYAN C. MORRIS
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