ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1155

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.*,

Respondent,

AMERICAN CHEMISTRY COUNCIL, *et al.*,

Movant-Intervenors.

On Petition for Review of a Final Rule of the
U.S. Environmental Protection Agency

RMP COALITION INTERVENORS' OPPOSITION TO PETITIONERS' MOTION TO STAY AND EXPEDITED CONSIDERATION OF THE APPEAL, OR, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION AND VACATUR

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GLOSSARY

EPA	U.S. Environmental Protection Agency
Response to Comments	EPA, *Response to Comments on the 2017 Proposed Rule Further Delaying the Effective Date of EPA's Risk Management Program Amendments (Apr. 3, 2017; 82 FR 16146)* (June 8, 2017)
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 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)

INTRODUCTION

Petitioners move to stay an Environmental Protection Agency ("EPA") final rule that modifies the effective date of regulations issued during the waning hours of the prior Administration. A stay is necessary, Petitioners argue, because their members might suffer harm unless EPA's regulations are permitted to go into effect. But what Petitioners fail to acknowledge is that—even before modification of the effective date—most of the regulations they deem essential were not required to be fully implemented until the year *2021*. That fact alone warrants denial of a stay. Those seeking a stay must demonstrate that they will face irreparable harm in the "near" future. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Petitioners have not presented any need for extraordinary relief, nor identified any reason that full briefing on the merits in the normal course would be insufficient in light of EPA's long time horizon for implementing these regulations.

Petitioners also have not demonstrated irreparable injury—or, for that matter, their Article III standing. Their motion rests primarily on the generalized harms that might befall their members if there were an accidental release of regulated substances. But there is a pre-existing regulatory framework governing accidental releases, designed to promote safety and substantially reduce accidents and their consequences. That regulatory framework will remain in effect

throughout this proceeding, and nothing in the record suggests any quantifiable safety improvement from the amendments EPA seeks to delay. Petitioners fail to show that a stay is necessary to avoid irreparable harm (or indeed any injury), particularly in the face of EPA's contrary conclusion.

Moreover, granting a stay would harm both the public and the regulated community. A stay would force covered facilities to begin preparations for complying with the revised risk management program regulations, which are under reconsideration and may well be later revised by EPA, leading to substantial expenditure of resources that could be nullified by any such revisions. A stay would also subject covered facilities to shifting regulatory regimes, causing disruption and confusion in both implementation and execution. Leaving EPA's modified effective date in place while it reconsiders the amended regulations provides the greatest predictability to stakeholders while preserving safety.

Finally, Petitioners also are unlikely to prevail on the merits. They argue that EPA cannot modify a rule's effective date for longer than three months through notice-and-comment rulemaking, but this Court held last week that EPA can do just that. *See Clean Air Council v. Pruitt*, __ F.3d __, No. 17-1145 (D.C. Cir. July 3, 2017). And though Petitioners argue that EPA's modification was arbitrary and capricious, EPA took their comments into account and explained why deferring the effective date was warranted. Petitioners plainly disagree, but the

agency's decision to modify the effective date here falls within EPA's discretion.

BACKGROUND

EPA Issues Risk Management Program Amendments. This case involves EPA's amendments to its "Risk Management Program" ("RMP") under section 112(r)(7) of the Clean Air Act, 42 U.S.C. § 7412(r)(7), and EPA's later final rule modifying the effective date of those amendments. The pre-existing RMP regulations are "evergreen"—meaning that they are performance-based and evolve as industry codes and standards change over time. The regulations require companies that use certain regulated substances to develop a program to mitigate the chemicals' risk and prevent their accidental release. EPA, *Clean Air Act 112(r): Accidental Release Prevention/Risk Management Plan Rule* (2009).[1]

On January 13, 2017, EPA issued a final rule—referred to here as the "RMP Amendments"—amending its existing RMP regulations. Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594 (Jan. 13, 2017). EPA revised the RMP regulations in response to an executive order issued by President Obama in the wake of an explosion at a fertilizer storage and distribution company in West, Texas in April 2013. *See*

[1] *Available at* https://goo.gl/1WPJqb.

Executive Order 13650, 78 Fed. Reg. 48,029 (Aug. 7, 2013).[2] The RMP Amendments require covered facilities to engage third-party auditors for compliance audits and conduct root cause analyses in connection with incident investigations after reportable accidents. 82 Fed. Reg. at 4607-29. Some provisions require covered facilities to release additional information to local emergency planning committees and the general public, *id.* at 4665-73; others require additional emergency-response coordination with local emergency personnel and emergency exercises. *Id.* at 4653-65. The RMP Amendments further require covered facilities from certain industries to conduct a safer technology and alternatives analysis as part of their five-year process hazard assessments. *Id.* at 4629-52.

Each of the intervenor trade associations here—referred to collectively as the RMP Coalition—and many of their member companies submitted comments on the proposed RMP Amendments rule. Two days before the comment period ended, the Bureau of Alcohol, Tobacco, Firearms and Explosives announced that the West, Texas fertilizer plant incident was not an accident—as most had believed—but a criminal act of arson. ATF, *ATF Announces $50,000 Reward in*

[2] *Available at* https://goo.gl/TMtHDo.

West, Texas Fatality Fire (May 11, 2016).[3] This revelation cast the West, Texas incident in an entirely new light, and heightened the RMP Coalition's security concerns about the proposed amendments to the RMP regulations. The proximity to the close of the short comment period, however, prevented the Coalition from including more than a few lines about the possible implications of the ATF investigation results on the proposed changes to the RMP in their comments.

EPA Reconsiders the RMP Amendments. EPA published the final RMP Amendments on January 13, 2017, one week before the changeover to a new Administration. The RMP Amendments contained many provisions to which the RMP Coalition had objected. 82 Fed. Reg. 4594. The RMP Amendments were to become "effective" on March 14, 2017, but the compliance date for fully implementing most of the key provisions is not until March 15, 2021. *Id.* at 4678.

Following publication of the final RMP Amendments, a number of trade associations—including this Coalition—submitted a petition requesting that EPA reconsider the RMP Amendments in light of, among other things, the results of the West, Texas investigation. Petition for Reconsideration and Stay, In re: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean

[3] *Available at* https://goo.gl/1bnUpG.

Air Act, Docket No. EPA-HQ-OEM-0725 (Feb. 28, 2017).[4] Eleven States also sought reconsideration in light of the RMP Amendments' risks to homeland security and unjustified burdens imposed on local emergency responders. Petition for Reconsideration and Stay, In re: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Docket No. EPA-HQ-OEM-0725 (Mar. 14, 2017).[5] The RMP Coalition additionally sought judicial review of the RMP Amendments in an action that the Court has placed in abeyance. *See Am. Chemistry Council v. EPA*, No. 17-1085 (D.C. Cir.).

In response, EPA's Administrator announced he would convene a proceeding to reconsider the RMP Amendments, 82 Fed. Reg. 27,133, 27,134 (June 14, 2017), and soon after that, issued a formal notice that included a three-month stay of the Amendments under section 307(d)(7)(B) of the Clean Air Act. 82 Fed. Reg. 13,968 (Mar. 16, 2017). That stay expired on June 19. *Id.*

EPA Engages in Notice-and-Comment Rulemaking to Postpone the RMP Amendments' Effective Date. Knowing that three months is insufficient to undertake a rulemaking revisiting the RMP Amendments, EPA issued a notice of proposed rulemaking that proposed changing the effective date of the RMP Amendments to February 19, 2019. 82 Fed. Reg. 16,146 (proposed Apr. 3, 2017).

[4] *Available at* https://goo.gl/weU7FN.

[5] *Available at* https://goo.gl/mJftWU.

Though EPA proposed to move the *effective date*, it did not propose to revise any of the *compliance deadlines*. *See id.* at 16,149. The RMP Amendments' compliance dates would therefore remain intact absent further EPA action, though EPA admitted that the few revisions in the RMP Amendments with compliance dates before February 2019 would not go into effect until the new modified effective date. EPA accepted public comment for over a month, receiving over 54,000 comments. *See* EPA, *Response to Comments on the 2017 Proposed Rule Further Delaying the Effective Date of EPA's Risk Management Program Amendments (Apr. 3, 2017; 82 FR 16146)*, at 1 (June 8, 2017) ("Response to Comments").[6]

EPA finalized its proposed new effective date for the RMP Amendments on June 9, 2017. 82 Fed. Reg. 27,133 (June 14, 2017) ("RMP Delay Rule"). EPA's final rule explained that "three months was insufficient" to adequately reconsider and, as needed, revise the RMP Amendments. *Id.* at 27,135. The agency also noted that "delaying the effective date . . . simply maintains the status quo" and pointed out that "compliance dates for most major provisions of the Risk Management Program Amendments rule were set for four years after the final rule's effective date, so EPA's delay of that effective date has no immediate effect

[6] *Available at* https://goo.gl/nQk2jx.

on the implementation of these requirements." *Id.* at 27,138. EPA further highlighted the security concerns raised by the petitions for reconsideration and indicated that, "[w]hile EPA has not concluded that the final rule would increase such risks, the petitioner's concerns, which are echoed by many other commenters, require careful consideration, and cannot be dismissed out of hand." *Id.* at 27,141.

ARGUMENT

I. PETITIONERS ARE NOT ENTITLED TO A STAY.

"On a motion for a stay, it is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). The Court therefore will not stay the EPA's final rule unless Petitioners demonstrate that (1) they are likely to prevail on the merits; (2) they will likely suffer irreparable harm if a stay is withheld; (3) no other party will suffer substantial harm if a stay is granted; and (4) the public interest favors a stay. Circuit Rule 18(a); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). Petitioners' motion fails to clear this high bar.

A. Petitioners' Claimed Irreparable Harms Are Distant and Speculative, Depriving Them Both Of Standing And Entitlement To A Stay.

To succeed on their motion, Petitioners must demonstrate that they will suffer an injury that is "both certain and great; it must be actual and not theoretical. Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time[.]" *Wis. Gas*, 758 F.2d at 674 (citations and internal quotations marks omitted). Rather, the harm must be "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (internal quotation marks and emphasis omitted).

Petitioners claim that their members will be harmed if the RMP Delay Rule is not stayed. *See* Mot. 26-32. But Petitioners' evidence fails to back up their rhetoric. Petitioners primarily rely on the general harms that might befall victims of potential future chemical releases, citing fear of such future incidents as justification for requiring the RMP Amendments to take effect immediately. *See* Mot. 26-31. But those speculative future scenarios are the paradigmatic harm "merely feared as liable to occur at some indefinite time." *Wis. Gas*, 758 F.2d at 674 (citation omitted).

Then there is the attenuated causal chain between Petitioners' posited harms and their request to stay the RMP Delay Rule. For Petitioners' feared harms to justify a stay, there must first be an accidental release of a hazardous chemical at a covered facility that causes irreparable harm to one of Petitioners' members between now and the new effective date of the RMP Amendments—February 19, 2019. The harm must also be one that would not have happened but for the RMP Amendments not being in effect. *See Wis. Gas*, 758 F.2d at 674 (stay is appropriate only where it will "prevent irreparable harm"); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981 (9th Cir. 2011) (stay is appropriate only where it will "forestall" the irreparable harm the movant alleges).

The Petitioners' theory of harm breaks from reality. Even before the RMP Delay Rule, compliance dates for most of the key provisions of the RMP

Amendments were far in the future. The deadline for fully implementing the requirements for third-party audits, root-cause analysis, safer technology and alternatives analysis, and information sharing all are still slated to go into effect on March 21, 2021—more than two years after February 19, 2019, the date the RMP Amendments would become effective under the RMP Delay Rule. 82 Fed. Reg. at 4675-80.

Furthermore, Petitioners have not demonstrated that these provisions are likely to be effective at reducing the potential harms they identify. To the contrary: EPA conceded that the RMP Amendments failed to identify and quantify the benefits that would result and the harm that would be prevented through adoption of the RMP Amendments. *See* Response to Comments at 31 (agreeing that the RMP Amendments were "unable to conclusively show that the benefits of the final rule exceeded its costs");[7] Response to Comments for the RMP Amendments, at 220 ("EPA acknowledges that it is not possible to estimate quantitative benefits for the final rule. EPA has no data to project the specific impact on accidents made by each final rule provision.").[8]

Petitioners' failure to plausibly link the RMP Delay Rule to the harms they allege not only shows that they do not have an irreparable injury, it also shows that

[7] Available at https://goo.gl/gvPZZY.

[8] Available at https://goo.gl/TBZC9G.

they do not have standing. A petitioner does not have a cognizable Article III harm capable of redress by judicial action where it rests on a "speculative chain of possibilities." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013). So it is here.

The only provision Petitioners claim the Court can put into practice more-quickly is the RMP Amendments' emergency-response-coordination provisions. *See* Mot. 31-32. But those provisions do not go into effect until March 2018, again undermining Petitioners' assertion that they need a stay right away. *See Wis. Gas Co.*, 758 F.3d at 674 (movant seeking stay must show that feared irreparable harm "is certain to occur in the *near* future" (emphasis added)).

More broadly, EPA found that Petitioners will not be harmed by the RMP Delay Rule. *Response to Comments* at 31-32, 34. With respect to the emergency-coordination provisions in particular, the existing RMP rule and numerous other federal emergency planning regulations already protect communities. *See* 40 C.F.R. § 68.95 (RMP emergency response), EPA, General RMP Guidance – Chapter 8: Emergency Response, at 8-8 (listing a dozen other federal emergency planning regulations).[9] Any additional benefits from overlaying the RMP

[9] *Available at* https://www.epa.gov/rmp/general-rmp-guidance-chapter-8-emergency-response-program.

Amendments were uncertain and unquantified, in EPA's view. The RMP Coalition, moreover, had raised legitimate security concerns about the requirement to provide a local emergency planning organization with *any* information the organization deems relevant, without any opportunity for the facility to question or oppose the request, or protect the information from further disclosure if it is provided. EPA concluded that it would be remiss for the agency to allow these provisions to go into effect without fully evaluating whether some of the provisions might actually increase or introduce new risks to RMP facilities, emergency responders, and communities. *See Response to Comments* at 31-32, 34. Petitioners and their supporting commenters obviously disagree with the agency. *See* Mot. 31-32. But they offer no sound reasons for this Court to second-guess the EPA's assessment.

B. A Stay Would Harm The Public and the Regulated Community.

Although a stay would not prevent the risk of harm to Petitioners, a stay would *inflict* substantial harm on the public and companies subject to EPA's RMP Amendments—such as the RMP Coalition's members. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987) (A court weighing preliminary relief "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief[.]").

Staying the RMP Delay Rule will impose costs on the industry. Although the RMP Amendments' post-February 2019 compliance date for most provisions means that a stay would not make Petitioners' members safer, a stay *will* compel industry to undertake burdensome steps to comply with the RMP Amendments, which might be subject to revision by EPA. *See* 82 Fed. Reg. at 27,139. Indeed, EPA set the original compliance dates in the RMP Amendments precisely because it realized that preparations would be necessary. *See* 82 Fed. Reg. at 4676-78. A stay would not only cause covered entities to potentially waste resources; it could also cause certain entities to delay or displace other safety-related activities, increasing risks to employees and surrounding communities.

Staying the RMP Delay Rule will also sow confusion in the regulated community. If a stay were granted, the RMP Amendments would go into effect, forcing covered entities to commit resources to complying. But if the Court were to find after plenary consideration that the RMP Delay Rule was justified, the stay would be lifted and the RMP Delay Rule would go into effect once more. Covered facilities would be subject to—and then not be subject to—the RMP Amendments that EPA is right now reconsidering. *See United States ex rel. New v. Perry*, No. Civ. A 96-0033 (PLF), 1996 WL 420175, at *2 (D.D.C. Jan. 16, 1996) (denying stay where one would "create a good deal of confusion about the lawfulness of" a government program).

If EPA ultimately *revises* the RMP Amendments, covered facilities risk being subject to three different RMP regulatory regimes in just a few-year span. Avoiding that uncertainty while EPA reevaluates the RMP Amendments is one reason why EPA took the time to propose and issue the RMP Delay Rule. It explained that "the Agency does not wish to cause confusion among the regulated community and local responders by requiring these parties to prepare to comply with, or in some cases, immediately comply with, rule provisions that might be changed during the subsequent reconsideration." 82 Fed. Reg. at 27,139.

For similar reasons, a stay is not in the public interest. As EPA found, requiring covered entities to immediately comply with the RMP Amendments' information-sharing provisions could create a security risk to employees at and communities near covered facilities. 82 Fed. Reg. at 27,141. Indeed, requiring immediate compliance with the RMP Amendments could even heighten the risk of intentional criminal attacks like the arson in West, Texas that first prompted the RMP Amendments. *See id.* at 27,140-41. The balance of the harms weighs against a stay.

C. Petitioners Are Unlikely To Succeed On The Merits.

Petitioners argue that the RMP Delay Rule is contrary to the Clean Air Act and inadequately supported by the rulemaking record. Mot. 14-26. They are wrong on both counts.

1. The RMP Delay Rule Is Not Foreclosed By Section 307(d)(7)(B) or Section 112(r) of the Clean Air Act.

All agree that EPA has the power, after notice and comment, to promulgate rules implementing section 112(r)(7) of the Clean Air Act, 42 U.S.C. § 7412(r)(7), which requires that there be a risk management program. Petitioners contend, however, that section 307(d)(7)(B) of the Act, 42 U.S.C. § 7607(d)(7)(B), forbids EPA from altering the effective date of an already promulgated section 112(r)(7) rule. Mot. 14-18. Petitioners' argument finds no support in section 307(d)(7)(B), section 112(r)(7), or the case law.

Section 307(d)(7)(B) provides that, under certain circumstances, the Administrator "shall convene a proceeding for reconsideration of [a] rule" and that "[t]he effectiveness of the rule may be stayed during such reconsideration . . . by the Administrator . . . for a period not to exceed three months." 42 U.S.C. § 7607(d)(7)(B). Section 307(d)(7)(B) thus imposes a time limit on the Administrator's power to stay the effectiveness of a rule when convening a reconsideration proceeding under that subsection. *Clean Air Council*, slip op. 13.

But Section 307(d)(7)(B) says nothing about the Administrator's authority to modify the effective date of a rule through notice-and-comment rulemaking. As the Court held just a week ago, EPA "obviously has broad discretion to reconsider a regulation at any time," so long as it "compl[ies] with the Administrative Procedure Act . . . , including its requirements for notice and comment." *Clean Air*

Council, slip op. 11. Items subject to revision through notice and comment may include a rule's effective date. *See Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (Agency action altering a promulgated rule's effective date is the "type of agency action ordinarily subject to the notice-and-comment procedure."); *see also Clean Air Council*, slip op. at 6 (holding that an agency's modification of a rule's effective date is "tantamount to amending or revoking a rule"). Thus, so long as EPA goes through notice-and-comment procedures—as it did here—it may amend the effective date of the RMP Amendments.

The Court confirmed as much in *Clean Air Council*. The Administrator there convened a reconsideration proceeding on limited grounds and issued a three-month stay under Section 307(d)(7)(B). Slip op. 4. Separately, EPA published a June 16 notice of proposed rulemaking (NPRM) that announced the agency's intention to extend the stay for up to two years and to reevaluate the entire rule that was undergoing reconsideration. *Id.* at 5. The Court vacated the three-month stay, concluding that the statutory prerequisites in section 307(d)(7)(B) for reconsideration were not met. *Id.* at 13-23. But the Court also emphasized that "nothing in [its] opinion in any way limits EPA's authority to reconsider the final rule and to proceed with its June 16 NPRM" delaying its effective date. *Id.* at 23.

Similar to that NPRM, the RMP Delay Rule here reconsiders, after notice

and comment, the RMP Amendments and delays the effective date of those Amendments until reconsideration is complete. 82 Fed. Reg. at 27,135. *Clean Air Council* holds that EPA was free to take that course—section 307(d)(7)(b) notwithstanding—so long as it adhered to the usual rules governing notice and comment. Slip op. 23.

Natural Resources Defense Council, Inc. v. Reilly, 976 F.2d 36 (D.C. Cir. 1992) is not to the contrary. *Cf.* Mot. 16. In *Reilly*, the pre-1990 amendments to the Clean Air Act "mandated a highly circumscribed schedule for promulgation of 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 that "clear statutory command," the Court found it could not conclude that EPA had the general rulemaking power to "stay regulations that were subject to the deadlines established by" the Clean Air Act. *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").

Here, by contrast, there is no statutory deadline, and thus no "clear statutory command" constraining EPA's authority to modify the effective dates of its regulations by notice and comment. Petitioners point (Mot. 18-21) to section 112(r)(7)(B) of the Clean Air Act, but that only requires that RMP regulations

"have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable." 42 U.S.C. § 7412(r)(7)(A). There is nothing in the word "practicable" that is akin to the 180-day deadlines in *Reilly*. Petitioners, of course, can challenge the adequacy of the reasoning behind EPA's conclusion that its new effective date is practicable—and they do. *See* Mot. 19-20. But that does not mean that section 112(r)(7)(B) supplants EPA's general rulemaking authority.

On the merits of the practicability finding, EPA explained that the word "practicable" requires the agency to take into account "all relevant factors." *Response to Comments* at 15. In doing so, EPA weighed on one side its desire not "to cause confusion among the regulated community and local responders." *Id.* On the other side of the scale, EPA found that the additional risk from delay would be minimal—and thus a later effective date practicable— because "compliance with most major provisions in the final rule would not be required until 2021, so delaying the effective date of the final rule would have minimal effect for these provisions." *Id.* Petitioners may disagree with EPA's balancing. But EPA's rule shows that the agency considered the implications of a modified effective date to facilitate its reevaluation process, and its decision was reasonable. *See NTCH, Inc. v. FCC*, 841 F.3d 497, 502 (D.C. Cir. 2016).

Petitioners' assertion (Mot. 20-21) that the RMP Delay Rule violates section 112(r)(7)'s requirement that EPA's RMP regulations "shall include procedures and measures for emergency response after an accidental release of a regulated substance in order to protect human health and the environment," 42 U.S.C. § 7412(r)(7)(B)(i), also misses the mark. The RMP regulations *already* include procedures and measures for emergency response. *See* 42 C.F.R. §§ 68.90, 68.95. The RMP Delay Rule merely maintains the status quo while EPA reevaluates the RMP Amendments. *Response to Comments* at 20-21. Moreover, compliance dates for most major RMP provisions were set for four years after the effective date, so delaying the rule for a shorter period "has no immediate effect on the implementation of these requirements." *Id.* at 21. The RMP Delay Rule conforms to all of the Clean Air Act's requirements.

2. The RMP Delay Rule is Not Arbitrary or Capricious.

Petitioners' attack on the reasoning behind the RMP Delay Rule is equally baseless.

1. Petitioners contend that EPA "has failed to recognize" that it is modifying policy through the RMP Delay Rule, warranting more stringent review. Mot. 22, 24. Not so. From the outset, EPA understood that it had exhausted the three-month administrative stay under section 307(d)(2)(B), that it required further comments to address lingering uncertainty with the previous rule, and that

addressing that uncertainty would require a modification to the effective date. *See, e.g.*, 82 Fed. Reg. at 16,148-49. The final rule was not the sort of "depart[ure] from a prior policy *sub silentio*" assumed in Petitioners' primary authorities. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 753 (3d Cir. 1982) (EPA "indefinitely postpon[ed] the effective date of final amendments . . . without complying with the notice and comment rulemaking requirements[.]").

2. Petitioners further contend that EPA failed to explain its purpose in extending the effective date. *See* Mot. 22-23. That is again not so. Most important, EPA agreed with the RMP Coalition that "the final [RMP Amendments] rule included some provisions that may have lacked notice and would benefit from additional comment and response." 82 Fed. Reg. at 27,137. Because EPA has concluded that certain core amendments—like the disclosure of sensitive chemical information to the public and local emergency planners—would benefit from receiving additional input, it may reasonably decide not to rely on the policy conclusions resulting from a flawed process. *Cf.* Mot. 22-23.

EPA went further still by identifying serious questions about the sufficiency of the record raised by the West, Texas investigation findings—findings released at the very end of the RMP Amendments comment process. *See* 82 Fed. Reg. at 27,137-38. The finding that the West incident was not an accident, but arson, was,

in EPA's words, "of central relevance to the outcome of the rule." *Id.* at 27,140. The timing of those findings might have seriously impacted the record supporting the amendments as provided through comments. *Id.* Moreover, EPA explained that the petitions for reconsideration posed "a large set of unresolved issues demonstrat[ing] the need for careful reconsideration and reexamination of the Risk Management Program Amendments." *Id.* A modification of the RMP Amendments' effective date therefore "allow[ed] EPA to address commenters' issues as appropriate." *Id.*

3. Petitioners largely ignore these procedural explanations and jump to what they contend are factual findings from the RMP Amendments that any rational decision-maker would agree required an immediate effective date. *See* Mot. 22-23. But none of Petitioners' cherry-picked statements or unexplained string citations forecloses a later effective date. Petitioners can only summon unidentified "risks" or "future damages[,]" "some portion of" which might be ameliorated through the RMP Amendments. Mot. 23. Such abstractions do not leave EPA without room to settle on a later effective date, *see* 82 Fed. Reg. at 27,139 (finding that the timing of such risks are necessarily "speculative" and therefore cannot be tied to a particular date), and that is especially true where, as here, the agency took pains to note that it is not changing the future *compliance* dates of the most significant amendments, *see, e.g.*, *id.* at 27,137.

EPA thus did not abandon its earlier factual findings; they are consistent with an extended effective date. And in those circumstances, this Court has held time and again that no heightened justification is necessary. *See Ark Initiative v. Tidwell*, 816 F.3d 119, 130 (D.C. Cir. 2016) (rejecting Petitioners' further-justification standard where agency decision was "based on an entirely new record" and "[n]one of the [new] findings conflict[ ] with the findings underlying" the previous decision); *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 626 (D.C. Cir. 2016) (rejecting Petitioners' further-justification standard where "EPA neither contradicted nor abandoned the factual findings it made in its earlier rulemaking").

What is more, the RMP Delay Rule's comment period produced claims about the *costs* of an immediate effective date that are as at least as strong as Petitioners' putative benefits. *See id.* at 27,142 (explaining risks from information sharing). Petitioners might care little about those costs, *see* Mot. 23, but EPA, as it should, rightly does. *See Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015) ("The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary.").

4. Finally, Petitioners claim that EPA unlawfully based the final rule on the fact "that reconsideration is occurring under § 7607(d)(7)(B)." Mot. 25. But that is nothing more than a reiteration of Petitioners' flawed claim that EPA may not use notice-and-comment procedures to modify a regulation's effective date. *See*

supra at pp. 14-19. It fails for the same reasons. Because EPA may lawfully use notice and comment to modify an effective date while it reassesses the RMP Amendments, the Administrator's separate decision to convene a reconsideration proceeding makes no analytical difference. *See* 82 Fed. Reg. at 27,136 (explaining that, "were no reconsideration involved, a rule with a future effective date could have its effective date delayed simply by a timely rulemaking amending its effective date before the original date").

II. SUMMARY VACATUR IS UNWARRANTED.

Petitioners' alternative request for summary vacatur (Mot. 3) is meritless. "Summary reversal is rarely granted and is appropriate only where the merits are 'so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision.'" *D.C. Circuit Handbook of Practice & Internal Procedure* 36 (Jan. 26, 2017) (quoting *Sills v. Federal Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985)). Petitioners are unlikely to succeed on the merits, making vacatur—much less summary vacatur—improper. *See supra* at pp. 14-23. But at the very least, the nature and complexity of the statutory and record questions presented warrants full merits briefing and oral argument.

CONCLUSION

For all of the foregoing reasons, Petitioners' motion should be denied.

Respectfully submitted,

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I certify that on July 10, 2017, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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