UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Environmental Defense Fund,	)	
Natural Resources Defense Council,	)	
and Clean Air Task Force	)	**Docket No. EPA–HQ–OAR–2018–0695**
Comments on *Adopting Subpart Ba*	)	*Submitted via Regulations.gov*
Requirements in Emission Guidelines	)	*January 3, 2018*
for Municipal Solid Waste Landfills	)	
***83 Fed. Reg.* 54,527**	)	

We submit these comments on behalf of Environmental Defense Fund, Natural Resources Defense Council, and Clean Air Task Force. In the proposed rule, *Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills*, 83 Fed. Reg. 54,527 (Oct. 30, 2018), the Environmental Protection Agency (EPA) proposes to further delay the implementation of emission guidelines for existing municipal solid waste (MSW) landfills that have been in effect since 2016. *See Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, 81 Fed. Reg. 59,276 (Aug. 29, 2016) ("2016 Emissions Guidelines" or "Guidelines"); Docket No. EPA-HQ-OAR-2014-0451. The 2016 Emission Guidelines were a long overdue update to clean air protections for landfills, designed to ensure that landfills use proven, cost-effective techniques for minimizing discharges of methane and other harmful pollutants. Yet, since May 2017, EPA has taken a series of steps to unlawfully thwart the implementation of these common-sense protections. EPA's proposal to further stymie implementation of these rules by extending long-passed regulatory deadlines is legally deficient, lacks any meaningful analysis of the proposal's impacts, and threatens public health and the environment. EPA must withdraw its unlawful and arbitrary proposal and move forward without delay to implement the 2016 Emission Guidelines.

Introduction

EPA issued the 2016 Emissions Guidelines on August 29, 2016, and they became effective on October 28, 2016. 81 Fed. Reg. at 59,276. The Guidelines apply to landfills constructed, modified, or reconstructed on or before July 17, 2014. The Guidelines include reasonable, long-overdue updates to landfill emission standards that would deliver important emissions reductions and public-health and environmental benefits. Landfills are the nation's third largest source of methane emissions, accounting for almost twenty percent of domestic methane emissions. *Id.* at 59,281. Landfill gas also contains non-methane organic compounds (NMOCs), including hazardous air pollutants (HAPs), which are known to cause cancer and other severe health impacts; and volatile organic compounds (VOCs), which react with sunlight to form ground-level ozone pollution, commonly known as smog. People with lung diseases such as asthma and chronic obstructive pulmonary disorder are particularly at risk from exposure to smog pollution, as are children and the elderly.

The 2016 Emission Guidelines represented the first substantial updates in two decades to clean air protections for landfills, and were already over a decade overdue by the time they were proposed in 2014. After first proposing to regulate landfill emissions in 1991, in 1996 EPA listed landfills as a source category that significantly contributes to air pollution that may reasonably be

anticipated to endanger public health and welfare, and concurrently promulgated new source performance standards (NSPS) and existing source emission guidelines for MSW landfills under section 111 of the Clean Air Act. *Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills*, 61 Fed. Reg. 9905 (March 12, 1996) (codified at 40 C.F.R. Parts 51, 52, and 60) ("1996 Rule"). The Clean Air Act provides that the "Administrator shall, at least every 8 years, review and, if appropriate, revise" standards established under section 111, including those for "new" and "existing" sources. 42 U.S.C. § 7411(a)(2) & (6), (b)(1)(B). EPA's 2014 proposal to update the 1996 Rule came long after that statutory review deadline had lapsed and, even then, only in response to a lawsuit brought to enforce EPA's obligation to update its standards. *See Environmental Defense Fund v. Perciasepe*, S.D.N.Y. No. 11-cv-04492-KBF (consent decree modified May 29, 2014). In the intervening decades, technologies and best practices to reduce landfill emissions had significantly advanced, as EPA recognized in the 2016 Emissions Guidelines. *See* 81 Fed. Reg. at 59,277.

The 2016 Emissions Guidelines promised to deliver significant emissions reductions and attendant health and welfare benefits, including reductions of "more than 1,810 Mg/yr" of non-methane organic compounds and "285,000 metric tons on methane." 81 Fed. Reg. at 59,306. In addition, "reduced demand for electricity from the grid" would "result in the net reductions of 277,000 metric tons [of] CO2." *Id*.

In 2017, however, under a new Administration and at the request of the regulated industry, EPA initiated a reconsideration of the Landfill Emissions Guidelines. 82 Fed. Reg. 24,878 (May 31, 2017). EPA explained that it wished to reconsider several aspects of the 2016 Emissions Guidelines and would "prepare a notice of proposed rulemaking" and gather public input. *Id*. at 24,879. At the same time, EPA began its quest to ensure that the public would be denied the benefits of the 2016 Emissions Guidelines. EPA purported to stay the Emissions Guidelines for three months pending its reconsideration pursuant to section 307(d)(7)(B) of the Act, which permits a three-month stay pending reconsideration under limited circumstances. *Id*.; *see* 42 U.S.C. § 7607(d)(7)(B). EPA later conceded in court filings that the three-month stay had no effect because no regulatory deadline fell within the designated three months. *Natural Res. Def. Council v. Pruitt*, No. 17-1157 (D.C. Cir. filed June 15, 2017), Stip. Of Voluntary Dismissal Pursuant to Fed. R. App. Proc. 42(b), ECF No. 1715796 at ¶¶ 1, 3 (Jan. 31, 2018). During the (ineffective) three-month stay, EPA considered proposing a rule to further extend the stay but ultimately abandoned that idea.[1] Instead, EPA decided simply to violate the regulatory deadlines and to encourage states to violate them as well. *See infra* § I.A. When a group of states sued EPA under the Clean Air Act's citizen suit provision for violating mandatory regulatory obligations, and a district judge was poised to rule on EPA's only defense, EPA recognized that it could no longer violate the law with impunity. Thus, EPA rushed out the current proposal two days before a court hearing in an attempt to buy itself more time.

Through the proposal, EPA seeks to further delay the implementation of a rule that has been final for over two years and would have been fully implemented without EPA's unlawful

[1] *See Stay of Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, RIN 2060-AT64*, https://reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=2060-AT64 (last visited Jan. 3, 2019).

attempts to stall. By virtue of the binding and long-established regulatory deadlines in 40 C.F.R. § 60.23 (and as laid out in the 2016 Emissions Guidelines), states were required to submit plans implementing the Landfill Emissions Guidelines by May 30, 2017. These regulations likewise required EPA to act on state plan submissions by September 30, 2017, and promulgate any necessary federal plans by November 30, 2017. 40 C.F.R. § 60.27. *All* of these dates passed well over a year ago. Yet, because EPA has illegally delayed implementing the rules, no state has an approved implementation plan, and no existing landfills are under a federal regulatory obligation to reduce health and welfare-endangering emissions below levels established by the outdated 1996 regulations.

EPA tries to downplay the consequences of adopting the proposal, claiming repeatedly that "[t]his regulatory action is a procedural change," and therefore "does not have any impact on human health or the environment," including the health of children. *E.g.*, 83 Fed. Reg. 54,532. But, as explained *infra* § IV, that claim is patently false. EPA proposes a *substantive* revision of the Emissions Guidelines which, as detailed *infra* § III, will result in significant additional emissions of dangerous air pollution and attendant adverse effects on human health and welfare. EPA's misconception of its own proposal leads it to unlawfully fail to disclose these consequences, which EPA must disclose (and subject to additional public comment) before finalizing any change to the Emissions Guidelines. *See infra* § V. The proposal's changes are also not supported by record evidence or reasoned explanation and are arbitrary and capricious. *See infra* § II.

Moreover, even the foregoing analysis gives the proposal too much credit. As explained *infra* § I, EPA has no intention of *ever* implementing the 2016 Emissions Guidelines (now or on the proposed extended deadline). To the contrary, the proposal is a transparent attempt to set aside the current requirements while EPA reconsiders and works to rescind or revise them. As such, it is an unlawful attempt to circumvent the Clean Air Act's specific and limited authorizations for stays pending administrative review.

EPA should withdraw this deeply flawed proposal, which would be unlawful if finalized.

I. EPA's Proposal is Designed to Circumvent Clean Air Act Requirements.

The proposal is transparently designed to circumvent the requirements of the Clean Air Act. The Act requires the Administrator to prescribe regulations to establish a procedure for state planning for existing source regulation whenever EPA directly regulates new sources of pollution. 42 U.S.C. § 7411(d). EPA did that in 1975, setting a schedule for state planning and implementation that the states and EPA have been following for four decades across multiple emission guidelines and source categories. *See* 40 C.F.R. Part 60; 40 Fed. Reg. 53,346 (Apr. 29, 1975).[2] In accordance with that duly promulgated regulation, the 2016 Emissions Guidelines

[2] In the proposal, EPA misleadingly refers to the current regulations as the "old implementing regulations." 83 Fed. Reg. at 54,527. The mere fact of a proposal to amend regulations does not render them "old." Unless and until EPA finalizes its proposals, the regulations at 40 C.F.R. Part 60 are the *current* regulations and are in full force. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.") (quoting *Nat'l Family Planning & Repro. Health Ass'n v. Sulivan*, 979 F.2d 227, 234 (D.C. Cir. 1992).

required states to submit plans by May 30, 2017; EPA to review and either approve or disapprove those plans by September 30, 2017; and EPA to promulgate federal plans by November 30, 2017, for states who either did not submit plans or whose plans were disapproved. 40 C.F.R. § 60.30f(b); *see* 81 Fed. Reg. at 59,304. The Act also forbids EPA to stay regulatory obligations for the purpose of reconsidering a final rule except under particular circumstances not present here. 42 U.S.C. § 7607(d)(7)(B). By flouting its regulatory obligations (and encouraging states to do so as well), EPA has openly and flagrantly violated its obligations under the Act. It has also delayed the critical protections of human health and welfare that the Act mandates.

A. The Proposal Violates the Clean Air Act's Explicit Limits on Delaying Regulatory Obligations for the Purpose of Reconsidering Them.

This proposal is just the latest in a series of unlawful steps EPA has taken in an attempt to stay the 2016 Emissions Guidelines while it reconsiders them. EPA first stayed the Guidelines for three months—the maximum time permitted—pursuant to section 307(d)(7)(B), citing its decision to grant reconsideration. 82 Fed. Reg. 24,878 (May 31, 2017). A suit challenging that stay was voluntarily dismissed, with EPA admitting that "[t]he Stay Decision only affects deadlines in the 2016 regulations that would have otherwise applied during the 90 days in which the stay was in effect." *Natural Res. Def. Council v. Pruitt*, No. 17-1157 (D.C. Cir. filed June 15, 2017), Stip. Of Voluntary Dismissal Pursuant to Fed. R. App. Proc. 42(b), ECF No. 1715796 at ¶¶ 1, 3 (Jan. 31, 2018). EPA agreed that "'the Stay Decision by its express terms began on May 31, not May 30, and therefore did not alter the May 30' deadline." *Id.* EPA then suggested that it would undertake a rulemaking essentially identical to this proposal "to further extend the stay in this action"—and thus the deadlines for state planning and implementation—in order to consider the industry's reconsideration petition.[3] EPA ultimately decided not to undertake that particular rulemaking, likely because of its patent illegality under section 307(d)(7)(B).

EPA's next attempt was simply to violate the agency's legal obligations and encourage states to violate theirs. In doing so, EPA made plain that the reason it was not fulfilling its obligations is because it sought to reconsider and revise the underlying rule. In an October 31, 2017, statement to Waste Dive—an online news outlet for the waste industry—EPA revealed that "any states that fail to submit plans . . . 'are not subject to sanctions,' and should not be concerned regarding any sanctions.'"[4] EPA further stated that "we do not plan to prioritize the review of these state plans . . . nor are we working to issue a Federal Plan for states that fail to submit a state plan."[5] EPA pinpointed its rationale in a letter to the California Air Resources Board and several other states on February 26, 2018:

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[3] *See Stay of Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, RIN 2060-AT64, https://reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=2060-AT64 (last visited Jan. 3, 2019).

[4] Cody Boteler, *EPA Offers Public Clarification on Timeline for NSPS, EG Landfill Rules Months After Stay Expires*, Waste Dive, (Oct. 31, 2017) https://www.wastedive.com/news/epa-offers- public-clarification-on-timeline-for-nsps-eg-landfill-rules-mon/508484/ (last visited Jan. 3, 2018).

[5] *Id.*

> *Since the agency is reconsidering various issues regarding the landfill regulations*, at this time we do not plan to prioritize review of submitted state plans nor are we working to issue a Federal Plan for states that failed to submit a state plan. . . . Additionally, we are currently working to align our reconsideration of certain portions of the [emissions guidelines] with the risk and technology review (RTR) for this source category. The EPA has a court order to complete the RTR by March 13, 2020 and the reconsideration will be finished on the same timeline.[6]

A draft desk statement dated October 2017 gave a similar explanation:

> *Since the Agency is reconsidering various issues regarding the landfill regulations*, at this time we do not plan to prioritize the review of these state plans nor are we working to issue a Federal Plan for states that failed to submit a state plan. A number of states have expressed concern that their failure to submit a state plan could subject them to sanctions under the Clean Air Act. As the Agency has previously explained, states that fail to submit state plans are not subject to sanctions (*e.g.*, loss of federal highway funds). Therefore, states should not be concerned regarding any sanction.[7]

Ultimately, however, that tactic too looked likely to fail when several states brought suit challenging EPA's blatant failure to perform its mandatory duties and a district judge was poised to rule on EPA's only substantive defense. *See California v. EPA*, No. 4:18-cv-03237 (N.D. Cal. filed May 31, 2018). In the face of that risk, EPA hastily rushed[8] out the present proposal in a last-ditch attempt to stay its duties while it reconsiders the underlying rule.

These varied attempts were consistent with a request EPA received from the regulated industry on March 15, 2017. In that request, the industry sought reconsideration of the Emissions Guidelines and explained that, "[w]hile rule revisions are our ultimate goal, an administrative stay of the rules … is critical to avoid forcing the regulated community and the states to begin

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[6] *Letter from Matthew Lakin, EPA, to Richard Corey, California Air Resources Board* (Feb. 26, 2018) (emphasis added).

[7] Appx. at 418, EPA, *MSW Landfills NSPS and EG Draft Desk Statement and Qs* (Oct. 2, 2017) (emphasis added). *See also* Appx. at 429-30, *Email Conversation Between EPA and Tennessee Dept. of Env. and Conservation with Attachment of PowerPoint Slide Stating EPA Does Not Plan to Prioritize Review of State Plans* (Feb. 23, 2018); Appx. at 105-19, *Email from Darrin Pampaian, Idaho Dep't Env. Quality to Geoffrey Glass, EPA with Attached Slides from Recent PowerPoint Presentation* (Nov. 6, 2017).

[8] Two days before the scheduled motions hearing, Acting Administrator Andrew Wheeler signed the proposal after a process that the Office of Management and Budget (OMB) described as "very rushed." OMB, *Internal Email from Chad Whiteman, Interagency Discussion and EPA Responses Pertaining to Landfills Subpart Ba NPRM [2060-AU33*] at 2 (Oct. 16, 2018), Supporting & Related Material Issued by EPA to EPA Docket No. EPA-HQ-OAR-2018- 19 0696-0003, https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0696-0003.OMB's review of the proposal took merely three days, foreclosing the ability of interested parties to meet with OMB regarding the proposal, as they usually are able to do. The resulting proposal did not even have the correct docket number. *Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills; Correction*, 83 Fed. Reg. 56,015 (Nov. 9, 2018).

implementing these flawed rules."[9] Industry also noted that "many states are already engaged in developing their mandated plans for implementation."[10]

The current proposal follows the well-worn path of EPA's other failed attempts to delay implementation of the 2016 Emission Guidelines. It is aimed at forestalling EPA's (and the states' and industry's) obligations while EPA reconsiders the Guidelines. This time, EPA attempts to do so in the face of a lawsuit, by retroactively "fixing" the violation challenged in the suit by giving EPA a post hoc extension of its legal obligations. The prepublication version was hurriedly signed just *two days* before a district judge was set to hear oral argument and rule on EPA's only defense in a lawsuit brought to enforce EPA's obligations under the Act to timely implement the 2016 Emission Guidelines. *See California v. EPA*, No. 4:18-cv-03237 (N.D. Cal. filed May 31, 2018). EPA then used the proposal to justify seeking a stay of that litigation (and EPA's substantive obligations) pending this rulemaking. EPA argued to the court that its rulemaking would "moot the claims at issue in this litigation," thus forestalling a remedy that might require EPA to implement the 2016 Emissions Guidelines before it had reconsidered them. Mot. to Stay Case Pending Conclusion of Rulemaking at 7, *California v. EPA*, No. 4:18-cv-03237 (N.D. Cal. Nov. 5, 2018). But EPA's *past* violation cannot be cured. Whatever EPA does now does not change the fact that it has violated a clear legal obligation from September 30, 2017, forward. What EPA attempts to do with this proposal is to deprive the plaintiffs in that suit of an effective remedy for EPA's blatant violation of its own regulations.

As with the agency's prior attempts, the proposal's purpose and effect are to delay EPA's obligations so that the agency may reconsider the guidelines and issue revised guidelines. As such, the proposal is an unlawful attempt to circumvent the Clean Air Act's clear limitation on staying rules pending reconsideration.

"[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked." *Clean Air Council v. Pruitt*, 862 F.3d at 9 (quoting *Nat'l Family Planning & Repro. Health Ass'n v. Sullivan*, 979 F.2d at 234).[11] Section 307(d)(7)(B) of the Act carves out

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[9] *Email from Kerry Kelly, Senior Director, Federal Affairs, WM Waste Management, to Samantha Dravis, et al, EPA* at 2 (Mar. 15, 2017).

[10] *Id.*

[11] While an agency is "free to [reconsider a rule] so long as 'the new policy is permissible under the statute, there are good reasons for it, and the agency *believes* it to be better,'" *id.* at 11 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)), the agency cannot violate the current law in the meantime. *See Air Alliance Houston v. EPA*, 906 F.3d 1049, 1065 (D.C. Cir. 2018) (vacating EPA rule to delay compliance with chemical safety regulation despite pendency of proposal to revise regulation, and explaining that "EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits"); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1066–67 (N.D. Cal. 2018) (vacating EPA delay of pesticide standard and rejecting EPA's argument that its action should be upheld "because more time was needed for 'further review and consideration of new regulations' and confusion could result if the rule went into effect but was 'subsequently substantially revised or repealed."); *see Natural Res. Def. Council v. Nat'l Highway Traffic Safety Admin*., 894 F.3d 95, 111-12 (2d Cir. 2018) ("[A] decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration."); *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1076 (N.D. Cal. 2018) (enjoining attempt of Bureau of Land Management (BLM) to suspend regulation despite BLM's plan to

a small exception, stating that "[t]he effectiveness of [a] rule may be stayed during such reconsideration … for a period not to exceed three months." 42 U.S.C. § 7607(d)(7)(B). The D.C. Circuit recently emphasized that there is no other mechanism in the Act for staying a regulation (and attendant obligations) for the purpose of reconsidering a rule. *Air Alliance Houston*, 906 F.3d at 1061 ("Congress saw fit to place a three-month statutory limit on 'such reconsideration,' and this court 'must give effect to the unambiguously expressed intent of Congress.'" (citing 42 U.S.C. § 7607(d)(7)(B) and *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 843 (1984))); *id.* ("EPA cannot escape Congress's clear intent to specifically limit the agency's authority under Section 7607(d)(7)(B) …."). Yet that is precisely the purpose and result of the proposal. In purpose and effect, EPA seeks to freeze states' and its own legal obligations to give the agency time to reconsider those obligations and finalize a proposal to render them ineffective. Although EPA purports to do so based on its authority under section 111(d), the record makes plain that the extension proposal is for the purposes of staying the guidelines while EPA reconsiders them. If EPA could lawfully accomplish that end "by simply insisting it was invoking [section 111(d)], even when it is indisputably responding to a Section 7607(d)(7)(B) petition and reconsidering a rule under that specific provision," the agency could avoid the restrictions of that section and "deprive [section 307(d)(7)(B)'s limitation] of virtually all effect." *Air Alliance Houston*, 906 F.3d at 1061.

EPA's aim is made plain by footnote 8 of the proposal, which states that the proposal is "separate and distinct from the ongoing reconsideration proceeding related to the MSW Landfill EG, which is scheduled to be proposed in spring 2019." 83 Fed. Reg. at 54,531 n.8. This footnote cites the May 5, 2017, letter from EPA to counsel for several waste trade groups, which stated that the agency was granting the groups' petitions for reconsideration because it "me[t] the standard of CAA section 307(d)(7)(B)."[12] EPA claims that this proposal is separate and distinct from its reconsideration without explaining how the purpose of this proposal is separate and distinct from the reconsideration. When the reconsideration is finalized, this proposal (and any final rule stemming from it) will be superseded. The *only* rational explanation for this proposal is that EPA would prefer not to implement and enforce the current guidelines while it develops new ones.

The proposal essentially revives the abandoned 307(d)(7)(B) extended-delay rule, but under a new guise in order to avoid the clear unlawfulness of issuing an extended stay pending reconsideration. It accomplishes the same end based on a purportedly different rationale. The reconsideration process renders this rulemaking meaningless *except* as a stay pending reconsideration. While dropping a footnote to acknowledge the ongoing reconsideration process, EPA does not explain how that reconsideration process might affect the present proposal. Indeed,

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rescind regulation); *California v. Bureau of Land Mgmt*., 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017) (vacating BLM's attempt to postpone regulation, and rejecting argument that requiring regulated entities to spend money to comply would be "unnecessarily disruptive and inequitable . . . because the Bureau is planning to lawfully suspend the Rule and ultimately revise or rescind it").

[12] EPA, *Letter from E. Scott Pruitt to Carroll W. McGuffey III,* RE: Convening a Proceeding of final rules entitled "Standards of Performance for Municipal Solid Waste Landfills," 81 Fed. Reg. 59,332 and "Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills," 81 Fed. Reg. 59276, both published August 29, 2016 (May 5, 2017) https://www.epa.gov/sites/production/files/2017-05/documents/signed_-_letter_-_municipal_solid_waste_landfills.pdf (last accessed Jan. 3, 2019).

if EPA finalizes new emissions guidelines for MSW landfills—as it currently plans to do—this rulemaking will be rendered toothless because EPA then would contend, presumably, that the new guidelines trigger an entirely new (and even more extended) timeline for state planning and implementation. EPA has no intention of enforcing the current guidelines, even on the extended timeline proposed in this rulemaking. The *only* purpose of this proposal is to buy time for EPA to complete its reconsideration—in other words, to stay the current regulations while EPA reconsiders them. Consequently, the proposal is an unlawful attempt to circumvent the plain language of the Clean Air Act.

B. EPA's Purported Justifications Attempt to Mask the Proposal's Unlawful Aim – Delaying the 2016 Emission Guidelines While EPA Reconsiders the Rule.

EPA's purported reasons for the proposal are fig leaves attempting to hide its true unlawful aim. But even evaluated on their own merits, those reasons are arbitrary and capricious. Their arbitrariness serves to further highlight EPA's true aim of suspending its own (and states') obligations so that it may reconsider the underlying rule.

EPA principally states that the extension is necessary in order to "harmonize" the "ongoing" state planning and implementation schedule for the landfills rule with *another* pending agency proposal (the ACE proposal)[13] to extend the deadlines for state planning and implementation in future section 111(d) rulemakings. 83 Fed. Reg. at 54,527. But EPA ignores the fact that, if the agency had not violated the law, there would be no "need" to "harmonize" the two rulemakings because the deadlines for landfills state planning and implementation all passed almost a year *before* the ACE proposal. The landfills state planning and implementation process is "ongoing," *see* 83 Fed. Reg. at 54,529, only because EPA has violated and continues to violate the law. Moreover, the ACE proposal by its terms would apply *prospectively*. 83 Fed. Reg. at 44,803 (proposed 40 C.F.R. § 60.20a would state: "Applicability. (a) The provisions of this subpart apply to States upon publication of a final emission guideline under § 60.22a(a), *if such final guideline is published after [date of publication of final rule in the Federal Register*]." (emphasis added)). That makes sense given the unfairness of changing the rules midstream—unfairness that EPA now contemplates visiting on the states that have properly submitted implementation plans for the existing landfills rule.[14] *See West Virginia Comments on Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills*, Dkt. No. EPA-HQ-OAR-2018-0696-0006, 2 (Nov. 8, 2018) ("West Virginia and other states that previously submitted their State Plans prior to these proposed amendments should not be penalized and required to duplicate their efforts when no substantial amendments were proposed to the MSW landfill EGs."). Moreover, as explained in detail below, *infra* § II, the ACE proposal's amendment to the implementing regulations is itself arbitrary and capricious, especially as applied to the 2016 Emissions Guidelines.

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[13] *Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program*, 83 Fed. Reg. 44,746 (Aug. 31, 2018) ("ACE Proposal").

[14] *See* 83 Fed. Reg. at 54,527 (seeking comment on whether to ask states that have already submitted plans in compliance with the 2016 Emission Guidelines to resubmit those plans).

EPA also tries to justify the proposal by claiming that states need more time to submit their plans. 83 Fed. Reg. at 54,350. First, EPA points to comments from stakeholders on the original guidelines, which "recommended allowing states varying amounts of time, from 12 to 24 months, to submit a state plan." *Id.* What EPA omits, however, is that even those requested extended timelines have now long passed (12 months would have meant state plans would have been due August 31, 2017, and 24 months, August 31, 2018), and EPA proposes a much greater extension—which would have the effect of giving states a total of 36 months to submit their plans. EPA cannot justify that extraordinary change—a full year beyond what any commenter asked for—based on stakeholders' comments.

EPA also arbitrarily fails to explain why it has disregarded the record supporting the original deadlines in the 2016 Emission Guidelines and misleadingly fails to acknowledge evidence that many states were working to meet the original May 2017 submission deadline. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). When EPA finalized the 2016 Emissions Guidelines, it explained that it denied the requests for an extended timeline because the circumstances stakeholders had cited where a "state may not be able to submit a revised plan within this timeframe due to specific circumstances," "will be the exception rather than the rule and the majority of states will be able complete the process within the prescribed 9 months."[15] The extent of EPA's rebuttal to its own earlier factual conclusion is to "further note[] that almost all of the states, rather than just a minority, did not submit a state plan within the prescribed 9-month period." 83 Fed. Reg. at 54,530. This statement is materially misleading and arbitrary. EPA completely omits the highly relevant fact that, as described in detail below, the agency *actively encouraged* states to flout the deadline.[16]

First, EPA sent a letter on May 5, 2017, to representatives of the waste industry announcing EPA's grant of reconsideration and promising to stay the rule. Then, when California "went ahead and submitted" its plan anyway, EPA officials expressed confusion.[17] Likewise, in response to Arizona's question "whether [Arizona] should continue working on the Municipal Solid Waste Landfill Rule" after the stay ended, EPA considered it "reasonable to suggest that [Arizona] hold off on additional work until [EPA] hear[d] something further" after the stay ended.[18] Likewise, in response to inquiries in the spring of 2017, EPA told Oklahoma

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[15] EPA, *Responses to Public Comments on EPA's: Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills: Proposed Rules*, at 31 (July 2016) *available at* https://www.epa.gov/sites/production/files/2016-12/documents/landfill-nsps-eg-2016-rtc.pdf (last accessed Jan. 3, 2019).

[16] *Cf. Connecticut Comments on Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills*, Dkt. No. EPA-HQ-OAR-2018-0696-0023, 1 (Dec. 13, 2018) ("What EPA's justification for the extension fails to note is that states are uncertain about the status of certain requirements of the emission guidelines as a result of EPA's delay in resolving an ongoing reconsideration of six issues including the Tier 4 surface emission monitoring, annual liquids reporting and design plan approval . . . . Although the stay expired on August 29, 2017, the reconsideration continues. This could be the reason that so few states submitted state plans.").

[17] Appx. at 351-54, *Email Correspondence Between EPA Officials Expressing Confusion at California's Choice to Submit a State Plan* (May 31, 2017), Appx. 351-54.

[18] Appx. at 123-29, *Email Conversation Between EPA Officials Discussing a Response to Arizona Dept. of Env. Quality's Question Regarding the Stay Ending* (Sept. 8, 2017).

and Texas that "a state submittal is not required at this time."[19] In another email informing states of the agency's reconsideration plans, EPA said bluntly: "[S]tates don't have to do anything now."[20] In an attached press release, EPA explained that "[t]o allow time for EPA to review … aspects which are central to the outcome of the rule, both rules are stayed." *Id.* EPA even created a PowerPoint presentation for states, communicating that it had no intention of creating a federal plan for states that failed to submit them and that "States that do not submit a state plan are not subject to sanctions, such as loss of highway funds[.] The Agency view is that states should not be concerned regarding sanctions."[21]

Indeed, documents that commenters obtained via FOIA demonstrate that, in addition to the four states that have submitted plans, many states (including Alabama,[22] Delaware,[23] Florida,[24] New York,[25] North Dakota,[26] Tennessee,[27] and Vermont[28]) submitted draft plans prior to the deadline, and that, in some cases, EPA even commented on these draft plans in March 2017.[29] Many additional states, including Colorado,[30] Massachusetts,[31] Montana,[32] New

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[19] Appx. at 355-56, *Letter from Samuel Coleman, EPA, to Richard Hyde, Texas Comm. on Env. Quality, Stating That a State Plan Submission Is Not Required at The Time Due to The Stay* (June 15, 2017); Appx. at 401-02 *Email Conversation Between Oklahoma Dept. of Env. Quality and EPA Providing Suggested Response Regarding Landfill Stay* (July 20, 2017).

[20] Appx. at 403-04, *Email from Kenneth Boyce, EPA to State Regulators in Louisiana, Oklahoma, New Mexico, Oklahoma, Texas, and Arkansas Telling States They Don't Have to Do Anything Now Due to the Stay* (May 24, 2017).

[21] Appx. at 105-19, *Email from Darrin Pampaian, Idaho Dep't Env. Quality to Geoffrey Glass, EPA with Attached Slides from Recent PowerPoint Presentation* (Nov. 6, 2017). *See also* Appx. at 120-22, *PowerPoint Shared with Alaska, Idaho, Oregon, and Washington* (Dec. 7, 2017); Appx. at 205-21, *Email from Ken Mitchell, EPA to Jason Dressler et al, EPA with Attached Draft PowerPoint Presentation for the Spring Air Directors' Meeting* (June 1, 2017); Appx. at 429-30, *Email Conversation Between EPA and Tennessee Dept. of Env. and Conservation with Attachment of PowerPoint Slide Stating EPA Does Not Plan to Prioritize Review of State Plans* (Feb. 23, 2018).

[22] Appx. at 424-25, *Letter Submitting Alabama's Proposed Plan* (Jan. 18, 2017).

[23] Appx. at 95-97, *Email Submission of Delaware's Plan* (Mar. 22, 2017).

[24] Appx. at 261-321, *Email Submitting Florida's Proposed Plan and Notice of Hearings* (Apr. 7, 2017).

[25] Appx. at 426-28, *Undated Draft Revisions of New York's Proposed Plan.*

[26] See Appx. at 140-55, *Email to North Dakota Dept. of Env. Quality Containing EPA's Comments on North Dakota's Proposed* (Mar. 8, 2017).

[27] Appx. at 322-49, *Email Submission of Tennessee's Proposed Plan* (June 2, 2017).

[28] Appx. at 437-42, *Email Submission of Vermont's Proposed Plan* (Apr. 13, 2017).

[29] Appx. at 140-55, *Email to North Dakota Dept. of Env. Quality Containing EPA's Comments on North Dakota's Proposed* (Mar. 8, 2017).

[30] Appx. at 156-201, *Colorado's Notice of Written Comment on Rulemaking and Colorado's Proposed Rulemaking Edits* (Feb. 17, 2017).

[31] Appx. at 101, *Email Conversation Between Massachusetts Dept. of Env. Protection and* EPA (Mar. 20-31, 2017).

[32] Appx. at 443-44, *Email Conversation Between Montana Dept. of Env. Quality and* EPA (Aug. 31, 2017).

Hampshire,[33] Oklahoma,[34] South Carolina,[35] Texas,[36] and Georgia[37] also communicated with EPA about the state plan requirements. For example, although Colorado had already initiated a public comment period and hearing on its state implementation plan,[38] after receiving an email from EPA informing it of the reconsideration and administrative stay, a Colorado official told EPA that it would "hold[] our state plan … while this stay and/or reconsideration plays out."[39] Similarly, a Montana official informed EPA that it had delayed its rulemaking "out of concerns for changes at the national administrative level."[40] Against the backdrop of this correspondence, EPA's suggestion that its rule is justified by the small number of states that actually submitted plans is at the very least disingenuous.

The only rational explanation for the proposal is that EPA desires to avoid an adverse ruling in a pending lawsuit over its past violation that might require the agency to enforce a law that it would like to reconsider. But there is no practical difference between doing that and staying the rule for the purposes of reconsideration. In both cases, EPA seeks to freeze legal obligations (its own and others') while it reconsiders a Clean Air Act rule. "Because the [extension proposal] is for all intents and purposes a Section 7607(d)(7)(B) stay pending reconsideration for EPA to decide what it wants to do … it cannot delay the effective date beyond three months." *Air Alliance Houston*, 906 F.3d at 1063. EPA should withdraw this deeply flawed proposal.

II. The Proposed Timeline Amendments are Arbitrary and Capricious

The proposed deadlines unreasonably extend the timeline for state plan development and implementation for multiple years without justification, dramatically delaying the emission reductions that would be achieved by a section 111(d) regulation. This proposal adopts timing amendments proposed in a separate EPA rulemaking to revise emission guidelines for existing fossil fuel-fired power plants, the ACE proposal.[41] The proposed amendments—proposed 40 C.F.R. §§ 60.23a & 60.27a—would make four major changes to the current section 111(d) regulatory timeline:

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[33] Appx. at 405-12, *Email Conversation Between New Hampshire Dept. of Env. Services and EPA* (Mar. 28-29, 2017).
[34] Appx. at 401-02 *Email Conversation Between Oklahoma Dept. of Env. Quality and EPA Providing Suggested Response Regarding Landfill Stay* (July 20, 2017
[35] Appx. at 222-260, *Email Submission of South Carolina's Plan to Submit a Proposed Plan with attached letter detailing South Carolina's plan* (Mar. 2, 2017).
[36] Appx. at 361-62, *Letter from Richard Hyde, Texas Comm. on Env. Quality, to Samuel Coleman, EPA, Requesting An Extension of State Plan Submission Deadline* (Apr. 21, 2017).
[37] Appx. at 449-50, *Email Conversation Between EPA and Georgia Env. Protection Division Regarding Georgia's Proposed Plan* (Jan. 25, 2017).
[38] Appx. at 156-201, *Colorado's Notice of Written Comment on Rulemaking and Colorado's Proposed Rulemaking Edits* (Feb. 17, 2017).
[39] Appx. at 130, *Email from Colorado Dep't Public Health & Env. to EPA holding work on state plan due to stay* (June 1, 2017).
[40] Appx. at 137-39, *Email Correspondence Between Gregory Lohrke, EPA and Julie Ackerlund, Montana Indicating Montana will Postpone Work on its State Plan Due to the Stay* (Mar. 8 & 13, 2017).
[41] 83 Fed. Reg. at 44,746.

- Proposed 40 C.F.R. § 60.23a(a)(1) extends the deadline for state plan submittal from nine months (under the current framework regulations at 40 C.F.R. § 60.23(a)(1)) to three years.
- Proposed 40 C.F.R. § 60.27a(g) adds a new step to EPA's review process, giving EPA six months to "determine whether the minimum criteria for completeness have been met."
- Proposed 40 C.F.R. § 60.27a(b) extends the deadline for EPA to either approve or disapprove a complete state plan submission from four months (under the current framework regulations at 40 C.F.R. § 60.27(b)) to 12 months, beginning only after EPA makes a determination that the state plan submission is complete.
- Proposed 40 C.F.R. § 60.27a(d) extends EPA's deadline for issuing a federal plan after a state fails to submit an approvable plan from six months (under the current framework regulations at 40 C.F.R. § 60.27(d)) to two years.[42]

As proposed, these amendments would add several years to a state-plan development and approval process that should already be well underway. The justifications in the ACE Proposal for the proposed timing amendments were inadequate, and this proposal has not improved on them. Because EPA has *never* offered a reasoned explanation or adequate record support for the proposed deadlines, finalization of these timing amendments would constitute arbitrary and capricious decisionmaking.

A. State Plan Submission Deadline

EPA proposes to "adjust the state plan due date from May 30, 2017, to August 29, 2019, which aligns with the proposed new timing requirements in 40 CFR part 60, subpart Ba," giving states three years from the effective date of the Landfills EG to submit state plans. 83 Fed. Reg. at 54,529. EPA's rationale for this change is that the original deadline does "not appropriately align with the direction in CAA section 111(d) that the EPA's regulations be 'similar' to the provisions under CAA section 110." *Id*. at 54,530. But the ACE Proposal failed to explain why the timeline for section 111(d) state plans should be identical to the timeline for section 110 State Implementation Plans.

As EPA correctly observed in the 1975 111(d) framework-regulation rulemaking, "Section 111(d) plans will be much less complex than" State Implementation Plans (SIPs) issued under section 110. 40 Fed. Reg. 53,340, 53,315 (Nov. 17, 1975). While a section 111(d) plan applies to a single category of sources, a section 110 SIP covers all of the different types of sources whose emissions must be reduced to meet an ambient air quality standard.[43] Section

[42] Proposed section 60.27a(d) fails to make clear that if a state does not submit a plan at all before the deadline for state plan submission EPA's obligation to develop a federal plan within two years should begin on the date of the missed deadline. A six-month "completeness" review makes no sense in the circumstance where a state has not submitted a plan.

[43] *See Connecticut Comments on Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills*, Dkt. No. EPA-HQ-OAR-2018-0696-0023, 2 ("As states had been regulating MSW landfills for 20 years, submitting an updated state plan is a reasonable task to accomplish within a 12-month period. . . . [T]he preparation of a state plan under CAA Section 111 emission guidelines is a less complex task than the preparation of a plan for how a state would attain a national ambient air quality standard under CAA Section 110.").

111(d) plans include for each covered source a standard of performance—that is, an emission limitation generally expressed as a maximum permissible emission rate or annual mass limit for that source—and EPA selects the best system of emission reduction that defines the degree of emission reductions that must be achieved by the individual sources in their jurisdiction through state-issued performance standards. In contrast, a section 110 SIP must ensure that ambient air concentrations of a given pollutant in the state will stay below the EPA-designated health-based standard, which is far more complicated to both achieve and demonstrate—for example, meeting the ambient air quality standards involves air quality monitoring, complex modeling procedures, and consideration of topography, wind patterns, cross-board transport of air pollution, and other factors. It is entirely appropriate and consistent with the statutory scheme that section 111(d) would have a shorter timeframe for state plan submission.

EPA repeats in this proposal the conclusory justification offered in the ACE Proposal that, "[d]ue to the amount of work, effort, and time required for developing state plans, . . . extending the submission date of state plans from 9 months to 3 years is appropriate." 83 Fed. Reg. at 54,530. But, to the extent that a particular emission guideline might call for more complex or involved state plans, the current framework regulations already provide that, under circumstances where the record would support such an action, "[t]he Administrator may, whenever he determines necessary, extend the period for submission of any plan or plan revision or portion thereof." 40 C.F.R. § 60.27(a). There is thus no reason to extend the deadlines across the board for *all* subsequent rulemakings under section 111(d).

Nor is there any reason to extend the deadline to three years for this specific rule. As EPA itself notes, commenters on the proposed Landfills EG who requested additional time for state plan development "recommended allowing states varying amounts of time, from 12 to 24 months, to submit a state plan,"[44] but no one requested three years. Indeed, several commenters, including the Iowa Department of Natural Resources, Pennsylvania Department of Environmental Protection, New Mexico Environment Department, and the National Association of Clean Air Agencies—the latter of which represents air pollution control agencies in 40 states—commented that 12 months would be sufficient to develop and submit state plans, as required by the Landfills EG.[45]

Moreover, the evidence demonstrates that state implementation plans for *these* emissions guidelines will be short and straightforward. As an initial matter, states need not adopt entirely new state plans for a new category of regulated sources; to the contrary, the need only update their current state plans. *See* Appx. at 171 (request from Colorado Department of Public Health and Environment to Colorado Air Quality Agency to "update" the state's 1998 plan to "incorporat[e] by reference" new Emissions Guidelines). Specifically, on February 13, 2017, EPA issued a Draft Technical Guidance for Implementing Emission Guidelines for Municipal

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[44] *Id.* (citing EPA, *Responses to Public Comments on EPA's Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills: Proposed Rules*, 30-33 (July 2016), https://www.epa.gov/stationary-sources-air-pollution/responses-public-comments-epas-standards-performance-municipal) ("Landfills EG Response to Comments")).

[45] Landfills EG Response to Comments at 31-33.

Solid Waste Landfills that was only 7 pages long.[46] It lays out precisely what states must do to develop plans to implement the 2016 Emissions Guidelines. *Id.* The final and draft state plans that have been submitted to EPA likewise show that the plans are not complex. For example, Arizona's plan is 25 pages long and, after discussing Arizona's authority to enforce the standards and inventorying the covered Arizona landfills, "incorporates by reference the federal standard." Appx. at 46. California's plan is 20 pages. Appx. at 67-90. Colorado's request states that only 16 owners and operators in Colorado may be subject to the Emissions Guidelines. Appx. at 172.

B. *EPA State Plan Review and Federal Plan Development Deadlines*

EPA proposes to give itself an entire six months after state plan submission just to "determine if the plan is complete." 83 Fed. Reg. at 54,531. Under the current framework regulations, no additional time is allotted for EPA to determine whether a state plan submission is complete before the agency's allotted time for reviewing the plan begins to run. EPA indicated in the ACE Proposal that an additional six-month window for determining plan completeness is necessary to maintain "consisten[cy] with the requirements of CAA section 110(k)(1)(B) for SIPs." 83 Fed. Reg. at 44,772. This proposal offers the additional justification that "it is important that the EPA have the opportunity to undertake a completeness review for all state plans." 83 Fed. Reg. at 54,530. But, as discussed above, section 111(d) state plans are simpler than section 110 SIPs, which cover multiple pollutants and sources and involve modeling to demonstrate that the emission limitations will keep the state's ambient air pollutant concentrations below the National Ambient Air Quality Standard. EPA has articulated no reason why any additional time is necessary to review section 111(d) plan submissions for completeness, let alone *six months*. Nor is there any indication that EPA has struggled in the past to stay within the existing timelines established in the current framework regulations on account of time spent determining whether state plan submissions were complete.

In addition, EPA proposes to "extend the period for the EPA's review and approval or disapproval of plans from the 4-month period provided in 40 CFR part 60, subpart B, to the 12-month period (after a determination of completeness . . .) provided in the proposed new implementing regulations." *Id*. Together with the six-month completeness review, EPA thus proposes to extend the time for it to review state plans from four months to 18 months—more than four-fold. Yet it gives no real explanation for doing so. Here EPA simply repeats the ACE Proposal's unelaborated claim that the proposed timeline would "provide adequate time for the EPA to review plans and follow notice-and-comment rulemaking procedures to ensure an opportunity for public comment,"[47] without articulating any evidence or reasoning for why a full year is necessary to review a state plan submission, after a full six months has been spent determining the submission's completeness.

Once again, the actual evidence regarding the Emissions Guidelines at issue here belie EPA's assertions that it needs 18 months to review state plans. Specifically, a number of states submitted draft state plans to EPA for review, and EPA commented on those plans. In each case, EPA's comments are less than two pages long. *See* Appx. at 413-15 (three short comments on

[46] Appx. at 7-13, *EPA Draft Technical Guidance for Implementing Emission Guidelines for Municipal Solid Waste Landfills* (Feb. 13, 2017).
[47] 83 Fed. Reg. at 54,530 (citing 83 Fed. Reg. at 44,771).

Alabama's draft plan comprising a half page of text, one of which regarded a "typo"); Appx. at 416-17 (two short comments on Florida's draft plan comprising half a page of text). In one case EPA even deemed the majority of its comments "negligible." Appx. at 140-55. (comments on North Dakota's draft plan). These limited comments suggest that EPA's review of state plans will not be exceedingly time consuming.

On top of that, EPA proposes to quadruple "from 6 months to 2 years" the time "for the EPA to promulgate a federal plan for states that fail to submit an approvable state plan." 83 Fed. Reg. at 54,531. In the ACE Proposal, EPA rationalized this amendment as "consistent with the FIP deadline under section 110(c) of the CAA." 83 Fed. Reg. at 44,771. Here, EPA illogically claims to need an additional 18 months to develop a federal plan because EPA "typically promulgate[s] a single federal plan that applies to a number of states," and, compared to a FIP "developed for a single state, the federal plan developed here may be more complex and time-intensive since it must be tailored to meet the needs of many states." 83 Fed. Reg. at 54,531. On the contrary, promulgation of a single, multi-state federal plan should be simpler and less time-consuming than concurrent development of multiple, state-specific FIPs.

The ACE Proposal did not offer a satisfactory rationale for amending the timeframe and deadlines for state plan submittal, approval, and implementation under section 111(d); this proposal has done nothing to improve upon that insufficient reasoning. If EPA truly believes the timing provisions in the framework regulations to be unworkable, it must provide actual evidence of impracticability and propose amended provisions that correspond to the actual workload involved in section 111(d) rulemakings, rather than those that are applicable to section 110 rulemakings. EPA has not met this burden—the proposed timing amendments are not accompanied by a reasoned explanation and lack an adequate basis of support in the record. Given EPA's failure to "cogently explain why it has exercised its discretion in a given manner," finalizing these proposed amendments would constitute arbitrary and capricious decisionmaking. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 48 (1983).

III. EPA Has Arbitrarily Failed to Consider the Environmental and Health Impacts of its Proposal

The proposal provides no justification whatsoever for EPA's belief that impacts will be "minimal," and based on EPA's prior analyses, which EPA also fails to acknowledge or consider, the public health and environmental impacts of the proposed delay are both quantifiable and substantial. The proposal also fails to consider energy impacts of the delay and improperly assumes that "benefits" will accrue from the delay. EPA's failure to properly evaluate these factors, all of which are required statutory considerations when establishing emission guidelines under section 111 of the Clean Air Act and are "important aspects" of EPA's decision, renders its proposal arbitrary and capricious. *See State Farm,* 463 U.S. at 43 (agency action is arbitrary and capricious where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

A. EPA's Proposal Fails to Consider Environmental and Public Health Impacts of the Delay.

EPA's proposal plainly ignores the substantial public health and environmental benefits that would result from full implementation of the 2016 Landfills Guidelines, benefits that are substantially delayed (if not—as is more likely given the combination of the proposal and EPA's pending reconsideration—entirely foregone) as a result of this proposal. The agency states only that while the costs and benefits of the proposal "cannot be quantified due to inherent uncertainties, the EPA believes that they will be minimal." 83 Fed. Reg. at 54,531. EPA professes this belief without providing *any* analysis or even attempting to assess the public health and environmental impacts from the added emissions during the lengthy delay period. By law, EPA should immediately be moving forward to approve state plans and finalize federal plans (indeed, should have approved and finalized all such plans over a year ago), but under the proposal, state plan approval will not occur until February 2021 for states that submit SIPs and until February 2022 or later for states that require a FIP. The proposal does not explain why the effects of the lengthy delays that it enables are too uncertain to analyze, what the "inherent uncertainties" are, nor, in the agency's haste to rush the proposal through OMB review, did EPA include any regulatory impact analysis that attempts to analyze these harmful impacts (as it is required to do pursuant to Executive Order 12866, *see infra* § IV).

In reality, the foregone benefits and other impacts of this action are readily quantified based on EPA's own prior analyses—and, far from being "minimal" they are significant. In developing the 2016 Emissions Guidelines and New Source Performance Standards,[48] promulgated together (2016 Landfill Rules), EPA conducted a regulatory impact analysis[49] that found the 2016 Landfill Rules would deliver substantial public health and environmental benefits. Among many other significant benefits of the rules, EPA estimated that the 2016 Landfill Rules would reduce emissions of methane by 330,000 metric tons per year by 2025. 81 Fed. Reg. at 59,335. Landfills are the nation's third largest source of methane, accounting for almost 20 percent of domestic methane emissions. Methane is a potent greenhouse gas that is over 80 times more powerful than carbon dioxide over a 20-year period, and up to 36 times more powerful over a 100-year period. Controlling methane emissions from landfills helps avoid the worst impacts of climate change.

EPA also determined that the 2016 Landfill Rules would reduce harmful non-methane organic compounds (NMOCs) from landfill gas by approximately 281 metric tons per year. The NMOCs emitted from landfills include HAPs, which are known to cause cancer and other severe health impacts, and VOCs, which react with sunlight to form ground-level ozone pollution, commonly known as smog. 81 Fed. Reg. at 59,334, 59,336.[50] People with lung diseases such as

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[48] *Standards of Performance for Municipal Solid Waste Landfills*, 81 Fed. Reg. 59,332 (Aug. 29, 2016).
[49] *Regulatory Impact Analysis for the Final Revisions to the Emission Guidelines for Existing Sources and the Final New Source Performance Standards in the Municipal Solid Waste Landfills Sector*, EPA-452/R-16-003 (July, 2016) (2016 RIA).
[50] *See also* 81 Fed. Reg. at 59,280 ("The NMOC portion of landfill gas can contain a variety of air pollutants, including VOC[s] and various organic HAP[s]. VOC emissions are precursors to both fine particulate matter ($PM_{2.5}$) and ozone formation. These pollutants, along with methane, are associated with substantial health effects, welfare effects, and climate effects. The EPA expects that the reduced

asthma and chronic obstructive pulmonary disorder are particularly at risk for harms from exposure to smog pollution, as are children and older adults. *See* 81 Fed. Reg. at 59,281 ("Ozone is associated with public health effects, including hospital and emergency department visits, school loss days and premature mortality, as well as ecological effects").

Table 1 sets forth emission reductions, costs, and net benefits attributable to the emission guidelines from EPA's 2016 RIA.

Table 1: EPA Projected Costs and Benefits of 2016 Emission Guidelines (RIA Tables, 3-13, 3-14, 6-7)

Year	Affected Landfills	Annual Emission Reductions		Annual Net Benefits (3%, $millions)
		NMOC [MT]	CH4 [MT]	
2019	92	2,080	330,000	$380
2020	95	1,990	310,000	$370
2021	99	1,950	310,000	$380
2022	103	1,940	310,000	$390
2023	92	2,070	330,000	$420
2024	94	1,940	310,000	$410
2025	93	1,810	290,000	$390
2026	89	1,680	260,000	$370
2027	86	1,920	300,000	$440
2028	84	1,840	290,000	$430
2029	86	1,810	280,000	$440
2030	83	1,900	380,000	$480

In the 2016 RIA, EPA assumed emission reductions would occur three years after plan approval or federal plan promulgation because of the timelines the guidelines provide for initial monitoring and installation of gas collection and control systems. Accordingly, it is possible to use EPA's projected benefits from the 2016 RIA, along with the agency's revised deadlines for SIP approval FIP promulgation, and anticipated timing of emission reductions post plan approval to analyze the foregone emission impacts and lost benefits associated with the proposal. In particular, EPA proposes to require that state plans be submitted by August 29, 2019 and, under the proposal, the agency would be required to approve those plans by February 29, 2021 (including 6 months for completeness determination and 12 months for plan approval). Emission reductions would then begin occurring in February of 2024, accounting for the initial monitoring and installation lead time provided by the guidelines. Accordingly, the emission reductions and benefits the agency projected between 2019 and 2024 would be lost under the proposal.

These impacts would be even greater for states that required a FIP. For instance, for any states that did not submit SIP, under EPA's proposal, the agency would be required to

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emissions will result in improvements in air quality and lessen health effects associated with exposure to air pollution related emissions, and result in climate benefits due to reductions of the methane component of landfill gas.")

promulgate a FIP by February of 2022 (assuming FIP promulgation occurs 2-years from the agency's completeness determination, as provided by the proposal). Under that scenario, the proposal would result in lost benefits between 2019 and 2025. Table 2, below, summarizes lost benefits under two alternative scenarios—one in which all states submit SIPs and the other where all states require FIPs. Actually, lost benefits would likely fall somewhere in between these two values, assuming some states submit SIPs and others require FIPs.

Table 2: Lost Benefits Attributable to EPA's Proposal

	Foregone Emission Reductions (Cumulative)		**Foregone Net Benefits ($millions, 3%)***
	NMOC [MT]	**CH4 [MT]**	
All States Submit SIPs	10,191	1,615,000	$2,158
All States Require FIPs	12,120	1,924,000	$2,606

*based on EPA's 2016 RIA.

As this analysis—based on EPA's own assumptions—demonstrates, the proposal will result in anywhere from 1.6 to 1.9 million additional tons of methane emissions and foregone net benefits ranging from $2.1 to $2.6 *billion*. While the agency's unlawful delays have already ensured some of these benefits will be foregone, the proposal has substantial impacts even when evaluated only prospectively. For instance, assuming a baseline in which EPA implements a FIP for all states by July of 2019, the proposal would still result in foregone benefits of approximately 3,000-5,000 tons of NMOCs, 500,000-800,000 tons CH_4, and net benefits of nearly one billion dollars.

Moreover, as with EPA's proposal, this analysis does not account for EPA's pending reconsideration. Because of the *combination* of this proposal (delaying EPA's obligations) plus the pending reconsideration (reconsidering those obligation) there is a substantial risk that the 2016 Emissions Guidelines will *never* be implemented and that its benefits will be entirely foregone. EPA was required to disclose this in the proposal to allow meaningful comment on the proposal, and must provide a realistic picture of the potential implications of finalizing the proposal.

B. EPA Arbitrarily Ignores the Proposal's Climate Impacts and Does Not Explain How the Proposal is Reasonable in Light of Recent Findings on the Urgency of Climate Change.

The most recent data before the agency indicate that climate change is an urgent and worsening global environmental crisis, and it will require every country to take steps to dramatically reduce greenhouse gas emissions. Most notably, just two months ago, this Administration—through the United States Global Climate Research Program ("USGCRP"), a federal program for which EPA is a constituent agency, along with NASA, NOAA, the National Science Foundation, and others—issued Volume II of the Fourth National Climate Assessment ("NCA4-II"), a dire report about the likely effects of climate change on the health and welfare of

Americans and the United States economy.[51] The NCA4-II is a comprehensive, interdisciplinary assessment that represents the federal government's best understanding of the consequences of climate change for the United States. It provides voluminous detailed evidence of the current and future harms and costs climate change imposes on the United States. The NCA4-II emphasizes that the degree of future harm society will experience from climate change depends upon the extent to which action is taken to mitigate emissions of climate-destabilizing greenhouse gases.

The NCA4-II describes the multiple and diverse harms that the United States is already suffering from climate change and explains that those risks will become more severe absent effective and timely action to reduce greenhouse gas emissions. The NCA4-II "draws a direct connection between the warming atmosphere and the resulting changes that affect Americans' lives, communities, and livelihoods, now and in the future." NCA4-II at 36. The report "documents vulnerabilities, risks, and impacts associated with natural climate variability and human-caused climate change across the United States," and "concludes that *the evidence of human-caused climate change is overwhelming and continues to strengthen, that the impacts of climate change are intensifying across the country, and that climate-related threats to Americans' physical, social, and economic well-being are rising*." *Id.* (emphasis in original).

Some of the harms driven by anthropogenic climate change include "[h]igher temperatures, increasing air quality risks, more frequent and intense extreme weather and climate-related events, increases in coastal flooding, disruption of ecosystem services, and other changes increasingly threaten the health and well-being of the American people, particularly populations that are already vulnerable." *Id.* at 55. The NCA4-II details how climate change is already contributing to massive harms throughout the United States—for example, "[c]limate change is altering the characteristics of many extreme weather and climate-related events. Some extreme events have already become more frequent, intense, widespread, or of longer duration, and many are expected to continue to increase or worsen, presenting substantial challenges for built, agricultural, and natural systems." *Id.* at 66.

These impacts impose significant economic costs. The NCA4-II notes that NOAA "estimates that the United States has experienced 44 billion-dollar weather and climate disasters since 2015 (through April 6, 2018), incurring costs of nearly $400 billion." *Id.* at 66. Additionally, "[i]n 2015, drought conditions caused about $5 billion in damages across the Southwest and Northwest, as well as parts of the Northern Great Plains. . . . Two years later, in 2017, extreme drought caused $2.5 billion in agricultural damages across the Northern Great Plains." *Id.* at 67. Furthermore, in 2015 "over 10.1 million acres—an area larger than the entire state of Maryland—burned across the United States, surpassing 2006 for the highest annual total of U.S. acreage burned since record keeping began in 1960," and in 2017 "a historic firestorm damaged or destroyed more than 15,000 homes, businesses, and other structures across California," and these fires "caused a total of 44 deaths and their combined destruction represents the costliest wildfire event on record." *Id.* at 67-68.

[51] USGCRP, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States* (Nov. 23, 2018) ("NCA4-II"), https://nca2018.globalchange.gov/ (last accessed Jan. 3, 2019).

Similarly, last year the Intergovernmental Panel on Climate Change (IPCC) issued a new report, synthesizing the latest peer-reviewed climate scientific research and concluding starkly that the time to act on the increasingly exigent circumstances is now.[52] Based on more than 6,000 scientific references and including contributions from thousands of expert and government reviewers worldwide,[53] the IPCC report considers the effects of global warming of 1.5°C above pre-industrial levels in comparison to the previously-considered 2°C; these values represent critical thresholds vis-à-vis the extent of the damage that will result from global climate change.[54] The report concludes that pathways to limit warming to 1.5°C with little or no overshoot require "a rapid phase out of CO_2 emissions and deep emissions reductions in other GHGs and climate forcers."[55] In pathways consistent with a 1.5°C temperature increase, global net anthropogenic CO_2 emissions must decline *by about 45 percent from 2010 levels by 2030*, reaching net zero around 2050 (*high confidence*).[56]

The IPCC report further explains that the approximately 1°C temperature rise that has already occurred has "resulted in profound alterations to human and natural systems, bringing increases in some types of extreme weather, droughts, floods, sea level rise and biodiversity loss, and causing unprecedented risks to vulnerable persons and populations."[57] The report elaborates on the specific nature of the threat at a 1.5°C temperature increase in comparison to a 2°C increase, indicating that the consequences of warming above 1.5°C are more devastating than previously understood and highlighting the urgency of limiting warming below this threshold. The IPCC demonstrates that a half degree Celsius of additional warming makes a vast difference in avoiding immense damage in food and water security, loss of coastal properties, extreme heat waves, droughts and flooding, migration, poverty, devastating health outcomes, and lives lost. And it leaves no doubt that emission reductions *within the next decade* will make that difference.

As EPA has recognized, a central feature of the climate crisis is that, once emitted, greenhouse gas emissions remain in the atmosphere for decades or centuries. *See* 81 Fed. Reg. at 59,282. This means that each year of unabated emissions contributes to a growing, destabilizing stock of climate-altering gases, and that only a limited opportunity to abate emissions remains before the Earth faces long-lasting and effectively irremediable consequences. The IPCC report bolsters this conclusion, essaying the overwhelming scientific evidence for the necessity of deep and immediate greenhouse gas reductions across all sectors of the economy to avoid devastating climate change-driven damages, underscoring the high costs of inaction or delays, *particularly* in

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[52] IPCC, *Special Report: Global Warming of 1.5°C* (Oct. 2018) ("IPCC (2018)"), https://www.ipcc.ch/sr15/.

[53] IPCC Press Release, *Summary for Policymakers of IPCC Special Report on Global Warming of 1.5 C approved by governments* (Oct. 8, 2018), https://www.ipcc.ch/site/assets/uploads/2018/11/pr_181008_P48_spm_en.pdf. The IPCC Special Report was produced by 91 authors from 44 citizenships and 40 countries of residence (14 Coordinating Lead Authors, 60 Lead Authors, and 17 Review Editors) and 133 Contributing Authors, includes over 6,000 cited references, and considered a total of 42,001 expert and government review comments.

[54] The IPCC Special Report found that many of the most disastrous outcomes of climate change would occur between 1.5°C and 2°C, rather than between 2°C and 2.6°C as considered in the IPCC's Fifth Assessment Report. IPCC (2018) Ch. 3 at 177-78.

[55] IPCC (2018) Ch. 2 at 112.

[56] *Id.* Summary for Policymakers, at 14.

[57] *Id.* Ch. 1 at 53.

the next decade. The report emphasizes the speed with which climate change is occurring and the urgency of taking decisive steps to curtail the emissions that will lock in further warming causing ever more severe harms: "If the current warming rate continues, the world would reach human–induced global warming of 1.5°C around 2040," and "[l]imiting warming to 1.5°C depends on GHG emissions *over the next decades*."[58] Existing national emission-reduction pledges are insufficient to limit global warming to 1.5°C, the report explains, "even if these pledges are supplemented with very challenging increases in the scale and ambition of mitigation after 2030."[59] Thus, critical emission reductions must occur *before* 2030. Limiting global temperature increases to 1.5°C will require action at "a greater scale and pace of change" than ever before,[60] including "very ambitious, internationally cooperative policy environments that transform both supply and demand."[61] "[E]very year's delay before initiating emission reductions reduces by approximately two years the remaining time available to reduce emissions to zero."[62]

Amazingly, despite these dire conclusions from the top scientists (including EPA scientists) in the U.S. government and the world's foremost scientific body on climate change, EPA's proposal would significantly *increase* methane emissions from MSW landfills over the next few years. This industry is the third largest contributor of methane emission in the United States. 81 Fed. Reg. at 59,281. The IPCC reports that, to avoid the worst consequences of climate change, there must be "major reductions in greenhouse gas emissions in all sectors."[63] EPA's proposal moves in precisely the opposite direction. It is entirely arbitrary for EPA to not acknowledge the gravity of the climate change problem—as recognized by its own scientists—and explain why the proposal is a reasonable and appropriate course of action in light of the grave risks posed by climate change.

Moreover, in the 2016 Emissions Guidelines, EPA acknowledged the urgency of the climate problem and explained how the rule would address that problem. EPA explained: "Landfills are a significant source of methane, a potent greenhouse gas, for which there are cost-effective means of reduction, so this rule is an important element of the United States' work to reduce emissions that are contributing to climate change." 81 Fed. Reg. at 59,277; *see also id.* at 59,281-82 (explaining in detail the link between landfill gas emissions and climate change and the harms caused by such emissions). In the proposal, EPA does not even acknowledge these findings, much less explain why it is reasonable for EPA to change course in light of these undisputed findings. *See Fox Television Stations, Inc.*, 556 U.S. at 515.

C. EPA's Proposal Improperly Relies on "Benefits" to the Agency from Delayed Implementation of 2016 Emissions Guidelines.

EPA's assessment of the proposed rule's "benefits," *see* 83 Fed. Reg. at 54,531, is unsound. The only beneficiary identified in the proposed rule is the agency itself, which hopes to

[58] *Id.* Ch. 1 at 81, Chapter 2 at 95 (emphasis added).
[59] *Id.* Ch. 2 at 95.
[60] *Id.* Ch. 4 at 315.
[61] *Id.* Ch. 2 at 95.
[62] *Id.* Ch. 1 at 61*; see also id.* Ch. 2 at 126 ("The later emissions peak and decline, the more CO2 will have accumulated in the atmosphere.")
[63] *Id.* Ch. 2 at 161.

extend a regulatory deadline that it has been violating for the past 15 months. But for an administrative agency to overturn a regulation solely to exculpate itself, and thus avoid being held to account by the judicial branch, is corrosive to the rule of law.[64] The "benefit" of insulating government actors that have not met their obligations from legal consequence should not play a role in EPA's decision to delay vital public-health protections.[65]

IV. EPA Must Prepare Other Analyses Before Finalizing the Proposal

When an agency issues a "significant regulatory action,"[66] it has certain obligations under a number of executive orders. A regulatory action is significant if it, *inter alia*, "is likely to . . . [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." E.O. 12866 § 3(f). In the proposal, EPA explicitly identifies "[t]his action [a]s a significant regulatory action." 83 Fed. Reg. at 54,531. The analysis in *infra* § III also demonstrates that this proposal is a significant regulatory action. Accordingly, the following obligations have been triggered:

- Under E.O. 12866, EPA "*shall* [] provide . . . [a]n assessment, including the underlying analysis, of benefits" and "costs anticipated from the regulatory action" as well as an assessment "of costs and benefits of potentially effective and reasonable feasible alternatives to the planned regulation, . . . and an explanation why the planned regulatory action is preferable to the identified potential alternatives," E.O. 12866 § 6(a)(3)(C) (Oct. 4, 1993) (emphasis added), an analysis which the agency *shall* make public, *Id.* § 6(a)(3)(E)(i);[67]

- Under E.O. 13045, EPA must "ensure that its policies, programs, activities, and standards address disproportionate risks to children that result from environmental health risks" for any "covered regulatory action" by providing OMB with "an evaluation of the environmental health or safety effects of the planned regulation on children; and [] an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency." E.O. 13045 §§ 1(b), 5 (Apr. 21, 1997); and

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[64] *Cf. Patchak v. Zinke*, 138 S. Ct. 897, 916 (2018) (Roberts, C.J, dissenting) ("'[C]hanging the rules of decision for the determination of a pending case' would impermissibly interfere with judicial independence." (citation omitted)).

[65] The lack of legal protection for illegal activity is an undercurrent that runs throughout U.S. law. *See, e.g., United States v. Williams*, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal activity are categorically excluded from First Amendment protection."); *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005) (explaining that the Fourth Amendment's privacy protections do not extend to an interest in possessing contraband); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) ("[A] person complaining that government action will make his criminal activity more difficult lacks standing because his interest is not 'legally protected.'").

[66] Identified as significant either by the agency or by OMB. *See* E.O. 12866 § 6(a)(3).

[67] Inexplicably, EPA completed one part of its duties under E.O. 12688 by submitting the action to OMB and providing the public with access to any changes OMB made, but entirely neglected to complete the second part of its duties.

- Under E.O. 13132, EPA "shall provide a process to ensure "meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications" when an action has "substantial direct effects on the States . . . or on the distribution of power and responsibilities among the various levels of government." E.O. 13132 § 1(a) (Aug. 10, 1999).

To the extent EPA claims E.O. 13045 does not apply to this action, the agency applied the incorrect standard to the first part of the analysis and ignored its own information for the second part of the analysis. Executive Order 13045 applies to "covered regulatory actions," where : (1) the action is a "significant regulatory action" as defined "under Executive Order 12866" and (2) "concern[s] an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children."[68] *Id.* § 2(a) & (b). Instead of applying the correct "significant regulatory action" standard to part one of the analysis, EPA incorrectly (and inexplicably) applied the a different standard of "economic[] significan[ce]." 83 Fed. Reg. at 54,532. As E.O. 13045 makes clear, the standard for the first prong of the "covered regulatory action" analysis is the *same standard* as that for a "significant regulatory action" under 12688.[69] Thus, EPA cannot simultaneously claim that the proposal is a significant regulatory action under 12688, but not under 13045. *See* 83 Fed. Reg. at 54,531-32.

Contrary to established requirements, EPA claims that it need not comply with these requirements because this "regulatory action is a procedural change and does not have any impact on human health or the environment." 83 Fed. Reg. at 54532 (asserting, *e.g.*, that EPA therefore "does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children"). EPA's characterization of this rule as a "procedural change" is false. The rule *revises* a substantive regulation in order to delay compliance deadlines. As such, EPA proposes to significantly delay substantial health and welfare benefits. There is nothing "procedural" about the rule.[70] Moreover, as discussed *supra* § III, EPA has already

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[68] An environmental health risk includes, among other examples, health risks from breathing polluted air. *Id.* § 2 2-203.

[69] *Compare* E.O. 12866 § 3(f) ("'Significant regulatory action' means any regulatory action that is likely to result in a rule that may [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities . . . .") *with* E.O. 13045 § 2(a) ("'Covered regulatory action' means . . . a rule that may [] be 'economically significant' under Executive Order 12866 (a rule-making that has an annual effect on the economy of $100 million or more or would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities).").

[70] *See Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981) (agreeing "that the December 5 order was a substantive rule since, by deferring the requirements that coal operators supply life-saving equipment to miners [for six months] it had palpable effects") (quotation omitted)); *see also Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) ("[A]ltering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards."); *Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816, 818 (D.C. Cir. 1983) (suspending rule's requirements has a "substantive effect on the obligations of the owners of existing facilities and on the rights of the public"); *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 763 (3d Cir. 1982)

acknowledged the increased health risks posed to children from air pollution.[71] EPA has previously qualitatively addressed the health risks posed by exposure to increased air pollution from landfills[72] and quantified the risks from methane emissions using the social cost of methane developed by the interagency working group.[73] Delaying the implementation of this rule by at least five years would forgo all of these benefits during that time, including the health risks to children.

Therefore, EPA has failed to satisfy the requirements of E.O. 12866 and 13045. EPA must disclose the impacts of this proposal, including the impacts on children's health.[74]

Lastly, to the extent EPA claims that E.O. 13132 does not apply here, this too contradicts the agency's prior analysis. EPA previously recognized that the 2016 Emissions Guidelines had federalism implications "because the rule imposes substantial direct compliance costs on state or local governments, and the federal government will not provide the funds necessary to pay those costs." 81 Fed. Reg. at 59, 310. Now, EPA proposes to shirk its obligations to approve state plans and develop a federal plan in order to shift responsibility back to both states who did not submit a plan *and* states that submitted a plan in accordance with existing regulations. These moves implicate the essence of cooperative federalism, and EPA's disavowal of any federalism implications demonstrates a fundamental misunderstanding of cooperative federalism. Before EPA can finalize this rule, it must meet with state interest holders to "ensure meaningful and timely input."

(postponement "certainly had palpable effects upon the regulated industry and the public in general, because, inter alia, the postponement of the amendments likewise postponed the obligation of the ... industry to comply with [the] standards, and therefore had a substantial impact upon both the public and the regulated industry" (quotation omitted)).

[71] *See, e.g.* EPA, M*anaging Air Quality – Human Health, Environmental and Economic Assessments*, EPA, https://www.epa.gov/air-quality-management-process/managing-air-quality-human-health-environmental-and-economic, (last updated Aug. 15, 2018) ("Specific groups within the general population may have a greater risk of pollution effects due to a variety of factors. For example, children often are more vulnerable to pollutants."); EPA, *Children Are Not Little Adults*, EPA, https://www.epa.gov/children/children-are-not-little-adults (last updated Oct. 31, 2018) (noting that due to "[u]nique activity patterns and behavior," "[p]hysiological differences," and "[w]indows of susceptibility during early lifestages including fetal development and puberty" "[c]hildren are often more likely to be at risk from environmental hazards").

[72] *See Regulatory Impact Analysis for the Proposed Revisions to the Emission Guidelines for Exiting Sources and Supplemental Proposed New Source Performance Standards in the Municipal Solid Waste Landfills Sector* at 4-1 to 4-3, EPA-HQ-OAR-2014-0451-0086 (linking landfill emissions reductions to reduced incidence of a variety of health impacts, including those impacting children, such as premature mortality, acute bronchitis, respiratory symptoms, asthma exacerbation, and school absences).

[73] *See id.* at 4-4 to 4-12 (finding the social cost of methane to range from $580 million to $1,700 million in 2020 (at a 5 percent discount rate) and from $700 million to $1,900 million (at a 2.5 percent discount rate) in 2025 (adjusted for inflation)).

[74] Further, EPA acknowledged in the 2016 Emissions Guidelines that that rule "will have positive health effects for children." *Id.* at 8-9. Thus, by implication, a delay of that rule will delay those "positive health effects for children" and EPA must quantify the delay of those benefits, and explain any contrary finding. *See Fox Television Stations, Inc.*, 556 U.S. at 515.

V. The Proposal's Failures Render Meaningful Comment Impossible

Notice and comment rulemaking requires an agency to disclose the bases for its proposed regulations, and "serves three distinct purposes." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). These include "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 938 (D.C. Cir. 2007); *see also Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 442-43 (D.C. Cir. 2018). While these requirements also apply to general rulemaking under the Administrative Procedure Act, in the Clean Air Act, Congress provided even more rigorous requirements to ensure that both the public and regulated community will have an adequate basis on which to comment on EPA proposals, a necessity given the highly complex issues addressed under the statute. *See, e.g., Schiller v. Tower Semiconductor, Ltd.*, 449 F.3d 286, 300 n.14 (2d Cir. 2006) (explaining that in Section 307(d) Congress provided specific procedures for notice and comment that go beyond what is required under the APA).

In particular, section 307(d)(3) mandates that EPA include in a proposed rule, among other things:

> (A) the factual data on which the proposed rule is based;
> (B) the methodology used in obtaining the data and in analyzing the data; and
> (C) the major legal interpretations and policy considerations underlying the proposed rule.

42 U.S.C. § 7607(d)(3). The Act also mandates that "[a]ll data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule." 42 U.S.C. § 7607(d)(3) (emphasis added). Thus, "the comments of other interested parties do not satisfy an agency's obligation to provide notice." *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1023 (D.C. Cir. 1986). There is a reason for these requirements. The public can only meaningfully analyze and comment upon a proposed rule if it has the data supporting the proposed rule. *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) ("'[T]he opportunity for comment must be a meaningful opportunity.' *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009). That means enough time with enough information to comment and for the agency to consider and respond to the comments.").

EPA has thoroughly violated its obligations under the Administrative Procedure Act and Clean Air Act. It is impossible for the public to meaningfully comment on EPA's proposed revisions where EPA has not provided *any* information as to the likely effects of its proposal on stakeholders, including adverse effects on the health and welfare of Americans. This may stem from the agency's incorrect view that the rule is merely "procedural." *See supra* § IV. It is not, and EPA must disclose the effects of the rule to the public to enable the required meaningful comment.

Conclusion

The proposal should be withdrawn. It represents an unlawful effort to circumvent EPA's clear obligations under section 111(d) of the Clean Air Act and the clear limits that Act places on delay of regulations pending their reconsideration. The proposed rule—whose true nature (and effect) is not procedural but substantive—also fails to adequately or accurately explain its costs and benefits in a manner sufficient to meet the requirements of section 307(d) of the Act. A proper accounting reveals that EPA proposes to enable hundreds of thousands of additional tons of dangerous pollutants and forgo billions of dollars of net benefits from emissions reductions simply to avoid being held to account in ongoing litigation for flouting a mandatory duty. That is not a valid basis for amending a federal regulation. If you have any questions about our submission, please contact Rachel Fullmer at rfullmer@edf.org.

Respectfully submitted,

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