UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Oil and Natural Gas Sector: Emission Standards for New and Modified Sources: Stay of Certain Requirements	)	**Docket No. EPA-HQ-OAR-2010-0505** **Docket No. EPA-HQ-OAR-2017-0346** *Via regulations.gov* *August 9, 2017*
Oil and Natural Gas Sector Emission Standards for New and Modified Sources: Three Month Stay of Certain Requirements	)	

We submit these comments on behalf of Clean Air Council, Clean Air Task Force, Center for Biological Diversity, Earthjustice, Earthworks, Environmental Defense Fund, Environmental Integrity Project, Environmental Law and Policy Center, Natural Resources Defense Council, Sierra Club, and National Parks Conservation Association (together, "Joint Environmental Commenters"). Joint Environmental Commenters appreciate the opportunity to submit these comments, which are informed by our ever-growing understanding of the urgent need to reduce emissions of methane and other harmful pollutants from the U.S. oil and natural gas sector. Based on this understanding of the need to address such emissions, and as explained in detail below, the Joint Environmental Commenters strongly oppose EPA's proposed stays, which are illegal and unauthorized.

Introduction

EPA's final rule, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," 81 Fed. Reg. 35,824 (Jun. 3, 2016) (codified at 40 C.F.R. pt. 60, subpt. OOOOa) (the "Rule"), also known as New Source Performance Standards ("NSPS") for the oil and natural gas sector, provides crucial climate and public health benefits by limiting emissions of methane, a potent greenhouse gas, as well as other health-harming pollutants. The standards enjoy broad and cross-cutting public support. They leverage proven methods for reducing emissions, utilizing cost-effective technologies that are well-known to the industry. Indeed, these standards reflect best practices that are already required by several major energy-producing states, have long been deployed by leading companies to reduce waste and enhance safety, and build upon existing EPA standards for this industry. A robust public record demonstrates that a broad and diverse set of stakeholders support these standards, including lawmakers in major producing states; small businesses; manufacturing workers' groups; investors; health professionals; public health groups; and environmental organizations.

Yet, in spite of the cross-cutting benefits, a proven track record of success, and the breadth of strong support for these standards, EPA is proposing to stay major requirements of the Rule with minimal public input. It proposes halting the Rule's leak detection and repair requirements ("LDAR"), standards for pneumatic pumps, and professional engineer's

certification requirements for closed vent systems that control emissions from various sources, first for a period of three months and then for two years. *Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed and Modified Sources: Three Month Stay of Certain Requirements*, 82 Fed. Reg. 27,641 (June 16, 2017) ("three-month stay"); *Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed and Modified Sources: Stay of Certain Requirements*, 82 Fed. Reg. 27,645 (June 16, 2017) ("two-year stay" or "stay"). The LDAR provisions included in the proposed stays are the cornerstone of EPA's methane standards. According to EPA itself, these provisions deliver over half of the Rule's methane reductions and nearly 90 percent of its toxic air pollution reductions. EPA, Regulatory Impact Analysis of the Final Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 3-13, Table 3-4 (May 2016), EPA-HQ-OAR-2010-0505-7630.

EPA's proposed stays are unlawful, exceed the agency's statutory authority, and are manifestly arbitrary and capricious. EPA has no authority to stay the Rule. The only way that EPA may revise the rule, including extending its compliance dates, would be through a Section 307(d) rulemaking revision proceeding. For such a proceeding to be lawful, EPA must reasonably explain the basis for the revision based on the record before the agency and follow the procedures established by section 111(b)(1)(B), 42 U.S.C. § 7411(b)(1)(B), for revising a new source performance standard—a process EPA has not yet even begun. EPA must explain how the revision is consistent with its statutory mandate and is good policy. That is no simple task. Halting key Rule provisions would allow significant amounts of climate-destabilizing methane emissions, as well as co-emitted smog-forming volatile organic compounds ("VOCs") and hazardous air pollutants ("HAPs"), to be released into the atmosphere, posing serious risks to the general public. Such a result is directly contrary to EPA's mandate under the Clean Air Act. Indeed, EPA's proposal notes that the increased pollution that will be emitted by staying these provisions would disproportionately harm children. 82 Fed. Reg. at 27,650 ("EPA believes that the environmental health or safety risk addressed by this action may have a disproportionate effect on children.").

While EPA attempts to justify the proposed stays on the basis of the modest costs to industry that would be avoided by staying Rule requirements, the agency has entirely failed to quantify, characterize, or otherwise consider the harm to communities associated with its proposed stays. Based upon this entirely one-sided exercise, the stays shield oil and gas companies from investing a small fraction of their proceeds to help ensure that their equipment is not harming the breathing public and the climate.

Because EPA's stay proposals are unlawful and contrary to the public interest and threaten imminent harm to communities across the country, we urge the agency to withdraw the proposals and allow the 2016 Rule to remain fully in effect.

I. The 2016 Rule Addresses the Urgent Threat of Climate Change and Improves the Health of Americans Living Near New Oil and Gas Development through Cost-Effective Requirements, While the Proposed Stay Would Significantly Increase Emissions of Harmful Methane, VOCs, and HAPs.

A. Climate change is an urgent threat.

EPA has a legal mandate to protect against the harms associated with climate change and the threats that climate pollutants like methane pose to public health and welfare. Global climate change is one of the largest challenges our civilization faces. As the agency itself has concluded, the science of climate change, the risks it presents to human health and welfare, and the role of anthropogenic greenhouse gas ("GHG") emissions as the prime driver of this phenomenon are irrefutable. *See generally Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule*, 74 Fed. Reg. 66,496 (Dec. 15, 2009). Immediate and deep cuts to global GHG emissions are necessary to mitigate the worst effects of climate change. Joint Environmental Commenters strongly oppose EPA's attempt to postpone the landmark 2016 standards that begin the process of directly controlling emissions from the oil and gas sector that contribute to climate change.

B. Methane emissions from the oil and gas sector are a significant contributor to this threat.

Reducing emissions from the U.S. oil and natural gas sector is an indispensable part of addressing the urgent threat of climate change. Methane is the main ingredient of natural gas and a common byproduct of oil production. This highly potent greenhouse gas and fast-acting climate forcer traps heat in the atmosphere at a rate 87 times that of carbon dioxide over a 20-year timeframe, and up to 36 times that of carbon dioxide over a 100-year timeframe. Approximately one-third of the anthropogenic climate change we are experiencing today is attributable to methane and other short-lived climate pollutants, and about thirty percent of the warming we will experience over the next two decades as a result of this year's greenhouse gas emissions will come from methane. Climate scientists now recognize that avoiding catastrophic climate change will require both a long-term strategy to reduce carbon dioxide emissions and near-term action to mitigate methane and similar short-term climate forcers.[1] The need to control greenhouse gases, therefore, is highly time-sensitive.

The onshore oil and natural gas sector is among the largest domestic industrial sources of methane emissions. According to EPA's most recent Inventory of Greenhouse Gas Emissions and Sinks, U.S. oil and gas operations emitted nearly 8.3 million metric tons of methane into the

[1] For examples of studies documenting methane's part in global climate change, *see* the Declaration of Dr. Ilissa Ocko, submitted in support of Environmental Petitioners' Emergency Motion for a Stay, or in the Alternative, Summary Vacatur in the proceedings over EPA's initial 90-day stay (Attachment 1).

air in 2015, approximately 31 percent of the nation's total methane emissions for that year.[2] The NSPS is projected to begin addressing these massive emissions figures by achieving annual reductions of 300,000 tons in 2020 and 510,000 tons in 2025. 81 Fed. Reg. at 35,885.

C. Emissions from the oil and gas sector also threaten the public health of local communities.

In addition to methane, oil and natural gas facilities co-emit significant amounts of other harmful air pollutants, which can be curbed by the same technologies and practices that reduce methane emissions. These pollutants include air toxics such as benzene, a known human carcinogen, and VOCs, which form ground-level ozone, the primary component of smog. Human exposure to ozone can cause respiratory and cardiovascular disease and lead to premature death. Not surprisingly, recent research demonstrates increased negative health effects among communities situated in close proximity to oil and gas development.[3] EPA's standards would significantly reduce emissions pollutants associated with oil and gas development, and any further delay in their enforcement or implementation would sacrifice a large quantity of those reductions and cause serious harm to human health.

The Rule is projected to bring much needed air quality benefits to communities affected by oil and gas development. EPA anticipates that compared to the status quo, the Rule will reduce annual VOC emissions by 150,000 tons in 2020 and 210,000 tons in 2025, and annual HAP emissions by 1,900 tons in 2020 and 3,900 tons in 2025. 81 Fed. Reg. at 35,827.

D. Emissions from the oil and gas sector also threaten the air quality of National Parks and their visitors.

Likewise, oil and gas-related emissions and climate change threaten the air quality and health of the nation's national parks, and delaying EPA's standards would allow continued harm to these treasured public lands and their visitors. Recent Colorado State University and National Park Service modeling identified that oil and gas emissions—despite likely being underestimated in current emissions inventories—nevertheless are "a significant source of pollution in national parks" that can cause or contribute to violations of health standards and exceedances of air quality related value thresholds, including haze pollution and ecosystem-damaging ozone and nitrogen deposition.[4] Oil and gas emissions represented an increase in ozone and nitrogen

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[2] EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2015* (2017) at ES-16, Table ES-2, https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf (Attachment 2)

[3] For examples of studies documenting the health effects of VOCs and HAPs, *see* the Declaration of Dr. Elena Craft, submitted in support of Environmental Petitioners' Emergency Motion for a Stay, or in the Alternative, Summary Vacatur in the proceedings over EPA's initial 90-day stay (Attachment 3).

[4] Tammy M. Thompson, Donald Shepherd, Andrea Stacy, Michael G. Barna & Bret A. Schichtel (2017) *Modeling to Evaluate Contribution of Oil and Gas Emissions to Air Pollution*, Journal of the Air & Waste Management Association, 67:4, 445-461, DOI: 10.1080/10962247.2016.1251508 (Attachment 4).

deposition levels of up to 33 percent versus the base case, and significantly degraded visibility at numerous national parks, including contributing substantially to haze on nearly every day of the year at Aztec Ruins National Monument in New Mexico.[5]

National parks are already being impacted by climate change as well, with 90 percent of our natural resource parks currently experiencing extreme weather[6] and 92 percent of our coastal parks already experiencing sea-level rise,[7] both of which scientists link to climate-changing air pollution. Damage associated with sea-level rise is expected to total more than $40 billion in just 40 of our coastal parks alone.[8] As the climate continues to change, Glacier National Park's namesake glaciers could disappear from the park within the century, and Joshua trees could disappear from Joshua Tree National Park, fundamentally altering the very icons these parks were designated to protect.

E. The 2016 Rule addresses these threats in a cost-effective, commonsense way that numerous states have successfully implemented.

EPA's proposed stays are also unwarranted because the standards in the 2016 Rule rely on highly cost-effective technologies and best practices to deliver real-world reductions, building upon the approaches of several state standards that are already in place and operating successfully. The 2016 Rule's provisions deliver significant net benefits at costs that constitute only a small fraction of industry revenues—and these costs will continue to decline with innovations in LDAR technology. Leading states, including Colorado, Wyoming, and Ohio, have already deployed many of these solutions to help reduce oil and gas methane emissions and protect the health of their citizens, all without negative economic repercussions. These proven state-level standards have shown that effective pollution control of oil and gas operations is plainly "achievable" and "adequately demonstrated" as required by the Clean Air Act, 42 U.S.C. § 7411(a)(1) (defining "standard of performance").

EPA amassed an extensive technical record supporting the 2016 Rule, including information on low-cost technologies that are readily available to reduce these emissions. A recent report by ICF International found that a discrete set of key technologies could help to reduce methane emissions by 40 percent for, on average, just one penny per thousand cubic feet

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[5] *Id.*

[6] Monahan WB, Fisichelli NA (2014) *Climate Exposure of US National Parks in a New Era of Change*. PLoS ONE 9(7): e101302. http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0101302 (Attachment 5).

[7] Caffrey and Beavers (2013) *Planning for the impact of sea-level rise on U.S. national parks*. Park Science, Vol. 30, Number 1. https://www.nps.gov/subjects/climatechange/upload/Caffrey-et-al-2013.pdf (Attachment 6).

[8] McDowell Peek et. al. (2015) *Adapting to Climate Change in Coastal Parks*. Natural Resource Report NPS/NRSS/GRD/NRR—2015/961. http://www.nature.nps.gov/geology/coastal/coastal_assets_report.cfm (Attachment 7).

of natural gas produced.[9] Another recent report concluded, based on emission estimates from EPA's Inventory of Greenhouse Gas Emissions and Sinks, that proven, low-cost technologies could reduce sectorwide methane emissions by 42 to 48 percent, at a cost of just $8 to $18 per metric ton CO_2-e.[10] These same technologies will likewise reduce VOC and HAP emissions at sources in the production and gathering and boosting segments of the sector. And because methane is a saleable commodity, reductions in methane emissions often pay for themselves, in whole or in part, due to reductions in wasted product—making methane mitigation a low-cost (and sometimes *negative* cost) proposition.

American companies and workers are ready to build and install the equipment and institute the practices necessary to reduce waste of natural gas and minimize emissions of methane and other harmful pollutants. Another recent report found these made-in-America solutions are manufactured by numerous companies across the country—many of them small businesses in places like Texas, Oklahoma, the Mountain West, and the industrial Midwest.[11]

F. The proposed stay rules would significantly increase harmful emissions over the duration of the stays.

An expert report prepared by Environmental Defense Fund scientist Dr. David Lyon, submitted separately in the dockets for both proposed stays and incorporated herein by reference, demonstrates that significant increases in harmful emissions will result over the next two years if EPA moves forward with these proposed stays.[12] Dr. Lyon's analysis quantifies the emissions that will have been prevented by the requirements in the 2016 Rule, including methane, VOC, and HAP emissions reductions that would be foregone as a result of EPA's proposed stays. Based on a methodology set out in the report, Dr. Lyon concludes that "the 40,872 producing wells located in states without their own LDAR programs will emit a total of 43,056 tons of additional methane, 11,865 tons of additional VOCs, and 452 tons of additional HAPs due to the proposed two-year stay."[13]

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[9] ICF International, *Economic Analysis of Methane Emission Reduction Opportunities in the U.S. Onshore Oil and Natural Gas Industries*, B-6 (March 2014) ("ICF (2014)"). https://www.edf.org/energy/icfmethane-cost-curve-report. (Attachment 8)

[10] Clean Air Task Force, *et al.*, *Waste Not: Common Sense Ways to Reduce Methane Pollution from the Oil and Gas Industry* 8-9 (Jan. 2015) ("Waste Not"), *available at* http://www.catf.us/resources/publications/files/WasteNot.pdf (Attachment 9).

[11] Datu Research, *The Emerging U.S. Methane Mitigation Industry* (October 2014), prepared for EDF, *available at* https://www.edf.org/sites/default/files/us_methane_mitigation_industry_report.pdf (Attachment 10).

[12] *Assessment of Incremental Pollution Associated with EPA's Proposed Stays of "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources,"* Dr. David Lyon and Hillary Hull, (Aug. 9, 2017).

[13] *Id*. at 22.

II. EPA Does Not Have Authority to Stay the Requirements of the 2016 Rule.

In its proposals to stay the 2016 Rule, EPA conspicuously fails to cite *any* valid authority, statutory or otherwise, for the extended stays. This failure alone is a violation of the Clean Air Act, which requires the agency to include in the proposal "the major legal interpretations … underlying the proposed rule." 42 U.S.C. § 7607(d)(3)(C). The legal basis on which the agency rests its statutory authority qualifies as a "major legal interpretation." EPA's failure to provide any supporting citations comes as no surprise because EPA *has* no authority to issue these stays under the circumstances here. As discussed in this section, the Clean Air Act expressly forecloses such authority. Until EPA duly revises the 2016 Rule after taking notice and comment on a substantive revision, demonstrating that the revision is permissible under the statute, and thoroughly explaining its reasons for such revision with support in the record, it must enforce the rule as it was finalized in June 2016. *See Nat'l Family Planning & Repro. Health Ass'n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked." (citing *U.S. v. Nixon*, 418 U.S. 683, 695-96 (1974)).

A. The Clean Air Act does not authorize EPA's proposed stays and, indeed, explicitly forecloses such authority.

EPA's proposed stays make clear that it seeks to stay the critical climate and public health protections in the 2016 Rule so that it may reconsider that Rule. 82 Fed. Reg. at 27,645 ("The proposed stay … would provide the EPA sufficient time to propose, take public comment, and issue a final action on the issues concerning the specific requirements on which EPA has granted reconsideration. During this time, the EPA also plans to complete its reconsideration process for all remaining issues raised in these reconsideration petitions…."). Yet the Clean Air Act provides only one, narrowly-circumscribed instance in which EPA is authorized to stay a promulgated rule—and only then for a single three-month period during a mandatory "reconsideration" proceeding. 42 U.S.C. § 7607(d)(7)(B). Under this provision, EPA may only issue such a stay where the party seeking reconsideration shows that it was "impracticable" to raise particular objections during the public comment period and that such objections are "of central relevance to the outcome of the rule." *Id.* Otherwise, "[s]uch reconsideration *shall not postpone* the effectiveness of the rule." *Id.* (emphasis added).

EPA cannot rely on this narrow stay authority here, as the U.S. Court of Appeals for the District of Columbia Circuit has already considered and vacated EPA's efforts to use that provision to suspend these same standards, concluding that agency's "90-day stay was unauthorized by section 307(d)(7)(B) and was thus unreasonable." *Clean Air Council v. EPA*, 2017 WL 2838112, at *12 (D.C. Cir. July 3, 2017). In particular, the Court held that none of the issues that EPA cited as bases for reconsideration were ones that were "impracticable" for stakeholders to address during the public comment period. *Id.* at *5-9. To the contrary, the Court noted that commenters actually *did* address each of those issues. *Id.*

EPA's proposed stays rest primarily on the precise contentions rejected by the Court in *Clean Air Council*. *See, e.g.,* 82 Fed. Reg. at 27,647 (asserting that the alternative means of

emission limitations ("AMEL") provisions included in the 2016 Rule "were finalized without having been proposed for notice and comment"); *id.* (claiming that "in the final rule, the EPA required that these well sites comply with fugitive emissions requirements, based on information and rationale not presented for public comment during the proposal stage"); *id.* ("The certification requirement was included in the 2016 Rule without having been previously proposed for notice and comment."). EPA also appears to tether these stays to its failed—and unlawful—attempt to stay the 2016 Rule pursuant to section 307(d)(7)(B), asserting that "when we have issued [section 307(d)(7)(B)] stays in the past, it has often been our practice to also propose a longer stay through a rulemaking process." *Id.* at 27,646. Consequently, under EPA's own rationale, the proposed three-month and two-year stays violate the law: the D.C. Circuit rejected EPA's initial 90-day stay on the very same reasoning that the agency now proposes as the basis for its extended stays, which the agency conceives as a direct extension of that initial unlawful stay.

Even if all the above were not true and there had been a notice failure that required EPA to undertake a valid reconsideration of the 2016 Rule, the Clean Air Act clearly limits the duration of a stay to a single three-month period. *See* 42 U.S.C. § 307(d)(7)(B); *Natural Res. Def. Council v. Reilly*, 976 F.2d 36, 40 (D.C. Cir. 1992) (finding the Clean Air Act "permitted a stay only under carefully defined circumstances; and even then, it did so for a single period not to exceed three months."). EPA expressly acknowledges in its current proposals that this authority is limited to a period of time "up to three months," 82 Fed. Reg. 27,646, and offers no alternative statutory justification for its second and third stays of three months and two years, respectively. Consequently, EPA does not have statutory authority under section 307(d)(7)(B) to stay the 2016 Rule.

Moreover, there is no other provision in the Act providing authority for any other kind of stay of a promulgated regulation. Indeed, the language of the Clean Air Act and the D.C. Circuit case law expressly preclude such authority.

First, "[i]t is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 689 (D.C. Cir. 2005). Thus, as the D.C. Circuit recently reaffirmed, EPA has no "*inherent power*" to stay a regulation. *Clean Air Council*, 2017 WL 2838112 at *4 (quoting *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (holding that "an agency literally has no power to act . . . unless and until Congress confers power upon it") (citations omitted)). The *only* authority that the Clean Air Act grants the Administrator to stay a rule is pursuant to section 307(d)(7)(B) which, as explained above, is not available here and is limited to a duration of no longer than three months. The Act provides no other authority to stay a promulgated rule.

Second, apart from the possibility of a three-month stay, the statute is explicit that promulgated regulations shall go into effect (i.e., shall *not* be stayed) even though those regulations might be changed through reconsideration or even vacated upon judicial review. At least three provisions of the statute specifically direct EPA to ensure that promulgated rules go into effect, absent a proper exercise of EPA's limited stay authority under 307(d)(7)(B). Section 111—the provision authorizing the 2016 Rule—holds that "[s]tandards of performance or revisions thereof *shall become effective upon promulgation*." 42 U.S.C. § 7611(b)(1)(B)

(emphasis added). Similarly, section 307(b)(1)—the Act's judicial review provision—mandates that "[t]he filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action . . . *and shall not postpone the effectiveness* of such rule or action. *Id.* § 7607(b)(1) (emphasis added). Finally, the Act's reconsideration provision directs that "such reconsideration *shall not postpone the effectiveness* of the rule." *Id.* §7607(d)(7)(B) (emphasis added); *see also id.* § 7411(e) ("After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source").

It is difficult to see how Congress could have been clearer that it intended duly promulgated rules that protect health and welfare to take effect—and stay in effect—even during judicial review or agency reconsideration proceedings. The legislative history confirms this understanding:

> [T]he bill amends section 307 of the Act by providing that petitions for reconsideration of final actions by the Administrator shall not render those actions non-final for purposes of judicial review . . . nor postpone the effectiveness of the action for which reconsideration is sought. *** This amendment is designed to . . . assure that the pendency of a petition for reconsideration does not *limit the effectiveness or enforceability of EPA's action pending reconsideration* . . . . *** This amendment reaffirms what both the language and the legislative history of section 307(b) demonstrate, this is, that Congress intended EPA rulemaking action to be final upon final promulgation, not upon a decision on reconsideration. *** This provision is *essential to the efficient implementation of the Act's regulatory program*. [Any other result] would delay judicial review of EPA actions, and would encourage the filing of petitions for reconsideration *as a delay tactic*.

S. Rep. No. 101-228, at 372 (1989) (emphasis added).

Third, the fact that Congress specifically directed that promulgated rules shall take effect and provided only one narrow basis for staying a regulation, under 307(d)(7)(B), demonstrates that Congress intended regulations not to be stayed on any *other* basis. It is well-established that "'when a statute lists several exceptions'" to a requirement, "'others should not be implied.'" *Reilly*, 976 F.2d at 40-41 (quoting *Sierra Club. v. EPA*, 719 F.2d 436, 452-53 (D.C. Cir. 1983)). Here, Congress's clear expression of the baseline requirement that promulgated rules shall go into effect and delineation of one specific exception precludes any argument that Congress intended for there to be other exceptions.

Finally, the D.C. Circuit has specifically addressed whether the Clean Air Act grants EPA authority to stay a promulgated rule beyond the single three-month period described in section 307(d)(7)(B) and determined that the answer is no, even after notice and comment rulemaking. *Id.* at 40-41. The facts of *Reilly* are indistinguishable from the facts here. In both cases, EPA unlawfully attempted to stay duly promulgated Clean Air Act emission standards beyond the narrow three-month period authorized by section 307(d)(7)(B) so that it could

reconsider those regulations. In both, a finding by the Administrator triggered a mandatory and circumscribed schedule for promulgating standards. In both, the agency claimed that a stay was appropriate because it was in the process of considering revisions to the rule in question. And just as in *Reilly*, EPA here cannot stay the standards promulgated in the 2016 Rule simply because it may at some future point promulgate a rule to revise those standards. Unless and until EPA *completes* a rulemaking that substantively amends or rescinds the 2016 Rule's standards consistent with its statutory mandate and pursuant to a reasoned justification with support in the administrative record, it cannot delay the effectiveness of the current standards.

EPA has previously suggested that it has "authority" to stay a rule "through notice and comment rulemaking." EPA Br. at 11 n. 5, *Clean Air Council v. EPA*, No. 17-1145, ECF Doc. 1679831 (D.C. Cir. June 15, 2017). But the notice and comment procedures required in section 307(d) of the Clean Air Act do not expand EPA's statutory authority. To the contrary, these provisions impose requirements regarding the procedures EPA must use when exercising its statutory authority. The agency must still point to explicit authority in the Clean Air Act to stay a promulgated rule, and it has not done so here. Further, the D.C. Circuit has held that the Act's "general grant of rulemaking power" does not provide EPA with the authority to stay promulgated regulations. *Reilly*, 976 F.2d at 41. In *Reilly*, EPA had also undergone notice and comment rulemaking, but following those procedures did not enlarge EPA's statutory authority. Indeed, it would completely circumvent the limitations on EPA's stay authority discussed above if the agency could stay a rule merely by expressing second thoughts about it, rather than *actually* amending it on the basis of reasoned decisionmaking and record evidence. EPA cannot evade the Clean Air Act's clear and explicit limitations on staying promulgated rules pending reconsideration simply by giving notice and taking comment on the stay.

Consequently, the Clean Air Act does not authorize the Administrator to stay a duly promulgated rule under the circumstances presented here.

B. The Administrative Procedure Act also does not provide authority for a stay under the circumstances presented here.

EPA did not cite section 705 of the Administrative Procedure Act as the basis for its authority to stay provisions of the 2016 Rule, and therefore cannot rely on it to finalize the proposed stays. Even if EPA attempted to rely on that authority, however, it is unavailing in these circumstances. Section 705 provides:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. A stay of the Rule under section 705 would be unlawful for at least three independent reasons.

First, section 705 authorizes a stay only "pending judicial review"—not pending administrative reconsideration. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33-34 (D.D.C. 2012) (holding a stay under section 705 "plainly must be tied to the underlying pending litigation," *not* to "stay the rule[] pending reconsideration."). Accordingly, an agency seeking to stay a rule under section 705 "must have articulated, at a minimum, a rational connection between its stay and the underlying litigation." *Id.* Here, the litigation over the 2016 Rule has been placed in abeyance indefinitely, as a result of EPA's successful motion to put off judicial review of the rules. *See* Per Curiam Order Granting Mot. to Hold Cases in Abeyance, *North Dakota v. EPA*, No. 16-1242 (D.C. Cir. May 18, 2017). If the litigation has been suspended indefinitely pending administrative reconsideration, there can be no rational connection between the proposed stays and the underlying litigation. Rather, EPA plainly attempts to rationalize the proposed stays solely based on its administrative reconsideration of the Rule, without any reference at all to the litigation. *See* 82 Fed. Reg. at 27,643 (attempting to justify proposed three-month stay based on "unnecessary burden and confusion as to what regulatory requirements are in effect and what regulated entities must do *during the reconsideration proceeding*") (emphasis added); 82 Fed. Reg. at 27,648 ("EPA believes it is reasonable to stay these requirements [for two years] *pending reconsideration*") (emphasis added).

Second, to justify a stay under section 705, EPA must satisfy the four-factor test required for staying a rule or otherwise show that "justice so requires." It has not done so here. The standard for a "stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test." *Jackson*, 833 F. Supp. 2d at 30. Thus, in order to provide a stay of the Rule pending judicial review under section 705, EPA must show that (1) challengers of the Rule are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of a stay, (3) the balance of equities tips in favor of a stay, and (4) a stay is in the public interest. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). In its proposals, EPA only considers the costs to industry that would be relieved by the proposed stays—ignoring all of the other consequences of staying the standards—and does not make so much as a passing reference to this test.

Even if the agency did not have to satisfy the four-factor test, EPA did not even engage in a minimal balancing of the relevant considerations to ensure a decision that is reasoned rather than arbitrary. Significantly, EPA has *not* considered the impacts of the stay on the public health and welfare it is charged with protecting. *See* 82 Fed. Reg. at 27,648 ("Although there would be foregone benefits as a result of this proposed delay, a quantitative estimate of this effect is not currently available, and therefore the associated foregone benefits are not presented."). Instead, EPA attempts to justify the proposed two-year stay solely on cost avoidance for the oil and gas industry. *See id.* at 27,648-50. EPA's explanation for the proposed three-month stay is even more cursory—the agency simply states that this proposed stay would avoid a "potential gap" in delaying the Rule, without any analysis of the legal merits of the Rule or the costs or benefits of a stay, apart from the sole issue of compliance costs to industry that would be avoided due to the stay. 82 Fed. Reg. at 27,641.

Third, EPA cannot "postpone the effective date" of a rule that has already gone into effect. Here, the "effective date of the rule is August 2, 2016"—a date that has already passed. 81 Fed. Reg. at 35,899. The D.C. Circuit has squarely rejected just such an attempt by EPA to "postpone the effective date" of an already effective rule pursuant to section 705. *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324, at *2-3 (D.C. Cir. Jan. 19, 1996) (per curiam). The court held that section 705 "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. It *does not* permit an agency to suspend without notice and comment a promulgated rule." *Id.* (emphasis added). That EPA has proposed to stay the 2016 Rule through a notice-and-comment rulemaking proceeding does not alter this conclusion. *See Reilly,* 976 F.2d at 41(rejecting EPA stay that the Agency premised on both section 705 of the Administrative Procedure Act and EPA's general rulemaking authority under section 301(a) of the Clean Air Act, even though EPA had issued the stay pursuant to a full notice-and-comment rulemaking). Moreover, the Court in *Clean Air Council* has issued the mandate striking down EPA's unlawful 90-day stay, meaning that the entirely of the 2016 Rule is currently effective and cannot now be stayed under section 705. Mandate, *Clean Air Council v. EPA*, No. 17-1145, ECF Doc. 1686664 (D.C. Cir. July 31, 2017).

Accordingly, even if EPA had purported to justify its proposed stays under section 705 of the Administrative Procedure Act, this section does not provide EPA authority to stay the 2016 Rule under the circumstances presented here.

C. The limitations on stay authority in the Clean Air Act and Administrative Procedure Act promote regulatory certainty.

There is good reason for the Clean Air Act's and Administrative Procedure Act's guardrails against staying or suspending duly promulgated rules: they give certainty both to the regulated community and the public. Broad authority to stay promulgated rules during reconsideration raises significant problems from the perspective of regulatory certainty.

Section 307(d) of the Clean Air Act and similar rulemaking provisions in the Administrative Procedure Act help to ensure that agencies do not change policies without a thorough review, that they have adequately explained why the new policy is consistent with the statute, and that there are good reasons for the change with support in the record. A hasty rulemaking to suspend a duly promulgated regulation, based principally upon a new Administrator's desire to rethink the regulation—*without* thorough study, input, and explanation—undermines the whole premise of ensuring that standards are amended only after a deliberative process. *See Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 445-46 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983) ("The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal").

For agencies to execute quick changes in policy without undergoing the process necessary to justify and explain such changes also disturbs the settled expectations of the regulated industry and public alike. *See Abraham*, 355 F.3d at 197 ("It is inconceivable that Congress intended to allow such unfettered agency discretion to amend standards … such a

result would completely undermine any sense of certainty on the part of manufacturers as to the required energy efficiency standards at a given time."); *cf. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 41 (1983) (A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out those policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.").

Regulatory certainty on the part of both the regulated industry and the public depends on agencies enforcing duly promulgated regulations until they are duly revised or revoked. Shortcuts to revising or repealing a rule on the simple premise that the rule is being "reconsidered" create uncertainty. If EPA may delay for two-plus years key provisions of the 2016 Rule merely so that it can "reconsider" them, then there is no reason that—should EPA ultimately rescind the 2016 Rule's requirements—a future EPA could not simply delay that rescission itself for two years so that it could "reconsider" it, quickly putting the 2016 Rule's requirements back into effect.[14] This cannot be what Congress had in mind when it required EPA to undergo a deliberative process to promulgate and revise rules.

III. EPA Has Failed to Follow the Reasoned Decisionmaking Requirements and the Rulemaking Procedures Required under the Clean Air Act to Revise the 2016 Rule by Postponing Compliance Deadlines.

As explained in Part II, EPA does not have authority to stay provisions of the 2016 Rule while it mulls revising them. Until such time as EPA duly revises the 2016 Rule, it must enforce it. Nor could EPA act now to *revise* the compliance deadline in the 2016 Rule because EPA has neither followed the proper procedures nor made any substantive findings needed to support a reasoned decision to revise the 2016 Rule. Indeed, EPA has explicitly disclaimed that it is now undergoing a substantive revision, explaining that the stay's impacts on children's health would more appropriately be addressed *not* in this rulemaking, but "in the context of any substantive changes proposed as part of reconsideration." 82 Fed. Reg. at 27,650. Should EPA wish to *substantively revise* the 2016 Rule by delaying its compliance deadlines, EPA must propose that substantive change, give the factual basis for such a change, and take comment on that change. Here, by contrast, EPA has specifically *precluded* comment on any of the substantive requirements of the 2016 Rule. 82 Fed. Reg. at 27,645. Finalizing a substantive revision of the 2016 Rule based on the current proposal would thus constitute a clear notice violation. Had EPA proposed to substantively revise the compliance deadlines based on the factors laid out in section 111 of the Act and permitted comment on substantive issues, Joint Environmental Commenters and other would have presented detailed information regarding the achievability of the current

[14] Indeed, there is precedent for the agency attempting to freeze a deregulatory rule—thus triggering the more stringent underlying standard—in order to reconsider the deregulatory rule. *See* 60 Fed. Reg. 55,202 (Oct. 30, 1995) (staying regulations promulgated under the Resource Conservation and Recovery Act that addressed how to handle recycled oil (the "Oil Mixture Rule"). There, the Administrator was not simply acting on her desire to rethink the Oil Mixture Rule, but was responding to a court opinion that seriously undermined the rule's legal foundations. Nonetheless, the D.C. Circuit did not countenance that shortcut. *Safety-Kleen Corp,* 1996 U.S. App. LEXIS 2324.

standards on the current timeline. But EPA has precluded any such comment here. Moreover, as described in this Part, the record is quite simply bereft of any material to justify the agency's proposed action, and the stays, if finalized, would be procedurally improper as well as arbitrary and capricious.

Paradoxically, although EPA is not accepting comment on substantive issues at this time, any final action delaying the 2016 Rule's compliance deadlines would amount to a substantive revision of the 2016 Rule under the Clean Air Act. *See Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) ("[T]he December 5 order was a substantive rule since, by deferring the requirements that coal operators supply life-saving equipment to miners, it had 'palpable effects' upon the regulated industry and the public in general."); *id.* at 582 n. 40 ("[T]he December 5 order … was an amendment to a mandatory safety standard.").[15] Furthermore, EPA's clear intent in suspending key requirements of the 2016 Rule for two or more years is to give the agency time to rescind or revoke those standards. On March 28, the President signed an executive order directing EPA to review the 2016 Rule and "as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules." Exec. Order No. 13783, § 7(a), 82 Fed. Reg. 16093 (March 28, 2017). A few days later, the Administrator signed an advanced notice of proposed rulemaking promising to "if appropriate" "initiate reconsideration proceedings to suspend, revise, or rescind the [2016 Rule]." 82 Fed. Reg.16,331 (April 4, 2017). EPA immediately sought abeyance in the cases challenging the 2016 Rule, explaining that "[a]gencies have inherent authority to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation." EPA Mot. to Hold Case in Abeyance, No. 13-1108, ECF No. 1670157 (D.C. Cir. April 7, 2017). Two weeks later, presumably finding suspension appropriate, EPA sent a letter to API and other industry groups notifying them that it was "convening a providing for reconsideration" and promising to stay key provisions of the Rule during that reconsideration. Letter from Scott Pruitt, EPA Administrator, to Howard Feldman, American Petroleum Institute, *et al.*, Re: Convening a Proceeding for Reconsideration of Final Rule, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources, Published June 3, 2016, 81 Fed. Reg. 35,824", EPA-HQ-OAR-2010-0505-10792. On June 5, EPA announced that the reconsideration proceeding had expanded to include pneumatic pumps and professional engineering certifications, and announced a stay of those provisions (which was soon thereafter vacated by the D.C. Circuit in *Clean Air Council*). 82 Fed. Reg. 25,730 (June 5, 2017). Eleven days after that, EPA proposed the stays at issue here and announced its "intent[t] to look broadly at the entire 2016 Rule" in its reconsideration proceeding. *Id.* at 27,654. This succession of actions demonstrates a deliberate plan by EPA to halt the 2016 Rule's requirements while the agency attempts to rescind its provisions.

[15] In particular, for purposes of enforcing the Clean Air Act, an "emission standard" is defined to include the "schedule or timetable of compliance" that EPA incorporates into the Rule, 42 U.S.C. § 7604(f)(1)—which is, in turn, defined to mean the "schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard." *Id.* § 7602(p); *see Natural Res. Def. Council v. EPA*, 683 F.2d 752, 761-62 (3d Cir. 1982) ("[W]ithout an effective date a rule would be a nullity because it would never require adherence.").

As such, the proposed stays are tantamount to a revocation and must therefore be justified in the same manner as a revocation. *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) ("[A]n 'indefinite suspension' does not differ from a revocation simply because the agency chooses to label it a suspension … NHTSA's action should be treated as a revocation, subject to the standard of review set forth in *State Farm*."). Yet in its proposed stays, EPA fails to set out any basis for revising to 2016 Rule consistent with section 111, much less revoking it.

A substantive revision to a rule may only be accomplished if it is permissible under the statute and there are good reasons for it supported by the agency's record. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009) (agency changing course must show "[1] that the new policy is permissible under the statute, [2] that there are good reasons for it, and [3] that the agency *believes* it to be better," and must offer "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy"); *State Farm,* 463 U.S. at 57 ("[A]n agency changing course must supply a reasoned analysis."); *Am. Petroleum Inst. v. EPA*, --F.3d--, 2017 WL 2883867, at *10 (D.C. Cir. July 7, 2017) (changes to agency rules must be "'justified by the rulemaking record'" (citing *State Farm*, 463 U.S. at 42)). The requirement for reasoned decisionmaking, which applies to rulemakings generally, is directly incorporated into the Clean Air Act. *See* 42 U.S.C. § 7607(d)(9). As the analysis provided below demonstrates, EPA has not satisfied this standard, having offered no valid reason for disregarding the facts and departing from the policies that underscored the 2016 Rule, and having not even sought comment on the substantive requirements of the Rule. The proposed stays, if finalized, would amount to classic arbitrary and capricious actions.

Moreover, section 111 of the Clean Air sets out specific procedures for revising an emission standard. It requires EPA to "revise such standards following the procedures required by this subsection for promulgation of such standards." 42 U.S.C. § 7411(b)(1)(B). Accordingly, EPA must "propose[] regulations[] establishing Federal standards of performance for new sources," and "afford interested persons an opportunity for written comment on such proposed regulations." *Id*. The term "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emissions limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." *Id*. § 7411(a). In addition, section 111's technology-forcing mandate requires that "when revising standards promulgated under this section, the Administrator shall … consider the emissions limitations and percent reductions achieved in practice." *Id*. § 7411(b)(1)(B).

The statute and case law make clear that when EPA issues a performance standard under section 111—and therefore also when it revises a standard— the statute's procedural requirements necessitate a thorough review of section 111's substantive factors, including whether, and by what date, the standards are "'achievable'" through a "'system of emission reduction,'" whether that system is the "'best'" that EPA has determined to be "'adequately demonstrated,'" the "'cost'" of those standards, any resulting "'nonair quality health and environmental impacts,'" "'energy requirements,'" the "'amount of air pollution reduced'" by the standards, and how the standard may drive "'technological innovation.'" 80 Fed. Reg.

64,510, 64,538 (Oct. 23, 2015) (quoting *Sierra Club v. Costle*, 657 F.2d 298, 326, 347 (D.C. Cir. 1981)); *see also* 42 U.S.C. § 7411(a)(1), (b)(1)(B), (h)(1).

To be permissible under section 111, a revision of the compliance deadline for a section 111 standard must start with a proposal and factual analysis showing that the revised deadlines reflect the degree of emissions limitation achievable through the application of the best system of emission reduction (or "BSER") based on the aforementioned statutory factors. But as discussed more fully below, EPA has failed to provide any analysis or discussion of BSER in its stay proposals and has ignored all of section 111's relevant factors apart from a calculation of avoided costs to industry. Accordingly, EPA 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." *State Farm*, 463 U.S. at 43.

A. EPA's proposals are inadequate under the Clean Air Act to revise an existing standard.

In the two proposed stays, EPA offered no analysis or application of the relevant factors under section 111. In fact, the proposals barely mention section 111 at all. To the contrary, EPA explicitly stated that it "is not taking comments at this time on substantive issues concerning these requirements." 82 Fed. Reg. at 27,645. Based on this limited notice and comment sought in the proposal, EPA cannot promulgate a substantive revision of the Rule under section 111.

In developing and issuing the 2016 Rule, EPA thoroughly explained how the Rule's requirements reflected the degree of emissions limitations achievable through the application of the best system of emissions reductions that had been adequately demonstrated, backing up its standards with a robust record. *See, e.g.*, EPA, *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, Background Technical Support Document*, Chapters 3-7 (May 2016), EPA-HQ-OAR-2010-0505-7631; 81 Fed. Reg. 35,826-27, 35,843-848. EPA explained that while the controls used to meet the VOC standards in the 2012 Rule also reduce methane emissions incidentally, in light of the current and projected future greenhouse gas emissions from the oil and gas industry, direct limitations on greenhouse gas emissions (expressed as methane standards) were necessary, and could be achieved through a carefully considered best system of emissions reduction. *Id.* at 35,841. EPA's BSER also included compliance deadlines that EPA determined, after public comment and upon a full record, reflected what was achievable by covered sources. *Id.* at 35,858-59.

In the stay proposals, however, EPA seeks to stay provisions (all of which are already in effect) for compliance with key pollution reduction measures without considering the relevant statutory factors or attempting to explain why this would be a permissible revision of the 2016 Rule under the statute. EPA also fails to point to any factual support for a conclusion that staying these requirements for two or more years reflects the best system of emissions reduction. Indeed, EPA does not make a single mention of the concept of BSER or attempt to tether its stay to that statutory standard, but instead relies solely on the irrelevant factor of the Administrator's wish to mull changes to the 2016 Rule. Not only does EPA not explain how its proposed stays are the

BSER, none of the bases it puts forward for reconsideration even raise serious issues with respect to that statutory requirement. Indeed, as discussed above, EPA has entirely precluded public comment on "substantive issues" like the BSER.

In addition to failing to explain how staying the rules is the BSER or even shedding any doubt on the 2016 Rule's selection of BSER, EPA has disregarded section 111's technology-forcing mandate that he "consider the emissions limitations and percent reductions achieved in practice" when revising standards under section 111. 42 U.S.C. § 111(b)(1)(B); *see Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (finding that a "rulemaking was arbitrary and capricious, because the [agency] failed to take account of a statutory limit on its authority"). In fact, EPA's stay proposals simply ignore *all* of section 111's factors except for compliance costs (which are only discussed in the proposal for the two-year stay). Even then, the agency offers no substantive data or conclusion about that factor that would allow for a change in BSER for these sources. Furthermore, EPA focuses solely on the compliance costs that industry would save as a result of the stays, neglecting to consider or discuss the environmental and public health costs that the stays would incur.

For these reasons, if EPA attempts, in taking final action, to re-characterize its action as a substantive revision of the 2016 Rule under section 111, such action would be plainly illegal. EPA cannot simply re-label its impermissible stay proposals as substantive revisions of the standards, which it failed to propose. *EDF v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) ("[I]t is the substance of what the [agency] has purported to do and has done which is decisive."). Doing so on the basis of the current proposals would also constitute a notice failure. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (agency must "make its views known . . . in a concrete and focused form so as to make criticism or formulation of alternatives possible"). While EPA may, at some point in the future, attempt to revise the 2016 Rule by issuing a substantive proposal that applies the statutory factors to the factual record, it cannot shortcut that process by suspending the Rule first and reconsidering, revising, and explaining its actions later.

B. EPA fails to give "good reasons" for the proposed stays supported by the record, or explain why it cannot enforce the current requirements while it reconsiders them.

EPA offers only two justifications in support of the proposed stays, neither of which meets the standard prescribed in *Fox Television Stations*.

First, EPA claims that the proposed stays are consistent with past EPA practice: "When we have issued similar stays in the past, it has often been our practice to also propose a longer stay." 82 Fed. Reg. at 27,646. However, EPA cites only a single instance of this allegedly often-used practice, and the agency in that instance relied on a statutory authority—section 301(a)—which the D.C. Circuit held in *Reilly* could not serve as the basis for staying a duly promulgated emission standard, even via a formal rulemaking process. *See* 74 Fed. Reg. at 36,430; *Reilly*, 976 F.2d at 41. In any event, a prior example of the same outcome could not make this action any less unlawful or arbitrary.

Moreover, in appealing to what it claims to be past practice, EPA relies on an erroneous claim that the aspects of the 2016 Rule it now seeks to stay were finalized without adequate

notice and opportunity for comment. 82 Fed. Reg. at 27,647/1-48. As discussed above, the D.C. Circuit roundly rejected this position in *Clean Air Council*, holding that there had been legally sufficient notice and an opportunity to comment on each of these issues and thereby vacating the 90-day stay as unlawful under section 307(d)(7)(B). 2017 WL 2838112 at *5-9. Further, as the Court recognized, industry stakeholders *had*, in fact, commented on each of these issues during the comment period for the 2016 Rule. *Id.* Accordingly, even if extending section 307(d)(7)(B) stays were past agency practice and even if conformity with past practice were a good reason, the D.C. Circuit has rejected as unlawful the administrative stay that EPA now wishes to extend through these rulemakings. Accordingly, the agency cannot now rely on the alleged deficiency of stakeholders' notice and opportunity for comment to justify the proposed stays.

Second, as to each element of the 2016 Rule that the agency proposes to stay, EPA asserts that such delay is "reasonable" in light of uncertainty regarding whether the 2016 Rule will be changed through the reconsideration process. 82 Fed. Reg. at 27,647-48. In addition to being an unlawful basis for a stay under the Clean Air Act, *see* Parts I and II, *supra*, the possibility that reconsideration may ultimately lead to a different regulation in the future provides no justification for rejecting the findings EPA made in issuing the 2016 Rule. EPA has not yet engaged with any of the findings it made or relied on in promulgating that rule, much less refuted them or supplied a reasoned basis for disregarding them. The agency must offer a justification for staying the compliance deadlines "*before* engaging in a search for further evidence." *State Farm*, 463 U.S. at 151 (emphasis added); *Pub. Citizen*, 733 F.2d at 98 (striking down agency's decision to suspend its program while it "further studied" an alleged problem). The agency's plan to stay now and look at the record and give reasons later renders it unable to give any "good reasons" for staying the compliance deadlines.

Even if EPA had authority to do so, staying the 2016 Rule's requirements would be particularly unreasonable in light of the minor nature of the "problems" in the Rule that EPA has identified and the availability of alternatives other than the proposed stays to address those alleged problems. The D.C. Circuit has explained that an agency acts arbitrarily in suspending regulatory requirements when (1) the record supports retaining the rules while improvements are made and/or (2) alternative remedies could address the problems the agency cites. *Public Citizen*, 733 F.2d at 99-100. The proposed stays of the 2016 Rule fail both prongs of this test. The deficiencies EPA alleges do not justify suspending the 2016 Rule's requirements while EPA reconsiders them. In addition, EPA fails to explain why it dismissed alternatives to the proposed stays, such as *not* staying the provisions of the 2016 Rule while it reconsiders them or promulgating a narrower stay that addresses only the very specific concerns EPA now raises.[16] EPA's mere assertion that it wishes to review and possibly revise the 2016 Rule is insufficient. *See id.* at 102 ("Without showing that the old policy is unreasonable," for an agency to say that

[16] Joint Environmental Commenters believe that *any* further delay in implementing or enforcing the 2016 Rule would be inappropriate, including a stay that is more narrowly tailored than the ones EPA has proposed. However, the imbalance between the precisely targeted nature of the reconsideration issues EPA has identified in the 2016 Rule (on the one hand) and the overly broad scope of the proposed stays (on the other hand) is particularly arbitrary, and is yet another reason why the proposed stays are unlawful.

"no policy is better than the old policy solely because a new policy might be put into place in the indefinite future is as silly as it sounds.").

Ultimately, EPA fails to give any rational explanation or point to any factual support for staying these critical health and environmental protections in their entirety simply so that the agency may rethink some of their details. Below, we discuss this failure in the context of each of the specific reconsideration issues that EPA has identified in its stay proposals.

C. The record and limited comment opportunity in the proposals do not support stays of the provisions.

a. ***Stay of LDAR requirements.***

EPA's proposed stays would halt the 2016 Rule's LDAR provisions in their entirety for two or more years. But instead of predicating these stays on factors relevant to the BSER, such as the achievability of the LDAR standards, the extent of the emission reductions they would achieve, or energy requirements they would implicate, EPA has premised its action on wholly irrelevant factors. Accordingly, its stay of these provisions is unjustified and unlawful.

First, EPA claims that the stays are necessary because the process by which operators can apply to use alternative methods of emission limitation ("AMEL") to comply with the LDAR requirements "may not be sufficiently clear to facilitate effective application and approval of AMEL." 82 Fed. Reg. at 27,647/1. Nowhere do the proposals even hint that the lack of clarity in the application process renders the 2016 Rule's standards unachievable or not adequately demonstrated. Nor could an administrative issue like this render the 2016 Rule's standards unachievable. Indeed, as their name makes clear, the AMEL provisions are merely *alternative means of compliance*, and do not have anything to do with whether companies can comply with the standards on time through the *regular* means of compliance.

Such justification is decidedly not based on any statutorily relevant factors, nor does it provide a reasonable basis for staying the LDAR requirements while EPA reconsiders them. Furthermore, the minor AMEL implementation issues raised by the reconsideration petitioners provide no rational basis for staying the *entire* LDAR program for well sites and compressor stations for two-plus years. Indeed, the implementation questions posed by industry—for example, whether a trade association may submit an application on behalf of multiple firms—plainly do not require a two-plus year rulemaking process to resolve. The agency has not explained why it cannot quickly issue guidance to resolve any alleged lack of clarity in the application process. The fact that very industry groups critical of the AMEL provisions have conceded that informal guidance would be sufficient to address their concerns only reiterates just how arbitrary EPA's action is. API, *Request for Administrative Reconsideration EPA's Final Rule "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources,"* EPA-HQ-OAR-2010-0505-7682, 15-16 (Aug. 2, 2016).

Moreover, EPA has not contended that AMEL approval is not available to companies as a practical matter, only that the AMEL provisions could be rewritten in a way that would more

efficiently facilitate AMEL use.[17] EPA has not explained why it is more sensible to stay the LDAR requirements entirely rather than implement them through a temporarily less-than-ideal application process. EPA's desire to lure more applicants to AMEL is not a rational basis for staying the underlying requirements. Indeed, even if it were, the proposed stay will only make it *less* likely that sources implement the emerging monitoring technologies EPA allegedly wants to foster as AMEL, since the program in its entirety would be suspended for over two years.

EPA asserts in its proposals that "the AMEL provisions involve determining the equivalency with the fugitive emissions requirements," 82 Fed. Reg. at 27,648, but EPA does not provide any evidence for actual inefficiencies in implementing the AMEL program or comparing applications with the 2016 Rule. Instead, EPA simply relies on industry claims that there are questions about "who can apply for and who can use an approved AMEL." *Id.* Without sufficient—or any—evidence that actual affected entities have applied for, and failed to receive, approval for AMEL, EPA cannot now contend that that AMEL provisions are insufficient to facilitate effective applications and approvals.

In addition to AMEL, EPA cites low-production wells as a reason for staying the 2016 Rule's LDAR requirements. In its proposal for the 2016 Rule, EPA initially exempted this category of sources from the LDAR program. 81 Fed. Reg. 56,664 (Proposed 40 C.F.R. § 60.5365a(i)(1)). However, after considering the public comments, investigating the issue, and analyzing the factual evidence in the record, the agency concluded in the final 2016 rule that low production wells did *not* have lower fugitive emissions than higher production wells and that the best system of emissions should thus also apply to low-production wells. 81 Fed. Reg. at 35,856; *see also Comments of Clean Air Task Force, et al.*, EPA-HQ-OAR-2010-0505-6984, 36-42 (Dec. 9, 2015), (describing how emission are not correlated with a well's production level); *API Comments on EPA's NSPS for the Oil and Natural Gas Sector*, EPA-HQ-OAR-2010-0505-6884, 121 (Dec. 5, 2015) (stating that "[f]ugitive emissions do not correlate to production"). In response to complaints from industry, EPA now wishes to reconsider this judgment and to stay the LDAR requirements for *all* sources while it reviews the applicability of those requirements to low-production wells.

Yet the agency provides no support to show that BSER should not apply to low-production wells. In its stay proposals, EPA does nothing more than simply outline the history of the 2016 Rule, assert (incorrectly, *see Clean Air Council*, 2017 WL 2838112 at *6) that the inclusion of low-production wells was "based on information and rationale not presented for public comment," and then state that "[i]n light of the sizable percentage of well sites that may be affected by the outcome of this reconsideration, the EPA believes it is reasonable to stay the well site fugitive emissions requirements while EPA reassess whether the exemption is appropriate." 82 Fed. Reg. at 27,647. Nowhere in this explanation does EPA even assert, much

[17] EPA provides no data regarding whether it has received applications for AMEL or has had any difficulty processing those applications, despite the fact that the LDAR standards have been in place (and not properly suspended) since June 3 of this year. Indeed, had there been significant demand for use of AMEL, as the proposed rules suggest, 82 Fed. Reg. at 27,647, one would expect that EPA would have received and processed applications well ahead of the initial June 3 deadline.

less provide factual support for, a conclusion that the 2016 Rule's inclusion of low-production wells was not the BSER or that staying compliance by two-plus years is the BSER. Instead, it relies entirely on the fact of its own reconsideration, a justification unrelated to relevant factors laid out in section 111 and for which section 307 seriously limits stay authority. The mere fact of reconsideration is not a factor that may be considered when revising a standard under section 111. As to the factors that *are* relevant to section 111—those enumerated on p. 15, *supra*—EPA provides no discussion or analysis.

In addition, the possibility that, at the end of its reconsideration and revision process, EPA *may* decide to exempt low-production wells from the Rule's LDAR requirements provides no rational basis for staying those requirements now, much less for staying the requirements as they apply to *all wells and compressor stations*. For example, EPA has not shown that low-production well sites emit fewer emissions than higher production ones (and all the record evidence indicates that they do not, *see Comments of Clean Air Task Force, et al.*, *supra* p. 20, at 36-42; *API Comments, supra* p. 20, at 121), nor that resources are inadequate to complete LDAR on schedule at these wells. It has not suggested why these sources cannot undergo LDAR while EPA considers exempting them in the future. As demonstrated in Part I, *supra*, LDAR does not involve sunk costs that would be stranded should EPA change the requirement. And while recognizing that low-production wells are a minority of wells, 82 Fed. Reg. at 27,647, EPA has not explained why staying LDAR requirements for *all* wells *and* all compressor stations is an appropriate solution if there were a problem with applying LDAR to low-producing wells. No more than AMEL, the issue of low-production wells provides no rationale for the proposed stays.

Finally, in proposing to stay the LDAR program, EPA fails to explain why the current compliance timeline—which would be suspended by the stays—is in any way problematic. In developing the initial compliance deadline for the 2016 Rule's LDAR requirements, EPA compiled a robust evidentiary record and determined, based on a thorough and well-explained justification, that the BSER required affected sources to detect and repair leaks on a certain fixed schedule. *See* 81 Fed. Reg. at 35,859, 35,863. To grant industry operators sufficient lead time to prepare for these requirements, EPA granted operators an entire year to complete the initial round of leak detection surveys. *See id.* at 35,862. Indeed, this year's worth of lead time was included in the final Rule in response to specific requests from industry. *See, e.g.*, *API Comments*, *supra* p. 20, at 121 ("API requests a one-year plus 60 days phase in period from the promulgation date for compliance with the LDAR requirements . . . . to allow operators time to purchase monitoring devices, conduct training, and establish protocols."); *Comments of the Texas Oil & Gas Association on EPA's September 18, 2015 Proposed Emission Standards for New and Modified Sources in the Oil and Gas Sector*, EPA-HQ-OAR-2010-0505-7058, 41 (Dec. 5, 2015) ("Accordingly, it is important for EPA to provide an initial one-year phase in of these [LDAR] requirements."); EPA, *Response to Comments Document, Chapter 4: Fugitives Monitoring*, EPA-HQ-OAR-2010-0505-7632, 4-188 (May 2016) (describing LDAR schedule, including year-long phase-in approach, as responsive to "a wide variety of comments and suggestions for the appropriate time for fugitive emissions monitoring to begin"). EPA now does not point to anything to suggest that this timeframe is unachievable or otherwise inconsistent with the BSER. Nor has it pointed to any "factual data" on which a purported revision of the Rule is based. *See* 42 U.S.C. § 7607(d)(3)(A). In its proposals, EPA does not even suggest that the 2016 Rule misapprehended the amount of time necessary to complete an initial round of

LDAR. This is not surprising, as there has been more than sufficient time for companies to come into compliance with the rule. *See, e.g.,* Mike Soraghan, *Companies Comply With EPA Rules Amid Legal Pingpong*, E&E News (July 17, 2017) ("Oil and gas companies say they're complying with U.S. EPA's methane rule for new wells . . . .").

For these reasons, EPA's proposal to stay the LDAR requirements is ungrounded in the relevant statutory considerations, is arbitrary and capricious, and fails as a matter of basic logic. The agency must abandon this proposal and implement the LDAR program according to the 2016 Rule's schedule.

b. ***Stay of professional engineer certifications for closed vent systems.***

EPA's proposal to stay the requirements for closed vent system certification by a professional engineer ("P.E. Certification") is equally baseless. Once again, the agency justifies this stay entirely on its desire to administratively reconsider its earlier determination that P.E. Certification was a component of BSER. And once again, the agency has failed to identify a legally permissible basis to stay the Rule.

In the final Rule, after extensive study and substantive input from the public, EPA included closed vent systems as a possible method of control for centrifugal and reciprocating compressors, pneumatic pumps, and storage vessels. By allowing the use of closed vent systems as a *possible* way of complying with the emission standards for those sources, and predicating their use on operators' demonstrations that such systems were properly designed to accommodate all potential emissions, EPA incorporated P.E. Certification into the affected sources' respective emission standards as an element of BSER for those sources. EPA stated as much in the final Rule, requiring P.E. Certification "to ensure that all emissions from the unit being controlled in fact reach the control device and allow for proper control." 81 Fed. Reg. at 35,871.

EPA does not now suggest that requiring P.E. Certification is inconsistent with the BSER. Rather, it premises the stay only on the Administrator's desire to rethink the requirement based solely on cost considerations, which the agency claims it did not properly evaluate when promulgating the 2016 Rule. *See* 82 Fed. Reg. at 27,647. While costs are one factor involved in a BSER determination, the statute requires consideration of at least eight other factors, *see* p. 15, *supra*, and EPA has cited not one of these other factors as a basis for staying P.E. Certification. Furthermore, EPA has not even reached any conclusion on the costs of the P.E. Certification, but has merely cited a desire to analyze those costs anew, even though it already quantified and evaluated the compliance costs of the 2016 Rule as a whole and found them to be reasonable. And, as discussed above, the Administrator's desire to reconsider a rule—even to reconsider relevant factors—does not provide a basis to stay the rule while such reconsideration is pending or underway.

Furthermore, in the stay proposals, EPA acknowledges that it "has observed instances of inadequate design and capacities of the closed vent system resulting in excess emissions from storage vessels," *id.* at 27,647/2, which is the precise reason EPA originally included P.E. Certification as an element of BSER for closed vent systems. The fact that the agency now states

that "it is not clear how pervasive this issue is," *id.*, is no reason to halt the requirement across the board while EPA studies the issue further. EPA cites no evidence that this issue is *not* pervasive enough to justify P.E. Certification, or any other evidence or reason for departing from its earlier determination. And because the evidence *actually* in the record demonstrates that there is a need for the requirement and that the 2016 Rule is cost-effective on the whole with that requirement in place, the agency's decision to stay the P.E. Certification while it re-evaluates its costs in isolation is arbitrary and capricious. Furthermore, the fact that the proposed rule does not identify any concrete examples of problems from the implementation of this requirement—which has been in effect for over a year at this point—reiterates the clear fact that EPA's proposed stay is unnecessary and unreasonable.

Therefore, EPA cannot justify its proposal to stay the Rule's P.E. Requirements for *any* period of time, let alone for over two years.

c. ***Stay of pneumatic pump standards***.

In the Final Rule, after extensive study and public input, EPA provided an exemption for certain pneumatic pumps at non-"greenfield" sites, but only if a professional engineer certifies that it is "technically infeasible" to control emissions from such pumps. 40 C.F.R. § 5393a(b)(5). EPA now seeks to stay *all* standards for pneumatic pumps pending reconsideration, claiming (once again, incorrectly, *see Clean Air Council*, 2017 WL 2838112 at *8-9) that the terms "technical infeasibility" and the "greenfield" were not proposed. EPA does not, however, point to any reason to conclude that the pneumatic pump standards in the 2016 Rule are not the BSER, or that staying them for two plus years is the BSER.

Nor does EPA provide a rational basis to stay the entirety of the pneumatic pump requirements to address this alleged issue. The agency contends that delaying the standards for new pumps at *all* well sites is an appropriate response to the problem that a fraction of pumps at *existing* well sites only will pursue an exemption for technical infeasibility that the agency now believes could be more clearly drafted. 81 Fed. Reg. at 27,647-48. EPA does not explain why a stay of any degree is justified under the facts in the record or the relevant statutory factors, let alone a stay that covers all pneumatic pumps as opposed to just those that would be subject to the relevant exemption. As with the P.E. Certification requirement, this provision has been in effect for over a year, but the proposed rule points to no evidence that the allegedly defective exemption process has been a significant obstacle to the implementation of the pneumatic pump standards, or that it is more sensible for EPA to stay these provisions while it clarifies the exemption rather than enforce them as finalized. And EPA has not explained why its proposed stay should rationally extend to pneumatic pumps at brand new well sites (i.e., "greenfields"), to which the exemption in question does not apply. EPA's proposed stay of the Rule's pneumatic pump standards is, therefore, arbitrary and capricious.

D. EPA fails to explain why it has changed its prior position that the 2016 Rule was reasonable, cost-justified, and should go into effect.

In developing the 2016 Rule, EPA did an unusually deep dive into the technical details of the regulated source category. Prior to proposing those regulations, EPA took the extraordinary

step of issuing white papers for peer review and public input to facilitate a more complete understanding of emerging data on emissions and controls for oil and gas facilities. As the agency explained in its proposal for the 2016 Rule, "the information gained through [the white paper] process has improved the EPA's understanding of the methane and VOC emissions from these sources and the mitigation techniques available to control them." 80 Fed. Reg. at 56,595. After evaluating more than 900,000 public comments on its proposal and holding three public hearings, EPA issued the 2016 Rule, finding that it "has a rational basis for concluding that GHGs from the oil and natural gas source category, which is a large category of sources of GHG emissions, merit regulation under CAA section 111." 81 Fed. Reg. at 35,842. In addition, EPA found that the 2016 Rule would achieve cost-effective emission reductions and that the rule's benefits outweigh its costs. *Id.* at 35,827. The 2016 Rule reflects EPA's conclusions that the standards established therein satisfy the Clean Air Act's legal requirements, are a sound policy to address harmful emissions from the sector in a cost-effective manner, and that compliance is achievable as a practical matter.

The proposed rule now seeks to reverse those conclusions without identifying a reasoned basis for doing so. Suspending regulations pending a new notice and comment process "is a paradigm of a revocation" and represents "a 180 degree reversal of [the agency's] 'former views as to the proper course.'" *Public Citizen*, 733 F.2d at 98 (quoting *State Farm*, 463 U.S. at 41). Lacking a "good reason" for its change in course and "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy," EPA's reversal is arbitrary and capricious. *Fox Television Stations*, 556 U.S. at 515. This is especially true in light of the unusually thorough process by which EPA promulgated the 2016 Rule, and the remarkably glib manner in which it now seeks to stay key parts of it.

For example, in the 2016 Rule, EPA carefully assessed the ability of affected sources to comply with each particular requirement, including the time needed for sources to implement measures like the leak detection and repair requirements. *See* 81 Fed. Reg. at 35,859. With respect to the requirement to obtain a P.E. Certification to support an exemption for certain pneumatic pumps, EPA similarly gave full consideration in the 2016 Rule to the time needed to implement the provision. *Id.* at 35,851. The proposed delay upends these and other thoroughly supported findings without even engaging with the 2016 Rule's reasoning, much less providing a "good reason" for its reversal in policy and "reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy." *Fox Television Stations*, 556 U.S. at 515. The law does not permit EPA to sweep away its 2016 conclusions without adequately justifying that reversal. *See id.* at 537 ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past.") (Kennedy, J., concurring). Because EPA has done that here, its stay proposals are arbitrary and unlawful.

E. EPA's proposal only looks at the cost savings of the proposed stays, not foregone benefits.

The proposed stays are arbitrary and capricious for another reason: EPA only looks at the costs to industry of the 2016 Rule, not the foregone benefits to the public that would be the direct results of the proposed stays. In describing the impact of these stays, EPA provides a quantitative analysis of the cost savings to industry it alleges will occur. 82 Fed. Reg. at 27,649 tbls. 1-3. Yet

it ignores the harms from increased emissions that will also result, despite acknowledging the inevitability of those adverse impacts. *Id.* at 27,648. In failing to consider the drawbacks of EPA's preferred policy outcome, the proposed stays are flagrantly arbitrary and capricious. *See Michigan v. EPA*, 135 S.Ct. 2699, 2707 (2015) ("[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."); *Global Tel-Link v. FCC*, 859 F.3d 39, 55-56 (D.C. Cir. 2017) (setting aside as arbitrary and capricious an "implausible" and "hard to fathom" agency decision "[i]gnoring costs that the Commission acknowledges to be legitimate"); *State of N.Y. v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992) (remanding rule where agency failed to explain how economic benefits would justify foregoing the promised air benefits); Circular A-4 at 19 (instructing agencies to monetize "foregone benefits" when calculating the costs and benefits of the alternatives under consideration).

EPA's failure is particularly egregious in this case: by its own terms, the purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," 42 U.S.C. § 7401(d)(1), yet EPA has turned a blind eye to the fact its proposal will *harm* the nation's air resources and *injure* public health and welfare. It is not that EPA disputes this fact; it simply takes no action to address it, merely stating that "[a]lthough there would be foregone benefits as a result of this proposed delay, a quantitative estimate of this effect is not currently available, and therefore the associated foregone benefits are not presented." 82 Fed. Reg. at 27,648. If critical data is "not currently available," it is the agency's duty to collect that data or to hold off on implementing its preferred policy. EPA's attempt to sidestep this duty only betrays the unlawful nature of the proposed action.

Further highlighting EPA's flawed analysis is the fact that the data *is* available in this case. For assessment of costs to industry, EPA relied on the 2016 Rule's Regulatory Impact Analysis ("RIA"). 82 Fed. Reg. at 27,648-50. This very same document includes estimates of the Rule's emission reduction benefits. EPA offers no explanation for why it used the RIA to estimate the proposed stays' cost savings but not to evaluate its negative emission impacts, baselessly concluding that such data is "not currently available." The calculation of negative emission impacts is as readily available and no more complicated than the assessment of costs to industry, as evidenced by Dr. Lyon's analysis described at p. 6, *supra*. As explained above, reasoned decisionmaking requires EPA to look at both the benefits and burdens of its proposed course of action. EPA's failure to do so here is arbitrary and capricious.[18]

[18] Indeed, even with respect to cost savings, EPA's "suspend now, revise, and explain later" approach renders it unable to give a realistic assessment of the cost savings, much the less foregone benefits, beyond the two-year horizon. EPA asserts that "[c]osts and benefits for each year after 2019 remain unaffected," 82 Fed. Reg. at 27,648, but that is only true if EPA chooses to retain the 2016 Rule as promulgated. And if it does so, it would mean critical health and safety protections were delayed for no good reason. The same is true of EPA's assertion regarding that any disproportionate effect on children would be limited to the two-year period of the stay. *Id.* at 27,650. EPA must give the good reasons *first* in order to inform the public of the real consequences of its actions. It may not defer explaining that impact until some later date after the agency studies the issue and figures out what it wishes to do.

The proposals also provide no notice to the public of the negative impacts of the stays except for the following remarkable admission: "EPA believes that the environmental and safety risk addressed by this action may have a disproportionate effect on children." *Id.* at 27,650. Amazingly, the agency rationalizes its failure to actually evaluate this disproportionate impact by asserting that "[a]ny impacts on children's health caused by the delay in the rule will be limited, because the length of the proposed stay is limited," and so "it is more appropriate to consider the impact on children's health in the context of any substantive changes proposed as part of reconsideration," rather than in the context of the proposed stays. *Id.* In other words, EPA reasons that because the stays may disproportionately harm children for a period of two years and three months as opposed to *permanently*, an analysis of that harm is simply unnecessary at this time. It should go without saying that where any agency proposal would disproportionately harm a vulnerable population for multiple years, the agency must evaluate that harm *before* it takes action. EPA's flawed logic makes this observation unfortunately necessary.

IV. EPA's Proposed Three-Month Stay Is Arbitrary and Capricious, and Inappropriately Circumvents the Limitations of the Congressional Review Act.

Alongside the two-year stay, EPA has proposed an additional three-month stay of the same provisions of the 2016 Rule, which would take effect immediately upon finalization. 82 Fed. Reg. at 27,641. The agency's rationale for the three-month stay is as follows: because the two-year stay "would likely be determined to be a major rule under the Congressional Review Act," it "will not take effect until sixty days after publication or after Congress receives the rule report, whichever is later." *Id.*; 5 U.S.C. § 801(a)(3). Therefore, "there may potentially be a gap" between EPA's 90-day administrative stay under section 307(d)(7)(B), which would have ended on September 1, and the two-year stay, which cannot take effect until at least 60 days after the final rule is published. 82 Fed. Reg. at 27,641. EPA reasons that this additional three-month stay, which would presumably *not* subject to the Congressional Review Act's 60-day waiting period, is needed in order to "avoid such a potential gap" and the resulting "unnecessary burden and confusion as to what regulatory requirements are in effect and what regulated entities must do during the reconsideration proceeding." *Id.*

This stated rationale for the proposed three-month stay is fatally flawed for two reasons. First, it relies upon outdated and incorrect facts. As discussed above, on July 3, the D.C. Circuit struck down the 90-day stay as unlawful under section 307(d)(7)(B). *Clean Air Council,* 2017 WL 2838112, at *5-9. The en banc court issued the mandate on July 31, 2017. Mandate, *Clean Air Council v. EPA*, No. 17-1145, ECF Doc. 1686664 (D.C. Cir. July 31, 2017). In light of this holding and mandate issuance, there is simply no "gap" for the three-month stay to bridge: the 2016 Rule is currently in effect, as the Clean Air Act compels, so the agency's rationale for the stay has simply disappeared. There is no more "confusion as to what regulatory requirements are in effect and what entities must do during the reconsideration proceeding:" the D.C. Circuit has ruled that the entire Rule is in effect and that regulated entities must comply with it. Nor can the three-month stay be justified as removing any "unnecessary burden:" because the 2016 Rule is currently applicable, any "burden" of compliance that oil and gas companies face is not only not "unnecessary," but is required under the terms of the Clean Air Act. EPA's factual basis for the three-month therefore no longer exists.

Second, the three-month stay would represent an improper attempt to circumvent the clear language of the Congressional Review Act. EPA openly acknowledges that the statute's 60-day waiting period before a major rule can take effect would apply to the two-year stay. 82 Fed. Reg. at 27,641. But because the agency doesn't want to abide by this requirement, and would instead like the stay to take effect immediately upon finalization, it is attempting an end-run around the statute by tacking onto the two-year stay an additional (and otherwise identical) three-month stay that would not, by itself, count as a major rule. In practical terms, these two proposals represent a single regulatory action and should not be analyzed separately for the purposes of the Congressional Review Act.

In an analogous context, courts have held that agencies may not evade the National Environmental Policy Act's requirements for environmental review of major federal actions by parceling out those actions into separate and discrete projects, none of which alone would have major impacts but which would have a major cumulative impact. *See, e.g., Coal. on Sensible Transp., Inc. v. Dole,* 826 F.2d 60, 68 (D.C. Cir. 1987) ("Agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without 'significant' impact."); *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 50 (D.C. Cir. 2015) ("[A]n agency cannot segment NEPA review of projects that are connected, contemporaneous, closely related, and interdependent.") (internal quotations omitted). Where a project lacks "substantial independent utility" vis-à-vis a related project—meaning it will not "serve a significant purpose even if a second related project is not [pursued]"—courts generally find segmentation to be unlawful under NEPA. *Hammond v. Norton*, 370 F. Supp. 2d 226, 247 (D.D.C. 2005); *see also id.* at 248 (holding that agency's determination of pipeline project's independent utility was "unsupportable" and could not justify segmentation under NEPA); *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1317 (D.C. Cir. 2014) (same).

Similarly, EPA should not be permitted to segment its action staying the 2016 Rule into two distinct rulemakings in order to bypass the Congressional Review Act's 60-day waiting period. In this case, the proposed three-month rule lacks a substantial independent utility: its sole purpose is to extend the effect of the longer two-year stay into the time period during which the latter rule cannot legally take effect. In other words, by EPA's own admission, the three-month stay has no independent utility other than nullifying the terms of the Congressional Review Act and extending the practical effect of the three-year stay beyond its lawful scope. For this reason as well, the proposed three-month stay is unlawful, and EPA must not finalize it.

Conclusion

For the reasons discussed above, EPA's proposed stays of the 2016 Rule are unauthorized under the governing statutes and lack a reasoned basis in both law and fact. As such, they are arbitrary and capricious and would be unlawful if finalized. The agency must therefore abandon these proposals and commit to fully enforcing and implementing *all* provisions of the 2016 Rule according to schedule and without further delay.

Respectfully submitted,

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