

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

Air Alliance Houston, <i>et al.</i> ,)	
)	
<i>Petitioners,</i>)	
)	
v.)	Case No. 17-1155
)	
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
<i>Respondents.</i>)	

PETITIONERS’ NON-BINDING STATEMENT OF ISSUES

Pursuant to this Court’s Order of June 16, 2017, Petitioners Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, and Utah Physicians for a Healthy Environment submit the following non-binding statement of issues to be raised:

1. EPA’s final rule (the “Delay Rule”) postpones until February 19, 2019, the effective date of the entire set of regulations promulgated on January 13, 2017 (originally effective March 14, 2017), at 82 Fed. Reg. 4954 and entitled

“Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act” (the “Chemical Disaster Rule”), based on reconsideration petitions and a reconsideration proceeding EPA convened pursuant to 42 U.S.C. § 7607(d)(7)(B). Does the Delay Rule, which postpones the effective date by an additional twenty months beyond a prior 3-month postponement based on the same reconsideration proceeding, violate § 7607(d)(7)(B), which prohibits the postponement of a rule’s effective date for more than three months based on such reconsideration?

2. EPA cites only 42 U.S.C. § 7607(d) as authority for the Delay Rule. Because EPA has no rulemaking authority other than that which is provided to it by statute, and because § 7607(d) provides no rulemaking authority for EPA to change or delay the effective date of a previously promulgated rule, much less any authority that supersedes the specific time limitation in § 7607(d)(7)(B) on postponement of effective dates, is EPA’s Delay Rule *ultra vires*?

3. The Delay Rule modifies the Chemical Disaster Rule, which was promulgated pursuant to 42 U.S.C. § 7412(r), and is constructively a 20-month repeal of that rule. Does the Delay Rule violate § 7412(r) by failing to consider or satisfy the chemical disaster prevention and expeditious compliance requirements of § 7412(r) when amending and effectively revoking the Chemical Disaster Rule (e.g., that such regulations “shall have an effective date . . . assuring compliance as

expeditiously as practicable”; that such regulations shall “provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances and for response to such releases”)?

4. EPA made fact-findings and determinations regarding many failures of the pre-existing rule and the need for the Chemical Disaster Rule to take effect and prevent and reduce the grave harm caused by accidents at regulated chemical facilities, particularly to workers, first-responders, and fence-line community members. Is the Delay Rule arbitrary and capricious, or otherwise not in accordance with law, because it nullifies the Chemical Disaster Rule for 20 months while disregarding those factual findings, and failing to acknowledge or provide the requisite explanation based on the record for contradicting them and removing all of the Rule’s health and safety protections?

5. EPA set the original effective date to trigger each of the compliance dates for the Chemical Disaster Rule, which ranged from March 14, 2018 to March 15, 2021, based on the time it found necessary for owners and operators to prepare for and ultimately achieve full compliance with that rule. The Delay Rule postpones by nearly two years the original effective date, pushing it 11 months past the March 14, 2018 compliance date for certain provisions of the Chemical Disaster Rule and revoking the requirement to take immediate steps to prepare to achieve compliance with all other provisions of the Chemical Disaster Rule. Does

EPA's failure to acknowledge or justify these resulting *de facto* changes to each of the compliance dates in the Chemical Disaster Rule, its failure to provide the more detailed explanation needed to change such fact-findings, and/or its refusal to take notice and comment on those *de facto* changes to the Chemical Disaster Rule, render the Delay Rule arbitrary and capricious, or otherwise not in accordance with law?

6. Is the Delay Rule arbitrary and capricious, or otherwise not in accordance with law because it is based on an unlawful reconsideration proceeding that EPA convened without identifying any objection to the Chemical Disaster Rule that either "arose after the period for public comment" or was "impracticable" to raise (and not raised) during that period, nor that is "of central relevance" to that rule?

7. Is the Delay Rule arbitrary and capricious, or otherwise not in accordance with law because it suspends and nullifies the entirety of a final rule designed to protect public health and safety *now*, based on the speculation that EPA *may in the future* undertake a new rulemaking to change some part of that rule based on some potential and hypothetical future ground (which EPA has not yet identified, and on which EPA has not yet sought or considered public comment, much less made any final decision) and the further speculation that such a change would actually remove the need for such compliance?

8. Is the Delay Rule arbitrary and capricious, or otherwise not in accordance with law because: (1) EPA provides no reasoned and lawful explanation for how Administrator Pruitt's prior representation of and advocacy for the particular position of one of the reconsideration petitioners in this matter (the State of Oklahoma) does not disqualify him from delaying, reconsidering, or taking other action in regard to the Chemical Disaster Rule; and (2) rather than resulting from the legally required, fair and objective process of reasoned decisionmaking in the public interest, including a meaningful opportunity for public participation and the rational consideration of public comments, the Delay Rule was issued by an EPA Administrator with an "unalterably closed mind," *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011)?

DATED: July 11, 2017

Respectfully submitted,

/s/ Gordon E. Sommers

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2017, I have served the foregoing **Petitioners' Non-Binding Statement of Issues** on all registered counsel through the court's electronic filing system (ECF).

/s/ Gordon E. Sommers
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