ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1222, Consolidated with No. 19-1227

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

ENVIRONMENTAL DEFENSE FUND,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITIONERS' PROOF BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel provides the following information on behalf of the petitioners in these consolidated cases.

A. Parties and *Amici*

Petitioners:

In Case No. 19-1222, petitioner is the Environmental Defense Fund. In accordance with Circuit Rule 26.1, Environmental Defense Fund states that it is a nonstock corporation that does not issue shares or debt securities, and it has no parent companies. Environmental Defense Fund is a national non-profit organization that links science, economics, and law to create innovative, equitable, and cost-effective solutions to urgent environmental problems. Environmental Defense Fund is organized under the laws of the State of New York with its headquarters in New York City.

In Case No. 19-1227, petitioners are the States of California (by and through Attorney General Xavier Becerra and the California Air Resources Board), Illinois, Maryland, New Jersey, New Mexico, Oregon, Rhode Island, and Vermont, and the Commonwealth of Pennsylvania (by and through Attorney General Josh Shapiro and its Department of Environmental Protection).

Respondents:

The United States Environmental Protection Agency is a respondent in Case

Nos. 19-1222 and -1227. Andrew R. Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency, is a respondent in Case No. 19-1227.

Amici Curiae:

No individuals or entities have yet filed notices of intent to appear as *amicus curiae*.

B. Ruling Under Review

These consolidated petitions challenge the final regulatory action taken by Respondents titled, "Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills," 84 Fed. Reg. 44,547 (Aug. 26, 2019) (JA___).

C. Related Cases

Counsel is not aware of any related cases.

/s/ Julia K. Forgie
JULIA K. FORGIE

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* Authorities chiefly relied upon are marked with an asterisk

GLOSSARY

EPA	United States Environmental Protection Agency
EDF	Environmental Defense Fund
State Petitioners	The States of California (by and through Attorney General Xavier Becerra and the California Air Resources Board), Illinois, Maryland, New Jersey, New Mexico, Oregon, Rhode Island, and Vermont, and the Commonwealth of Pennsylvania (by and through Attorney General Josh Shapiro and its Department of Environmental Protection)
Delay Rule	84 Fed. Reg. 44,547 (Aug. 26, 2019)
Landfill Emission Guidelines	81 Fed. Reg. 59,276 (Aug. 29, 2016)
Section 110	42 U.S.C. § 7410
Section 111	42 U.S.C. § 7411

INTRODUCTION

Landfills emit significant quantities of climate-changing methane as well as health-harming volatile organic compounds and hazardous air pollutants. Consistent with its mandate under the Clean Air Act, the United States Environmental Protection Agency ("EPA") set standards in 2016 that the agency explained would "significantly reduce" these harmful emissions. These standards required every state in the nation to have an implementation plan in place by November 2017.

Since May 2017, however, and under the Trump administration, EPA has deployed a series of tactics to delay implementing the standards, without ever providing a valid reason for doing so. EPA first stayed the implementation deadlines for 90 days and then considered a proposal to stay the deadlines—some of which were already overdue—even longer. Ultimately, EPA decided to simply ignore the deadlines, broadcasting to states and the regulated industry that there was no need to comply, and shrugging off its duty to act by telling this Court that the "deadlines have come and gone" without any effort by the agency to meet them. After many of the same petitioners here sued to enforce those duties in district court, that court required EPA to fulfill its mandatory duty to implement the standards no later than November 6, 2019. EPA instead issued this final rule, retroactively delaying its long-past deadlines by several years. JA___ (84 Fed. Reg. 44,547 (Aug. 26, 2019) ("Delay Rule")).

This latest step in EPA's campaign to avoid implementing its own emission-reduction standards is unlawful. EPA has ignored the purpose of the Clean Air Act, provided no valid justification for delaying these crucial protections, and put forward rationales that run directly contrary to the facts. The agency has also brushed aside evidence undermining its rationales and completely ignored the Delay Rule's substantial adverse impacts, including environmental and public health impacts. This Court should vacate the Delay Rule and require EPA to implement these long-overdue protections.

JURISDICTIONAL STATEMENT

On October 23, 2019 (Case No. 19-1222), and October 25, 2019 (Case No. 19-1227), Petitioners timely sought review of EPA's Delay Rule, published at 84 Fed. Reg. 44,547 (Aug. 26, 2019) (JA___). Because the Delay Rule is a nationally applicable final rule, this Court has jurisdiction to review EPA's Delay Rule under 42 U.S.C. § 7607(b)(1).

ISSUE PRESENTED

Whether EPA acted arbitrarily and capriciously when it issued a final rule delaying critical health and welfare protections in contravention of congressional intent, without a reasoned justification supported by the record, and without considering the impacts of its delay on the environment and public health, including on environmental justice communities and tribes.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.[1]

STATEMENT OF THE CASE

The Delay Rule extends, by multiple years, EPA's already-overdue deadlines for implementing standards that limit emissions of greenhouse gases and other harmful air pollutants from existing municipal solid waste landfills. Prior regulations required that every covered landfill in the country be subject to a plan implementing these standards by November 2017; the Delay Rule, published in August 2019, delays this timeline until at least August 2021.

I. AIR POLLUTANT EMISSIONS FROM LANDFILLS

Municipal solid waste landfills are a significant source of air pollutants, including methane (a powerful greenhouse gas), smog-forming volatile organic compounds, and cancer-causing hazardous air pollutants.

A. Methane Emissions

Municipal solid waste landfills are the third largest anthropogenic source of methane emissions in the United States. Methane and other greenhouse gases cause or contribute to climate change that endangers public health and welfare. *Cf.* 74 Fed.

[1] Citations to Petitioners' Addendum, which includes standing declarations, are designated "ADD."

Reg. 66,496 (Dec. 15, 2009)[2] (EPA finding that greenhouse gas emissions from new motor vehicles and engines endanger public health and welfare because of their contribution to climate change). Among greenhouse gases, methane is of particular concern because, although it remains in the atmosphere for less time than carbon dioxide, it is 84 to 87 times more powerful over a 20-year timeframe. JA___ (Multistate comments at 5).

There is overwhelming and incontrovertible evidence that the United States is already experiencing the deleterious impacts of climate change. In November 2018, EPA and twelve other federal agencies issued a comprehensive assessment detailing the effects of climate change on human health and welfare and the United States economy. JA___ (U.S. Global Change Research Program, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States* 92 (Nov. 23, 2018) (*National Assessment*)). These effects include "[h]igher temperatures, increasing air quality risks, more frequent and intense extreme weather and climate-related events, increases in coastal flooding, disruption of ecosystem services, and other

[2] Courts "may properly take judicial notice" of "matters of public record which could be unquestionably demonstrated from easily accessible sources of indisputable accuracy," like Federal Register entries and publicly available agency documents. *Joseph v. U.S. Civil Serv. Comm'n*, 554 F.2d 1140, 1147 & n.12 (D.C. Cir. 1977); *see Nebraska v. EPA*, 331 F.3d 995, 999 (D.C. Cir. 2003) (in challenge to agency regulation, taking "judicial notice of information on the EPA's website"). Likewise, "[i]t is settled law that the court may take judicial notice of other cases including the same subject matter or questions of a related nature between the same parties." *Fletcher v. Evening Star Newspaper Co.*, 133 F.2d 395, 395 (D.C. Cir. 1942).

changes . . . ." JA___ (*Id.* at 55). In California, for example, annual mean temperatures have increased by about 2.2 degrees Fahrenheit since 1895. *See* JA___ (Multistate comments, Appx. A at A-4); ADD050–51 (Declaration of Dr. Rupa Basu, Exhibit A (Cal. Envtl. Protection Agency, Office of Envtl. Health Hazard Assessment, *Indicators of Climate Change in California* (May 2018) at 55–56)). And studies have documented increased mortality risk associated with extreme heat events. *See, e.g.*, JA___ (Multistate comments, Appx. A at A-3); ADD033 (Basu Decl. ¶¶ 3–4). Sea level rise increases risks of inundation from flooding and is already accelerating coastal erosion, harms the Supreme Court has recognized "will only increase over the course of the next century," *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007). And the number and intensity of wildfires has increased in tandem with rising temperatures. *See* JA___ (Multistate comments, Appx. A at A-2); ADD065 (Basu Decl. Exh. A (*Indicators of Climate Change in California* at 185)).

These climate impacts have already imposed significant economic costs in this country. The National Assessment reported that the "United States has experienced 44 billion-dollar weather and climate disasters since 2015 (through April 6, 2018), incurring costs of nearly $400 billion." JA___ (*National Assessment* at 66 (explaining further that these "extreme events have already become more frequent, intense, widespread, or of longer duration" due to climate change)). And the wide-ranging costs of climate change on states are likely to increase.

The *timing* of greenhouse gas emission reductions is critical to any climate response. The National Assessment confirms that "more immediate and substantial global greenhouse gas emissions reductions . . . would be needed to avoid the most severe consequences [of climate change] in the long term." JA___ (*Id.* at 27); *see also* JA___ (*id.* at 26 ("Future risks from climate change depend primarily on decisions made today.")). Indeed, immediate reductions in greenhouse gas emissions would yield outsized returns: "Early and substantial mitigation offers a greater chance for achieving a long-term goal, whereas delayed and potentially much steeper emissions reductions jeopardize achieving any long-term goal given uncertainties in the physical response of the climate system to changing atmospheric [carbon dioxide], mitigation deployment uncertainties, and the potential for abrupt consequences." JA___ (*Id.* at 1351). And immediate reductions in methane emissions are "particularly" important. JA___ (International Panel on Climate Change, *Special Report on Global Warming of 1.5° C* at 95 ("Limiting warming 1 to 1.5° C implies reaching net zero CO_2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO_2 forcers, particularly methane.")).

B. Non-Methane Emissions

Landfills also emit significant quantities of volatile organic compounds and hazardous air pollutants that harm human health and welfare. JA___, ___ (81 Fed. Reg. 59,276, 59,281, 59,334 (Aug. 29, 2016)). Volatile organic compounds react with sunlight to form ground-level ozone, or smog, short-term exposure to which can

cause chest pain, coughing, and throat irritation. *Id.*; JA___–___ (Multistate comments at 5–6); JA___–___ (EDF comments at 16–17). Long-term exposure to ozone can cause decreased lung function and chronic obstructive pulmonary disease. JA___ (81 Fed. Reg. at 59,281); JA___–___ (Multistate comments at 5–6); JA___–___ (EDF comments at 16–17); *see also* 80 Fed. Reg. 65,292, 65,322 (Oct. 26, 2015) (detailing adverse health impacts of ozone exposure, particularly for children, older adults, and people with lung diseases). Recent evidence suggests that ozone exposure may be associated with increased mortality, strokes, heart disease, respiratory diseases such as asthma and reduced lung function, and some reproductive and developmental effects. *See* 80 Fed. Reg. at 65,308–09.

Hazardous air pollutants emitted from landfills include known carcinogens benzene and formaldehyde. JA___ (81 Fed. Reg. at 59,281). There is no safe exposure threshold to these air pollutants, which increase the risk of many cancers and other adverse health impacts, including respiratory and neurological illnesses. *See* 81 Fed. Reg. 35,824, 35,837 (June 3, 2016); JA___ (EDF comments at 16).

These harmful landfill emissions have a disproportionate impact on low-income and minority communities. According to EPA, the impacts of emissions from landfills "can be felt many miles away," and a 2016 EPA analysis demonstrated that "a higher percentage of communities of color and people without high school diplomas liv[e] [within three miles of a landfill] than national averages." JA___ (81 Fed. Reg. at 59,312).

II. STATUTORY AND REGULATORY BACKGROUND

A. Section 111 of the Clean Air Act and EPA's Implementing Regulations

Congress enacted the Clean Air Act (or "Act") "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(b)(1). Section 111 of the Act, *id.* § 7411, "require[s] EPA and the States to take swift and aggressive action" to control air pollution from stationary sources. 40 Fed. Reg. 53,340, 53,342–43 (Nov. 17, 1975). Section 111 mandates that EPA directly regulate new sources of air pollution and issue standards for existing sources. 42 U.S.C. § 7411(b), (d).

For existing sources, like those at issue here, "[t]he [EPA] Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title [Clean Air Act Section 110]." *Id.* § 7411(d)(1). Under the Section 111 program, after EPA develops or amends standards—called "emission guidelines"—for a class of sources, states must submit to EPA plans to implement those standards for sources within their borders. *Id.* EPA must review those plans and approve or disapprove them. *Id.* If a "State fails to submit a satisfactory plan," Section 111 requires the Administrator to promulgate a federal plan for that state to meet the emission guidelines. *Id.* § 7411(d)(2). Federal plans typically "prescribe emission standards of the same stringency as the corresponding" standards that EPA has prescribed. 40 C.F.R. § 60.27(e)(1).

In 1975, EPA issued timing regulations mandating that (1) states submit plans within nine months after EPA issues emission guidelines, (2) EPA review those state plans within four months of submission, and (3) EPA issue a federal plan for any states that did not submit approvable state plans at any time within six months of states' deadline to submit plans. 40 Fed. Reg. at 53,340–41; 42 U.S.C. § 7411(d)(2). In issuing its initial timing regulations, EPA explained that Congress had been "dissatisfied with air pollution control efforts . . . and was convinced that relatively drastic measures were necessary to protect public health and welfare." 40 Fed. Reg. at 53,342–43. Section 111 therefore "required EPA and the States to take *swift and aggressive action*" to reduce pollution. *Id.* (emphasis added).

B. 2016 Landfill Emission Guidelines

In 1996, EPA first listed landfills under Section 111 as a source category that contributes significantly to air pollution that may reasonably be anticipated to endanger public health and welfare, and concurrently issued guidelines to control harmful emissions from landfills. 61 Fed. Reg. 9905 (Mar. 12, 1996). In 2016, EPA strengthened those guidelines for existing municipal solid waste landfills. JA___ (*Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, 81 Fed. Reg. 59,276, 59,281 (Aug. 29, 2016)) ("Landfill Emission Guidelines" or "Guidelines"). Among other things, these Guidelines lowered the threshold for control, requiring landfills that emit more than 34 megagrams (roughly 37 tons) of non-methane organic

compounds per year[3] to install emission control systems. *Id.* at 59,278. The strengthened Landfill Emission Guidelines remain in place to date.

EPA found in 2016 that the Landfill Emission Guidelines would "significantly reduce emissions" of methane and other pollutants, including harmful volatile organic compounds and hazardous air pollutants. *Id.* at 59,279–80 (standards would reduce excess annual emissions of 1,810 metric tons of ozone-forming volatile organic compounds and 285,000 metric tons of methane). In total, the Landfill Emission Guidelines' projected annual emissions reductions were equivalent to 7.1 million metric tons of carbon dioxide emissions, which equates to removing more than 1.5 million cars from the roads each year. *See* JA___ (Multistate comments at 2). EPA estimated in its 2016 Regulatory Impact Analysis accompanying the Landfill Emission Guidelines that from 2019 (the first year the Guidelines were expected to yield emission reductions) to 2030, net annual benefits would be between $380 and $480 million (in 2012 dollars).[4]

In the Landfill Emission Guidelines, EPA instructed states to submit plans to implement the Guidelines within nine months, *i.e.*, by May 30, 2017. JA___ (81 Fed.

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[3] Landfill gas is made up of non-methane organic compounds, including volatile organic compounds and hazardous air pollutants, and methane. By articulating emission limits in terms of non-methane organic compounds, the standards limit emissions of landfill gas and, therefore, all of its components, including methane.

[4] JA___ (EDF comments at 17 (reproducing tables 3-13, 3-14, 6-7 from 2016 Regulatory Impact Analysis, https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0451-0225)).

Reg. at 59,313 (codified at 40 C.F.R. § 60.30f(b) (2016))). EPA was then required to review and approve state plans within four months—i.e., by September 30, 2017—and to promulgate a federal plan within six months—i.e., by November 30, 2017—for states without EPA-approved plans. *See id.* at 59,304. Thus, if EPA had complied with its legal obligations, by November 2017 every state would have had a new plan to reduce landfill emissions (either an approved state plan or a federal plan), and sources would already be achieving necessary reductions. Landfills subject to the Landfill Emission Guidelines must install required emission control systems within 30 months of submitting their first emission reports under those Guidelines. *See id.*

III. EPA'S REFUSAL TO IMPLEMENT THE LANDFILL EMISSION GUIDELINES AND SUBSEQUENT LITIGATION

Rather than implement the Landfill Emission Guidelines as required by law, in May 2017, EPA embarked on a campaign to evade its mandatory duties. Weeks before the May 30th state plan deadline, EPA notified industry groups that it intended to stay the Landfill Emission Guidelines "in their entirety" for 90 days. *See* 82 Fed. Reg. 24,878, 24,879 (May 31, 2017) (describing letter sent on May 5). EPA also emailed state officials days before the state plan submission deadline to assure them that "states don't have to do anything now." JA___ (EDF comments, Appx. at 403–04 (email from EPA to state regulators in Louisiana, New Mexico, Oklahoma, Texas, Arkansas, May 24, 2017)). On May 31, the day after state plans were due, EPA issued a 90-day stay of the Guidelines. 82 Fed. Reg. 24,878. The stay expired in August 2017

and, according to EPA, ultimately had no effect on any deadline. *Natural Res. Defense Council v. Pruitt*, 2018 WL 1052622, No. 17-1157 (D.C. Cir. Jan. 31, 2018) (challenge to EPA's 90-day administrative stay voluntarily dismissed after EPA confirmed that the stay did not affect any of the implementation deadlines).

In the summer of 2017, EPA considered proposing a rule to further stay the deadlines. JA___ (EDF comments at 2). Instead, it opted to simply not follow the law. Although three states had submitted state plans, EPA's September 2017 deadline to review them and the November 2017 deadline to promulgate a federal plan passed without any indication that EPA ever planned to implement the Landfill Emission Guidelines. Indeed, EPA conceded in this Court in January 2018 that "[these deadlines] . . . have come and gone," and "EPA has neither approved nor disapproved the state plans that were timely submitted, nor has EPA promulgated any federal plans." Resp'ts Init. Br. at 36, 37, in *Natural Res. Defense Council v. Pruitt*, 2018 WL 1052622, No. 17-1157, ECF No. 1714147 (D.C. Cir. Jan. 22, 2018). At the same time, EPA broadcast to states and the regulated industry through a statement to the press that "any states that fail to submit plans . . . 'are not subject to sanctions,'" and that the agency "do[es] not plan to prioritize the review of [submitted] state plans," nor was EPA "working to issue a Federal Plan for states that fail to submit a state plan."[5]

[5] JA___ (EDF comments at 4 (quoting Cody Boteler, *EPA Offers Public Clarification on Timeline for NSPS, EG Landfill Rules Months After Stay Expires*, WASTE

On May 31, 2018, eight states, including most of the State Petitioners here,[6] filed a Clean Air Act citizen suit against EPA in the U.S. District Court for the Northern District of California for its conceded failure to comply with the implementation deadlines. *California v. EPA*, 385 F. Supp. 3d 903 (N.D. Cal. 2019). Environmental Defense Fund intervened in support of the plaintiff States. Although EPA had previously told this Court that "any remedy for EPA's failure to act . . . would lie in district court" under the citizen-suit provision, Resp'ts Init. Br. at 37, in *Natural Res. Defense Council v. Pruitt*, No. 17-1157, ECF No. 1714147 (D.C. Cir. Jan. 22, 2018), when the States filed such a citizen suit, EPA sought unsuccessfully to dismiss it for lack of statutory subject-matter jurisdiction. *California v. EPA*, 360 F. Supp. 3d 984 (N.D. Cal. 2018).

Two days before the hearing on EPA's motion to dismiss, and after what the Office of Management and Budget described as a "very rushed" 3-day review process, EPA issued a proposal to retroactively extend the deadlines for implementing the Landfill Emission Guidelines, including extending EPA's deadline for issuing its federal plan until at least August 2021. JA___ (83 Fed. Reg. 54,527 (Oct. 30, 2018) ("Proposed Delay Rule")); JA___ (Office of Management and Budget, *Internal Email*

DIVE (Oct. 31, 2017), https://www.wastedive.com/news/epa-offers- public-clarification-on-timeline-for-nsps-eg-landfill-rules-mon/508484/)).

[6] Of the State Petitioners, only New Jersey did not participate as a plaintiff in the Northern District of California lawsuit.

from Chad Whiteman at 2 (Oct. 16, 2018), EPA-HQ-OAR-2018-0696-0003). EPA then sought unsuccessfully to stay the States' citizen suit. 360 F. Supp. 3d 984.

Finally, in summary judgment briefing, EPA conceded liability and presented a declaration (the "Lassiter Declaration") from an agency official asserting that EPA would need between four and twelve months to review already-submitted state plans, and another twelve months (twice the amount of time permitted by the Landfill Emission Guidelines) to promulgate a federal plan. Declaration of Penny Lassiter, in *California v. EPA*, No. 4:18-cv-03237-HSG, Dkt. 92-1 (N.D. Cal. Feb. 19, 2019).

In May 2019, after carefully considering the Lassiter Declaration alongside other evidence and briefing, the district court concluded that it would be "feasible" and consistent with the Clean Air Act for EPA to review already-submitted state plans within four months (by September 6, 2019), and to issue a federal plan for any states without approved state plans within six months (by November 6, 2019). 385 F. Supp. 3d at 916. The court entered a final judgment to that effect from which EPA did not appeal.

Proving the feasibility of the district court's deadlines, EPA began to implement the Landfill Emission Guidelines and timely met initial milestones. First, in late August and early September 2019, EPA approved implementation plans (including partial approval of California's plan) from the five states that had submitted them prior to the district court's judgment. Status Report at 2–3, in *California v. EPA*, No. 4:18-cv-03237-HSG, Dkt. 125 (N.D. Cal. Nov. 5, 2019). Second, on August 22,

2019, EPA proposed a federal plan to govern the remaining states. 84 Fed. Reg. 43,745 (Aug. 22, 2019). In that plan, EPA proposed a straightforward application of the Landfill Emission Guidelines that the agency already had "specifically and explicitly set forth" three years earlier. *Id.* at 43,756 (acknowledging that issuing a federal plan will not require "the exercise of any policy discretion"). EPA received only seven short public comments in this docket, and no public hearing was requested.[7]

IV. EPA'S FINAL DELAY RULE

Just four days after publishing its proposed federal plan, however, EPA finalized the Delay Rule challenged here, which retroactively extended its implementation deadlines. JA___ (84 Fed. Reg. 44,547). Specifically, the Rule delays the already-passed deadline for state plan submission from May 30, 2017, to August 29, 2019—three days *after* the Delay Rule's publication and eight days *before* its effective date. *Id.* Instead of the four months for state plan review contained in the Landfill Emission Guidelines, the Delay Rule grants EPA up to six months to determine whether state plans are complete and twelve additional months to review complete state plans. JA___ (*Id.* at 44,549). Finally, the Rule provides EPA an additional two years, or until August 2021 or later, to promulgate a federal plan—nearly four years after the deadline contained in the Landfill Emission Guidelines and

[7] *See* Docket at https://www.regulations.gov/docket?D=EPA-HQ-OAR-2019-0338.

nearly two years after the deadline set by court order. JA___, ___ (*Id.* at 44,547, 44,549).

EPA based these new deadlines on the agency's recent, separate finalization of revisions to the general Section 111(d) implementing regulations. JA___ (84 Fed. Reg. 32,520 (July 8, 2019)). Those regulatory changes do not apply directly to the Landfill Emission Guidelines, which, although also implemented under Section 111(d), were promulgated long before the regulatory change and contained specific implementation deadlines. But, claiming that implementation of the Landfill Emission Guidelines was "ongoing"—despite the fact that, had EPA complied with the law, their implementation would have long been complete—EPA retroactively extended the implementation deadlines for the Landfill Emission Guidelines to align them with the new deadlines for Section 111(d) emission guidelines. JA___ (84 Fed. Reg. at 44,550).

EPA further maintained that, in light of its experience working with states on implementation plans under a different provision of the Act, Section 110,[8] the new Section 111(d) landfills state plan submission and EPA review deadlines were "realistic" and would minimize the risk of slowing down eventual approval of state plans. JA___ (*Id.* at 44,551). And, although EPA had not appealed the district court's conclusion that a six-month timeline for federal plan promulgation was feasible, and although EPA's federal plan was all but complete, EPA justified significantly

[8] Section 110, 42 U.S.C. § 7410, requires much more complex plans covering stationary and mobile sources across multiple economic sectors within a state.

extending the federal plan deadline on the ground that "the rulemaking requirements [for issuing a federal plan in Clean Air Act] section 307(d)" "involve[] a number of *potentially* time-consuming steps," for a federal plan that "*may* be . . . complex and time-intensive." *Id.* (emphases added).

The Delay Rule had other notable omissions. For one, EPA declined to conduct a Regulatory Impact Analysis of its Delay Rule on the ground that the Rule was purely procedural, and that any emissions costs were "inherently uncertain," but likely minimal. JA___ (*Id.* at 44,553–54). Nor did EPA analyze or even consider the increased emissions resulting from the Delay Rule and the impact of those emissions on public health, including impacts on environmental justice communities and tribes.

V. EPA'S FURTHER ACTIONS TO AVOID IMPLEMENTING THE GUIDELINES

After publishing the Delay Rule, and to avoid finalizing its proposed federal plan by the November 6, 2019 court deadline, EPA sought relief from the district court's final judgment under Federal Rule of Civil Procedure 60(b)(5). The district court denied EPA's request the day before that deadline. *See California v. EPA*, 2019 WL 5722571 (N.D. Cal. Nov. 5, 2019) (Order Denying Rule 60(b) Motion). Taking "all the circumstances into account," *Bellevue Manor Ass'ns v. United States*, 165 F.3d 1249, 1256 (9th Cir. 1999), the district court concluded that EPA had not borne its burden to demonstrate inequity where "EPA undisputedly violated the Old Rule, received an unfavorable judgment, and then issued the New Rule only to reset its

non-discretionary deadline (rather than to remedy its violation)," *California v. EPA*, 2019 WL 5722571 at *2. The district court also observed that EPA was attempting "to erase the commitment it made before and extend the deadline to comply by a period of several years, even while acknowledging that the harms that are the target of the rule are significant." Transcript of Proceedings, in *California v. EPA*, No. 4:18-cv-03237-HSG, Dkt. 122, at 3 (N.D. Cal. Oct. 24, 2019). The district court stayed its judgment—and thus the operative federal plan deadline—for two months to allow EPA to secure a stay pending appeal, which the U.S. Court of Appeals for the Ninth Circuit granted without comment. Order at 1, in *California v. EPA*, No. 19-17480, ECF No. 11558460 (9th Cir. Jan. 10, 2020). That Court heard oral argument on July 17, 2020. *See id.*, ECF No. 11678713. At no time during the post-judgment district court proceedings or in the Ninth Circuit litigation did EPA claim that it was infeasible to comply with the district court's order and immediately finalize its proposed federal plan. To date, however, EPA has not done so.

STANDARD OF REVIEW

This Court must set aside EPA action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 42 U.S.C. § 7607(d)(9). Agency action is arbitrary and capricious when the agency has "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*");

see also Encino Motorcars v. Navarro, 136 S. Ct. 2117, 2125 (2016) (agency decision is arbitrary and capricious if agency fails to rationally connect its choice to the facts).

An "agency changing its course . . . is obligated to supply a reasoned analysis for the change," *State Farm*, 463 U.S. at 42, and must "provide a more detailed justification than what would suffice for a new policy created on a blank slate . . . when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy," *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

SUMMARY OF ARGUMENT

EPA's Delay Rule exemplifies arbitrary and capricious agency action. It departs drastically from the Clean Air Act's aim to "protect and enhance the quality of the Nation's air resources," 42 U.S.C. § 7401(b), and Congress' mandate that EPA and the states take "swift and aggressive action" to reduce harmful pollution, 40 Fed. Reg. at 53,342–43. And it does so without reasoned explanation and in contravention of the facts, all while ignoring the very harms Congress intended EPA to avoid.

1. EPA's justifications for issuing the Delay Rule and for each of the deadline extensions therein are undermined, and in some cases directly contradicted, by the record and EPA's own actions. EPA's principal justification for issuing the Delay Rule is to "align" the Landfill Emission Guidelines implementation deadlines with the new implementing regulations for Section 111(d) plans. But EPA fails to provide a reasoned justification for applying the new Section 111(d) deadlines to the Guidelines

at issue here, which are concededly straightforward, time-sensitive, and would have been fully implemented nearly three years ago had it not been for EPA's unlawful conduct. For this reason, EPA's Delay Rule is arbitrary and capricious.

EPA's justifications for extending the state plan, federal plan, and EPA review deadlines fare no better and also render the Delay Rule's deadline extensions arbitrary and capricious. For example, EPA's extension of the state plan deadline to just *three days after* the Delay Rule's publication and *eight days before* its effective date lays bare the absurdity of EPA's claim that it is granting states more time to work with EPA on their state plans. And EPA's assertion that preparation of the federal plan "may be complex and time-intensive," JA___ (84 Fed. Reg. at 44,551), is belied by the fact (which EPA ignored) that the agency had already published a "straightforward" proposed federal plan four days before publishing the Delay Rule.

2. EPA's Delay Rule also arbitrarily ignores important aspects of the problem: the very environmental and public health harms that the Clean Air Act seeks to avoid, and their particular impacts on environmental justice communities and tribes. By delaying critical pollution-reducing regulations, the Delay Rule will result in significant emissions of harmful air pollutants from landfills—harms that EPA not only did not quantify in choosing to delay protections, but dismissed entirely. Each of EPA's grounds for dismissing these harms is meritless. As executive orders mandating consideration of a rule's costs and particular impacts on vulnerable and tribal

communities confirm, EPA's decision not to assess these impacts renders its Delay Rule arbitrary and capricious.

STANDING

EPA's final Delay Rule dangerously delays implementation of requirements to control harmful emissions of greenhouse gases, volatile organic compounds, and hazardous air pollutants from landfills. That delay will harm Petitioners in multiple ways that are redressable by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000).

Noting the special solicitude afforded State plaintiffs in the standing analysis, *Massachusetts*, 549 U.S. at 518–20, a district court previously concluded that State Petitioners had standing to sue EPA for failing to implement the Landfill Emission Guidelines in a timely manner—an analysis that is equally applicable here. *California*, 385 F. Supp. 3d at 910–11. Indeed, by delaying control of greenhouse gas emissions, EPA's Delay Rule will contribute to and exacerbate climate change, which directly and cognizably harms State Petitioners. ADD026–31 (Chamberlin Decl. ¶¶ 6–15); ADD076–80 (Aburn Decl. ¶¶ 11–18); ADD083–90 (Fleishman Decl. ¶¶ 6–19). Control of methane emissions now is critical to avoid tipping points beyond which climate impacts are irreversible and will accelerate. Climate change impacts to State Petitioners include loss of sovereign territory due to sea level rise, damage to state-owned parks and infrastructure, increased costs to public health programs, more frequent and severe wildfires and extreme weather events, and impairment of

agricultural production and other vital economic activity, among others. *See* ADD026–31 (Chamberlin Decl. ¶¶ 6–15); ADD076–80 (Aburn Decl. ¶¶ 11–18); ADD083–90 (Fleishman Decl. ¶¶ 6–19); ADD035–36 (Basu Decl. ¶¶ 9–11). State Petitioners therefore have standing.

Only one of the petitioners needs to have standing, *Massachusetts*, 549 U.S. at 518, but Petitioner Environmental Defense Fund independently has standing in this action. It represents hundreds of thousands of members whose lives, health, careers, property, and recreational interests are harmed by greenhouse gas emissions from landfills. *See* ADD129, 131–32 (Declaration of John Stith ¶¶ 8–9, 12–13); ADD122–23 (Declaration of Jeremy Proville ¶¶ 9–13); ADD115–18 (Declaration of Denise Fort ¶¶ 7–15). Additionally, delay in control of volatile organic compounds and hazardous air pollutants injures Petitioner Environmental Defense Fund's members, many of whom live in such close proximity to covered landfills that they suffer from the localized health impacts and increased cancer risk associated with their exposure to these pollutants. ADD094–95 (Declaration of Dr. Elena Craft ¶¶ 6–8); ADD107–09 (Declaration of Trisha Dello Iacono ¶¶ 3–9); ADD131–32 (Stith Decl. ¶¶ 12–13); ADD122–23 (Proville Decl. ¶¶ 10–13). EPA's Delay Rule unlawfully delays emission controls. A favorable ruling would require that EPA control those harmful emissions immediately. *See Natural Res. Defense Council v. Wheeler*, 955 F.3d 68, 77–78 (D.C. Cir. 2020) (concluding that plaintiffs had standing based on climate harms); *California*, 385 F. Supp. 3d at 910–11.

ARGUMENT

The Clean Air Act fundamentally aims 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(b); *see Natural Res. Defense Council v. EPA*, 896 F.3d 459, 464 n.4 (D.C. Cir. 2018) (noting the "supremacy of public health" in the Act). As EPA has explained, Section 111 reflects Congress' concern that "relatively drastic measures were necessary to protect public health and welfare" and its mandate that EPA and the states take "swift and aggressive action" to reduce pollution. 40 Fed. Reg. at 53,342–43. EPA's 2016 Landfill Emission Guidelines embody the Clean Air Act's aim by "significantly reduc[ing]" harmful emissions of air pollutants from landfills, JA___, ___ (81 Fed. Reg. at 59,279, 59,280), and doing so swiftly, 40 Fed. Reg. at 53,342–43.

EPA's Delay Rule, by contrast, delays these critical emissions controls, and for no valid reason. In doing so, the Delay Rule departs drastically and impermissibly from Congress' mandate that the agency promote public health through swift action. The record and EPA's own actions undermine its stated justifications for the Delay Rule. EPA's weak reasoning exposes the Delay Rule as nothing more than the next step in EPA's campaign, since May 2017, to delay or avoid implementing critical public health measures simply because this EPA prefers not to regulate. That is not a permissible (let alone reasoned) justification for changing course. Indeed, further betraying its disregard for the Clean Air Act's aims, EPA failed to consider critically

important aspects of the problem, including the very health and environmental harms that Congress sought to avoid, and the people it sought to protect. For each of these reasons, EPA's Delay Rule is arbitrary and capricious and should be set aside.

I. EPA FAILED TO PROVIDE ANY REASONED JUSTIFICATION FOR ITS DELAY RULE

EPA's principal "alignment" explanation for its Delay Rule and its justifications for extending specific implementation deadlines are unreasoned, unsupported by the record, and contrary to facts before the agency. They are therefore arbitrary and capricious. *See Air Alliance Houston v. EPA*, 906 F.3d 1049, 1066–67 (D.C. Cir. 2018) (delaying public health protections requires justification); *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 603 (D.C. Cir. 2017) (agency action that is "insufficiently reasoned" is "arbitrary and capricious"); *State Farm*, 463 U.S. at 42 (an "agency changing its course . . . is obligated to supply a reasoned analysis for the change").

Because EPA's "alignment" rationale is arbitrary and capricious, this Court should vacate the Delay Rule in its entirety. EPA's arbitrary and capricious justifications for its specific implementation deadline extensions further support vacating each of those deadline extensions.

A. EPA Has Not Justified Retroactively Realigning the 2016 Landfill Emission Guidelines Deadlines with Its 2019 Section 111(d) Implementation Regulation

EPA principally justifies its Delay Rule by arguing that extending its already-passed implementation deadlines for the Landfill Emission Guidelines to conform

with a different new rule setting forth deadlines applicable to Section 111(d) emission guidelines (the intent of which was, in turn, to conform with statutory deadlines set by Congress thirty-three years ago under a different section of the Act, Section 110) is "a reasonable way to provide realistic deadlines." JA___ (84 Fed. Reg. at 44,551). But aside from pointing to its "experience" working with states to implement Section 110, EPA provides no explanation for why that separate new rule makes it appropriate or reasonable for EPA to take *the additional step* in the Delay Rule to specifically extend the long-overdue deadlines for implementing the Landfill Emission Guidelines at issue here. The lack of explanation is particularly telling given that the Landfill Emission Guidelines should have been fully implemented long ago, EPA could implement them immediately without hardship, and a court in fact ordered EPA in May 2019 to implement them expeditiously. EPA's failure to provide a reasoned explanation supported by the record renders the Delay Rule arbitrary and capricious.

Indeed, the Delay Rule arbitrarily disregards important distinctions between the scope and complexity of the Landfill Emission Guidelines and Section 110. These distinctions render irrelevant EPA's "experience" working with states to develop and review state implementation plans (commonly known as "SIPs") under Section 110. *See* JA___ (84 Fed. Reg. at 44,551). A Section 110 State Implementation Plan covers multiple pollutants and types of sources within a geographic area and involves complex modeling of emissions, topography, wind patterns, cross-border air transport, and other factors to demonstrate that controls across a broad range of

sources will collectively reduce ambient air concentrations of a given pollutant in a State as necessary to achieve EPA-designated health-based standards (National Ambient Air Quality Standards). 42 U.S.C. § 7410. In contrast, the Landfill Emission Guidelines address a single source category—landfills—and revise earlier standards to lower the threshold at which landfills are required to install a particular system of pollution control to achieve a set emission limit. JA___ (Multistate comments at 16). Because state plans and a federal plan already exist for the previous emission guidelines (from 1996), implementation planning for landfills requires simply updating those plans rather than creating new ones. JA___ (*Id.* at 17).

EPA itself recognized this distinction in its proposed Delay Rule. JA___ (83 Fed. Reg. at 54,530 n.4 ("The EPA acknowledges that the procedural and substantive requirements established by Congress for the [State Implementation Plan] process under CAA section 110 are *considerably more detailed than the corresponding requirements* established by Congress for the state existing-source performance standards plans under CAA section 111(d)." (emphasis added))); *see also* 40 Fed. Reg. at 53,345 ("Section 111(d) plans will be much less complex than the [Section 110 State Implementation Plans]" in part because "[e]xtensive control strategies are not required, and after the first plan is submitted, subsequent plans will mainly consist of adopted emission standards").

In its final Delay Rule, however, EPA ignores its prior statements and the public comments identifying these critical distinctions between implementing the

Landfill Emission Guidelines and implementing Section 110 standards generally. Instead, EPA simply repeats its unexplained and generalized claim that its "experience" with Section 110 justifies these Section 111(d) Landfill Emission Guidelines implementation timeline extensions. JA___ (84 Fed. Reg. at 44,551). "[S]uch an unadorned explanation does not suffice." *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1087 (D.C. Cir. 2017). Nor does it constitute an adequate response to comments. *Sierra Club v. EPA*, 863 F.3d 834, 838–39 (D.C. Cir. 2017) (EPA must "respond adequately to comments disputing [its] explanations").

Accordingly, the fact that EPA decided—thirty-three years after Congress extended Section 110 timelines—to import that timeline into regulations governing general Section 111(d) planning obligations does not justify its separate, rushed rulemaking to apply this new extension retroactively to the Landfill Emission Guidelines. *See* JA___ (84 Fed. Reg. at 44,549 (conceding that separate rulemaking was required)). To the extent EPA rationalizes this extension by characterizing the Landfill Emission Guidelines as "ongoing," *id.*, or not fully implemented, it is improperly capitalizing on its own violation of the law. *See California*, 385 F. Supp. 3d at 916. Had EPA complied with its mandatory deadlines, the Landfill Emission Guidelines would have been fully implemented by November 2017. EPA cannot now rely on its unlawful failure to meet its own deadlines as a justification for applying the new Section 111(d) general timelines to the Landfill Emission Guidelines.

B. EPA's Justifications for Extending Each of its Implementation Deadlines Are Unreasoned and Unsupported

EPA's discrete justifications for each of the Delay Rule's implementation deadline extensions fare no better. These justifications are entirely unsupported, and in some instances directly contradicted, by the record and lack reasoned explanation. Each of these deadline extensions should therefore be vacated.

1. EPA's justifications for delaying the state plan submission deadline are unreasoned, unsupported, and arbitrary

EPA's specific justifications for delaying the state plan submission deadline (from which all of the other deadlines in the Delay Rule flow) are unsupported by the record or reasoned explanation.

The Landfill Emission Guidelines required each state with one or more covered landfills to submit a state plan for implementing the Guidelines to EPA by May 30, 2017. JA___ (81 Fed. Reg. at 59,286); *see also* 40 C.F.R. § 60.30f(a) & (b) (2016) (superseded Sept. 6, 2019). The Delay Rule resets that deadline to August 29, 2019, three days after the Rule's publication and eight days before its effective date of September 6, 2019. JA___, ___ (84 Fed. Reg. at 44,547, 44,549); *see also* 40 C.F.R. § 60.30f(b) (2019). Indeed, by the Delay Rule's plain terms, the new implementing regulations do not apply to plans submitted by the new state plan deadline. 40 C.F.R. § 60.30f(a) (2019) (new implementing regulations "will apply for state plans submitted after September 6, 2019"). EPA justifies enlarging the state plan deadline in this

fashion by claiming that the longer submission period gives states "more time to interact and work with the EPA in the development of state plans." JA___ (84 Fed. Reg. at 44,551).

Whether or not states could benefit from more time to implement other Section 111(d) guidelines going forward, the new state plan deadline as applied to the 2016 Landfill Emission Guidelines lays bare the absurdity of this regulatory change. Giving states three days' notice to submit their plans obviously does not give them "more time to interact and work with EPA" on their plans or establish "realistic deadlines." *See id.* And there is no evidence that EPA actually used the three days between the promulgation of the Delay Rule and new deadline (or, for that matter, the time between the proposal and finalization of the Delay Rule) to work with states. *Contra* JA___ (*id.* at 44,551). Indeed, only one state submitted a plan between EPA's proposal and the Delay Rule's new submission deadline[9]—and, as explained above, the new implementing regulations do not even apply to that plan. EPA may not rely on justifications that have no support in reality. *See Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1111–14 (D.C. Cir. 2019) ("Although the court must 'give appropriate deference to predictive judgments' by an agency where supported by 'substantial evidence,'" an agency's rule is arbitrary and capricious where the agency "referred to no evidence" to support its judgment.).

[9] Virginia submitted its state plan for approval on August 29, 2019. EPA-R03-OAR-2019-0537-0002.

Moreover, EPA provides no evidence that states needed until August 29, 2019, to submit their plans, or that giving states additional time would materially increase the number of plans submitted. EPA points to the fact that few states submitted plans by May 30, 2017, as purported proof that that deadline was not feasible. JA___–___ (84 Fed. Reg. at 44,551–52). But EPA ignores that the Clean Air Act effectively allows states to choose whether to submit a state plan or to be subject to a federal plan, and fails to explain why states making that considered choice should wait more than two additional years before EPA begins work on that federal plan.

EPA also disregards that its own actions discouraged the submission of state plans. *See id.* After EPA had signaled on May 5, 2017, that it planned to stay the Landfill Emission Guidelines, then stayed them for 90 days beginning on May 31, 2017, and explained to states (many of which had not submitted state plans by the deadline) and regulated entities in October 2017 that "any states that fail to submit plans . . . 'are not subject to sanctions,'" and that the agency "do[es] not plan to prioritize the review of [submitted] state plans" or "work[] to issue a Federal Plan for states that fail to submit a state plan," it is no surprise that states did not timely submit state plans. Indeed, it is not clear what purpose EPA's announcement of its impending stay or its actual stay had if not to dissuade states from submitting state plans by the then-applicable deadline.

The state plans submitted to date further undermine EPA's insistence that states required more than two additional years to submit plans. The submitted state

plans are relatively short and do not resemble the complex, multi-source State Implementation Plans developed under Section 110.[10] They are also largely revisions of the original state plans submitted for the old emission guidelines, not new plans; and the regulatory text of the Landfill Emission Guidelines sets out in detail the provisions that a plan must include. JA___–___ (81 Fed. Reg. at 59,313–30). And most of the state plans merely incorporate the federal standards by reference. *See* note 10.

Additionally, EPA fails to respond adequately to comments noting that, in response to EPA's 2015 proposed emission guidelines, no state requested a full three years to submit state plans. *See* JA___ (Multistate comments at 18); *Sierra Club*, 863 F.3d at 838–39. Only four states objected to the proposed nine-month state plan submission period, requesting instead between one and two years. JA___ (Multistate comments at 18). And one of those states, New Mexico, ultimately developed,

[10] As described in comments, JA___ (EDF comments at 14), Arizona's plan is only 25 pages long. After it discusses Arizona's authority to enforce the standards and provides an inventory of covered Arizona landfills, that plan "incorporates by reference the federal standard." JA___ (*Id.* at 16). New Mexico's plan is 22 pages long and similarly "incorporate[s] by reference the Emissions Guidelines." 84 Fed. Reg. 47,899, 47,900 (Sept. 11, 2019) (EPA approval of New Mexico plan); *see also* JA___ (EDF comments, Appx. at 445 (Letter submitting New Mexico's proposed plan to EPA); New Mexico State Plan at 5, EPA Docket No. EPA-R06-OAR-2019-0306-0004 ("incorporates by reference the allowable emission rates, compliance, control plan requirements, actual and allowable emissions, monitoring and testing requirements, recordkeeping and reporting requirements, and control schedules required in Subpart Cf").

approved, and submitted a state plan by the May 30, 2017 deadline anyway. JA___ (*Id.* at 19). Rather than address this evidence that undermines its position, EPA merely repeats that most states did not submit state plans. *See Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("an agency cannot ignore evidence that undercuts its judgment").[11]

While the Delay Rule's state plan submission deadline has now passed, the remainder of EPA's obligations to implement the Landfill Emission Guidelines flow from that revised deadline. *See, e.g.*, JA___ (84 Fed. Reg. at 44,549 (administrator must promulgate a federal plan "within 2 years after . . . a state fails to submit a plan")). Accordingly, should this Court conclude that the new state plan deadline is arbitrary and capricious and should be vacated, those subsequent deadlines should be vacated as well or, at the very least, are now overdue.

2. EPA's justification for delaying the federal plan implementation deadline is contrary to the facts

EPA attempts to justify the Delay Rule's two-year period to promulgate a federal plan (after the state plan submission deadline has passed) on the ground that

[11] EPA's additional claim that it is more efficient to adopt a delayed regulatory scheme than grant individual states extensions where needed is likewise out of step with the facts of implementation. The Clean Air Act itself provides the efficient solution for a state's inability to timely submit a plan: EPA is to promulgate a federal plan. Any state can submit a state plan at any time to replace the federal plan that has been imposed as a backstop. 84 Fed. Reg. at 43,754. There is no need, therefore, for a deadline extension for any state.

such a plan "involves a number of potentially time-consuming steps" and "may be . . . complex." JA___ (84 Fed. Reg. at 44,551). The agency further claims that the process may be even more complex because EPA would issue a single federal plan that would apply to multiple states. *Id.* "Because the EPA's own record plainly contravenes that rationale," *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 432 (D.C. Cir. 2018), the federal plan delay is arbitrary and capricious. *See State Farm*, 463 U.S. at 43 (agency action is arbitrary and capricious where agency's explanation "runs counter to the evidence before the agency").

EPA's explanation is "more disingenuous than dispositive." *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017). EPA prominently ignores that the agency had *already published* a proposed federal plan that, far from being complex, "implements mandates [already] specifically and explicitly set forth in" the 2016 Landfill Emission Guidelines without requiring "the exercise of any policy discretion," 84 Fed. Reg. at 43,756, and was preparing to issue a final federal plan by November 2019 in compliance with the Northern District of California's judgment. *See California v. EPA*, 385 F. Supp. 3d at 916. "Reliance on facts that an agency knows are false at the time it relies on them"—or, as here, reliance on fabricated uncertainty—"is the essence of arbitrary and capricious decisionmaking." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003). EPA's failure to reconcile the actions it had already taken to finalize a federal plan with its speculation that the federal plan may involve time-consuming steps and may be complex "evidences a complete failure to

reasonably reflect upon the information contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decision-making." *Fred Meyer Stores*, 865 F.3d at 638; *Natural Res. Defense Council v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) ("an agency rule is arbitrary and capricious if the agency . . . ignores important arguments or evidence").

Moreover, EPA's actions in the Northern District of California and Ninth Circuit litigation further contradict its justification for delay here. The Delay Rule does not explain that EPA submitted a sworn declaration to the Northern District explaining that it required 12 months to issue a federal plan, *half* of the two years that the Delay Rule claims is necessary (and yet still twice the six months EPA anticipated it would take in 2016). *Supra* p. 14. And the Delay Rule ignores that the Northern District carefully considered that sworn declaration and the arguments of the parties, and determined that EPA could feasibly issue a federal plan in *six months* (or by November 6, 2019). *California*, 385 F. Supp. 3d at 916. Nor does it mention that EPA did not appeal this order and final judgment. *See generally* Docket, No. 4:18-cv-03237-HSG (N.D. Cal.).

In litigation over EPA's request under Federal Rule of Civil Procedure 60(b) to modify that final judgment based on the post-judgment Delay Rule, EPA has never once argued that it could not immediately finalize its proposed federal plan, or that it would face *any* burden in being required to do so. Indeed, in a filing to the Ninth Circuit just six days before the district court's (extended) January 14, 2020 federal plan

deadline, EPA still did not assert any difficulty in finalizing the federal plan by that deadline even when discussing the irreparable harm the agency supposedly faced. EPA Reply ISO Mot. for Stay Pending Appeal at 8–10, in *California v. EPA*, No. 19-17480, ECF No. 11555090 (9th Cir. Jan. 8, 2020); *see also id.* at 6 ("It does not matter whether the judgment was correct when issued; whether it is possible, painless, or legally permissible for EPA to comply; or even if compliance with the judgment would benefit the Plaintiffs or the public."). EPA may not simply ignore these circumstances in claiming that it is appropriate to expand its time for developing a federal plan from the six months specified in the Landfill Emission Guidelines to two years. *See Genuine Parts Co.*, 890 F.3d at 312 ("an agency cannot ignore evidence that undercuts its judgment").

Both the record and EPA's own actions similarly undermine its purported concern about the complexity of tailoring a single federal plan to multiple states. *See* JA___ (84 Fed. Reg. at 44,551). As State Petitioners commented, the existing federal plan for the previous landfill emission guidelines, codified at 40 C.F.R. Part 62, Subpart GGG, contains no provisions referencing the special needs of any particular state or facilities. JA___ (Multistate comments at 23). And EPA's proposed federal plan for the 2016 Landfill Emission Guidelines similarly contains no provisions that require or reflect state-specific tailoring. *See* 84 Fed. Reg. 43,745. EPA provides no explanation of why such tailoring might suddenly be necessary in finalizing its federal plan. In fact, after State Petitioners raised this point in comments, EPA's only

response—that in developing its existing federal plan, EPA also prepared supporting materials, including an inventory of affected landfills, JA___ (Response to comments at 5)—does not demonstrate any state-specific tailoring, and certainly does not provide justification for any such tailoring in EPA's new federal plan.

This Court should vacate EPA's delayed deadline for issuing a federal plan. Even if this Court leaves the delayed deadline for state plan submission in place (as explained, *supra* Arg. § I.B.1, it should not), if EPA is required to issue a federal plan within six months of that submission deadline as required by the Landfill Emission Guidelines, that federal plan would be long overdue.

3. EPA has not justified its state plan review deadline delays

In addition to extending states' deadlines for submitting plans and EPA's deadline for issuing a federal plan, the agency grants itself eighteen months, instead of four, to review state plans. Here too, EPA has not provided any reasonable justification.

To begin, EPA creates a new six-month "completeness review" of state plan submissions. EPA's only justification for adding this additional review period is that it mirrors Section 110's process. JA___ (84 Fed. Reg. at 44,552); JA___ (Response to comments at 14). But as discussed above, *supra* Arg. § I.A, EPA has not justified retroactively realigning the 2016 Landfill Emission Guidelines with its new Section 111(d) implementing regulations (and Section 110).

Next, EPA has extended its state plan review period from four to twelve months (after the new six-month completeness review). EPA arbitrarily disregards the far shorter amount of time—on average, less than four months—that the agency actually needed to review already-submitted landfill state plans. *See supra* p. 14; *see also* JA___–___ (EDF comments at 14–15). And, in the Northern District of California litigation, the court determined that four months was adequate time. *Supra* p. 14. In the Delay Rule, the agency merely gestures to its irrelevant "experience" reviewing Section 110 State Implementation Plans. JA___ (84 Fed. Reg. at 44,551); *see supra* Arg. § I.A. That is not enough under *Fox Television*. 556 U.S. at 515 (agency must show that "there are good reasons" for changing position).

* * *

At every turn, EPA's justifications for the Delay Rule simply do not add up. The Delay Rule is "insufficiently reasoned, and therefore arbitrary and capricious." *Humane Soc'y of the U.S.*, 865 F.3d at 603. Indeed, the absence of any reasoned justification for EPA's retroactive deadline extensions makes it difficult to view the Rule as anything more than the latest in EPA's extraordinary efforts since 2017 to frustrate implementation of these critical public-health protections.

Delay for delay's sake cannot be a valid justification for thwarting the Clean Air Act's aim to swiftly reduce harmful air pollutants. And courts have often expressed concerns about agency decisionmaking (or inaction) based in administrative "keep away" or pretextual rationales. *See In re American Rivers and Idaho Rivers United*, 372 F.3d

413, 420 (D.C. Cir. 2004) ("petitioners are entitled to an end to [the agency's] marathon round of administrative keep-away and soon"); *see also Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2573, 2575–76 (2019) (concluding that "[s]everal points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided"); *Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (finding an agency action arbitrary and capricious because it was "obvious that the sole reason behind the Secretary's [action] . . . was to provide a pretext for [an] ulterior motive"). Since 2017, EPA has repeatedly avoided implementing the Landfill Emission Guidelines, arguing in this Court and then the Northern District and Ninth Circuit that Petitioners' concerns are appropriately raised elsewhere, if anywhere. These unlawful efforts to delay implementation of the Landfill Emission Guidelines, combined with the lack of any reasoned explanation for this rulemaking, demonstrate that the action is arbitrary and capricious. EPA's unreasoned "alignment" justification supports vacatur of the entire Delay Rule, and its unreasoned and unsupported justifications for delaying individual implementation deadlines support vacating each of those deadlines.

II. EPA UNLAWFULLY IGNORED THE HEALTH AND WELFARE EFFECTS OF ITS DELAY RULE WITHOUT REASONED EXPLANATION

Not only is there no reasoned basis *supporting* the Delay Rule, but EPA has actively disregarded the Delay Rule's multiple harms to the environment and public health, which provides an independent reason to vacate the Rule as arbitrary and

capricious. In promulgating the 2016 Landfill Emission Guidelines, EPA furthered Congress' aim to promote public health and welfare. Given the purpose of the Clean Air Act and the Landfill Emission Guidelines, it was incumbent on EPA to consider and analyze, in the Delay Rule, the increased emissions the Rule would cause and the impact those emissions would have on public health. *See, e.g.*, *Gresham v. Azar*, 950 F.3d 93, 102–04 (D.C. Cir. 2020) (health agency acted arbitrarily and capriciously when it "fail[ed] to account for loss of [health care] coverage, which is a matter of importance under the statute"). Indeed, "[r]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions," "including, for instance, harms that regulation might do to human health or the environment." *Michigan v. EPA*, 576 U.S. 743, 752–53, 135 S. Ct. 2699, 2707 (2015).

In the Delay Rule, however, EPA declined to even consider, much less quantify, the environmental and health impacts of delay. JA___ (84 Fed. Reg. at 44,553) (claiming that the Rule will not "result in significant foregone economic and climate benefits"). In so declining, EPA unlawfully ignored these important concerns. Its "failure to consider an important aspect of the problem is one of the hallmarks of arbitrary and capricious reasoning." *Util. Solid Waste Activities Grp.*, 901 F.3d at 429–30. The agency's failure to conduct a Regulatory Impact Analysis or otherwise assess the costs and benefits of its Delay Rule (as mandated by Executive Order 12866), consider any disproportionate impacts on environmental justice communities (as

mandated by Executive Order 12898), and consult with Native American Tribal Governments (as mandated by Executive Order 13175) only magnifies these errors.

EPA claims without support that it "believes" any negative emissions impacts are likely "minimal," that the Delay Rule makes purely procedural changes, and that an analysis of emissions costs, for instance, is infeasible due to "inherent uncertainties." JA___, ___ (84 Fed. Reg. at 44,552, 44,554). But, as discussed below, EPA cannot prejudge the outcome of any impacts analyses as a means to justify not conducting them, particularly where the record—including EPA's own prior analyses—demonstrates that the Delay Rule *will* have substantial environmental and health costs. EPA's failure to analyze and consider these harms renders its Delay Rule arbitrary and capricious and independently supports vacatur of the entire Rule.

A. The Delay Rule Will Have Substantial, Not "Minimal," Health and Welfare Impacts

EPA claims that analysis of the health and environmental impacts of its Delay Rule is unnecessary because—though EPA declined to analyze them—any such costs are likely "minimal." But the evidence shows otherwise, and EPA's failure to consider these harms or to explain why the agency could assess them in its 2016 Landfill Emission Guidelines but not here is arbitrary and capricious.

As Petitioners articulated in comments to the agency, the Delay Rule will result in substantial costs attributable to emissions impacts. JA___–___ (Multistate comments at 25–26); JA___–___ (EDF comments at 16–18). In promulgating its

2016 Landfill Emission Guidelines, EPA itself projected significant annual emissions reductions of climate-changing methane, ozone-forming volatile organic compounds, and cancer-causing hazardous air pollutants due to the Guidelines' implementation. JA___ (81 Fed. Reg. at 59,280). Any delay in implementation will result in the irreversible forfeiture of critical reductions in these emissions. And with respect to methane, the *timing* of reductions is of particular significance in addressing the dangers it causes. *Supra* p. 6.

It is reasonable to assess the impacts of the Delay Rule by considering the number of years it will delay implementation of the Landfill Emission Guidelines and, therefore, the Guidelines' critical emissions reductions during those years. Under this approach, and using EPA's own numbers contained in the Landfill Emission Guidelines, the Delay Rule will lead to excess emissions of up to 1,810 metric tons of ozone-forming volatile organic compounds into the air Americans breathe, as well as 285,000 metric tons of the powerful greenhouse gas methane each year that implementation of the Guidelines is delayed. *See* JA___ (81 Fed. Reg. at 59,280).[12]

[12] As EPA notes in its Delay Rule, JA___ (84 Fed. Reg. at 44,554), because a small subset of states with approved state plans (five states in total) will be implementing the Landfill Emission Guidelines earlier than those subject to a federal plan, the total emissions impact of the Delay Rule may be less than the projected annual emissions savings from the Landfill Emission Guidelines. However, it is EPA's responsibility to assess the impact-offset of the five states with state plans, and to do so before promulgating its Delay Rule.

Commenters also submitted compelling evidence of the health harms caused by EPA's ongoing delay in implementing those protections. *See, e.g.*, JA___–___, ___ (Multistate comments at 5–6, 25); JA___–___ (EDF comments at 16–18). These impacts are determinable and quantifiable, as multiple stakeholders explained in comments. For instance, State Petitioners cited EPA's own 2016 Landfill Emission Guidelines, in which EPA quantified projected climate benefits of the Guidelines at $200 million to $1.2 billion in the year 2025. JA___ (Multistate comments at 25); *see also* JA___ (81 Fed. Reg. at 59,280).

These excess emissions will harm people. The record shows that the emissions at issue disproportionately impact already-disadvantaged and vulnerable communities. That landfills tend to be located in or near such communities is well documented and supported by EPA's analysis of proximate communities in its 2016 Landfill Emission Guidelines. JA___ (*Id.* at 59,312). The Delay Rule saddles surrounding communities with continued emissions of volatile organic compounds and hazardous air pollutants from landfills. These same communities are also disproportionately impacted by the effects of climate change. JA___ (Multistate comments at 30). Likewise, as EPA has admitted, there are three tribes with landfills subject to the Landfill Emission Guidelines on their lands. Many tribal communities are impacted by air pollution and are experiencing effects of climate change through increased storm surge, erosion, flooding, prolonged droughts, wildfires, and forests being devastated by insect pest outbreaks. *See id.* And native peoples are likely to suffer disproportionately from the

effects of climate change on wildlife, fish, and native plants, which they may depend on for subsistence and maintaining traditional cultural practices. *Id.*

Yet EPA fails to acknowledge that low-income and minority populations will be disproportionately impacted by the Delay Rule and fails to analyze the extent of that impact. And the agency incorrectly claims—without any analysis or support—that tribal communities are not impacted by the Delay Rule, in part because the Rule constitutes "merely a procedural change." JA___ (84 Fed. Reg. at 44,555). In so doing, EPA has ignored an important aspect of the problem, as confirmed by its disregard for the mandates set forth in Executive Orders 12898 and 13175.[13] *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006) (while "[t]he [Executive] Order does not . . . create a private right of action" the court can still "review the agency's consideration of environmental justice issues under the APA's deferential 'arbitrary and capricious' standard").

These harms are hardly "minimal," as EPA claims to "believe[]." JA___ (84 Fed. Reg. at 44,552). And they reflect the harms EPA acknowledged, assessed, and

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[13] Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994), requires federal agencies, including EPA, to make environmental justice part of their mission "to the greatest extent practicable." Specifically, the Executive Order "instructs agencies to identify and address disproportionately high and adverse human health and environmental effects on minority and low-income populations." *Latin Americans for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 465 (6th Cir. 2014). Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000), requires "[e]ach agency [to] have an accountable process to ensure meaningful and timely input by tribal officials [*15] in the development of regulatory policies that have . . . direct effects on one or more Indian tribes . . . ." *Id.* at 67,250.

sought to reduce by promulgating the Landfill Emission Guidelines in the first place. JA___ (81 Fed. Reg. at 59,280). EPA now not only dismisses these harms but also completely ignores (in a rulemaking to extend implementation deadlines) that *time is of the essence* in reducing climate-changing methane emissions due to their near-term impact. JA___–___ (Multistate comments at 9–12); JA___–___ (*National Assessment* at 26–27). EPA's failure to explain its departure from its prior factual findings is arbitrary and capricious. *Fox Television*, 556 U.S. at 515–16 ("more detailed justification" required where "new policy rests upon factual findings that contradict those that underlay its prior policy").

Importantly, they are also the very environmental and human health dangers Congress sought to avoid in Section 111(d). 42 U.S.C. §§ 7401(b), 7411. In ignoring these impacts and the urgency of the emissions reductions, EPA has ignored an important aspect of the problem and a "matter of importance under the statute." *Gresham*, 950 F.3d at 102. The agency's failure to acknowledge and assess these significant environmental and health impacts, which reflect the primary purpose of the Clean Air Act (and are also the driving concern of several executive mandates), renders its Rule arbitrary and capricious. *See Nat'l Lifeline Ass'n*, 921 F.3d at 1111–14 (failure to consider the impact of a proposed change on the primary purpose of a program or otherwise explain how it is compatible with that purpose is arbitrary and capricious); *see also Fred Meyer Stores, Inc.*, 865 F.3d at 639 (concluding that agency's opinion "evidences a complete failure to reasonably reflect upon the information

contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decision-making").

B. Mislabeling the Delay Rule as Procedural Does Not Justify Ignoring Its Impacts

EPA paints its Delay Rule as a mere "procedural change whose impacts cannot be characterized." JA___ (84 Fed. Reg. at 44,554). The agency even goes so far as to claim that the Delay Rule "is a procedural change and does not concern an environmental health risk or safety risk." JA___ (*Id.* at 44,555). Yet, in the following paragraphs, EPA admits that the Delay Rule amounts to both a "significant" and "deregulatory" action. JA___ (*Id.* at 44,554). The agency has made no effort to reconcile these inconsistent statements. *See United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Commc'ns Comm'n*, 933 F.3d 728, 740–42 (D.C. Cir. 2019) (finding failure to reconcile conflicting assertions about whether action would have environmental impacts arbitrary and capricious).

EPA cannot hide the very real adverse health and welfare effects of its delay by deeming its Delay Rule "procedural." As EPA itself has acknowledged, a change to a procedural legal duty "is a change in the 'underlying substantive law.'" EPA Reply Br. at 21, *California v. EPA*, No. 19-17480, ECF No. 11663219 (Apr. 16, 2020)[14]; *see also*

[14] In the Ninth Circuit briefing, the States and EDF characterized the Delay Rule as "procedural," Response Br. at 44, *California v. EPA*, No. 19-17480, ECF No. 11631805 (March 16, 2020), not to suggest that the Rule had no substantive health effects (which they vociferously argued any delay did, *id.* at 37–38), but to explain that

Clean Air Council v. Pruitt, 862 F.3d 1, 6 (D.C. Cir. 2017) ("EPA's [3-month] stay, in other words, is essentially an order delaying the rule's effective date, and this court has held that such orders are tantamount to amending or revoking a rule."); *Natural Res. Defense Council, Inc. v. EPA*, 683 F.2d 752, 761–62 (3d Cir. 1982) (noting the effective date of a regulation is an "essential part of any rule"); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 579 n.26 (D.C. Cir. 1981) (holding agency order deferring a compliance deadline for six months "was in effect an amendment to a mandatory safety standard"). The Delay Rule's primary function is to allow EPA to significantly delay implementation of the Landfill Emission Guidelines, allowing increased air pollution in the meantime that would not otherwise have occurred and cannot be reversed. It was incumbent on EPA to consider those impacts of its Delay Rule in its rulemaking process.

Moreover, the Delay Rule does not align with the traditional understanding of a "procedural" rule under the prevailing body of administrative law. "'Procedural rules,' the general label for rules falling under [the APA notice and comment] exemption, are 'primarily directed toward improving the efficient and effective operations of an agency, not toward a determination of the rights [or] interests of affected parties." *Mendoza v. Perez*, 754 F.3d 1002, 1023–24 (D.C. Cir. 2014) (quoting *Batterton*, 648 F.2d at 702 n.34). True procedural rules generally relate to internal procedure, a far cry

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it delayed deadlines rather than change the emissions standards and requirements of the Landfill Emission Guidelines.

from the situation here, where the deadlines at issue have very real consequences—both in terms of the timing of compliance and substantive impacts resulting from excess emissions—for states, regulated entities, and the public. It does not suffice, here, for EPA to dismiss this rulemaking as "procedural" and thereby ignore these very real effects. *See Am. Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 924 (D.C. Cir. 2017) ("Blinders may work for horses, but they are no good for administrative agencies.").

C. "Inherent Uncertainties" Do Not Justify Ignoring the Delay Rule's Impacts

EPA also dismisses any impacts of its Delay Rule by claiming that voluntary early compliance with the Landfill Emission Guidelines may minimize any impacts, and therefore "inherent uncertainties" preclude EPA from characterizing those impacts. JA___ (84 Fed. Reg. at 44,554).

EPA may not justify delaying a regulatory deadline on the unsupported ground that it is possible that industry may comply early, voluntarily, or that the agency may move faster than required. *See id.* EPA issued its Landfill Emission Guidelines and set deadlines for their implementation, and the Clean Air Act required it to do so, presumably because these deadlines were necessary to ensure compliance. Regulatory action is generally needed to address market failures. It is farcical to delay regulation on the assumption that the invisible hand will magically account for externalities and therefore eliminate the need for regulation. *See Nat'l Lifeline Ass'n,* 921 F.3d at 1111–

14 ("Although the court must 'give appropriate deference to predictive judgments' by an agency where supported by '[s]ubstantial evidence,' the [FCC] referred to no evidence that facilities-based providers will make up the gap in services when non-facilities-based providers are ineligible to receive the enhanced Tribal subsidy."). Likewise, EPA's suggestion that the agency itself may move faster than required, JA___ (84 Fed. Reg. at 44,554), stands in opposition to its parade of efforts *not* to do so, *supra* pp. 11–15, and its claims in the Delay Rule that more time is needed. It is improper to place the onus on commenters to refute EPA's unfounded and contradictory assumptions. *See* JA___ (84 Fed. Reg. at 44,554).

To support its position, EPA points to the results of "a web search of" two greenhouse gas registries, which demonstrated that some landfills have registered for emission reduction credits they can sell. JA___ (*Id.* at 44,553). Not only is that a woefully inadequate analysis of the issue, EPA also did not provide those data in its proposal and therefore provided no opportunity for meaningful comment on them. *See, e.g.*, *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) (an agency must "provide an accurate picture of the reasoning that has led the agency to the proposed rule" and "identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules"). Yet it now relies on this unscientific "assessment" in claiming that commenters who cited the 2016 Regulatory Impact Analysis "failed to provide any new information or refute the EPA's assessment that some landfills would install

controls earlier than required by federal regulations." JA___ (84 Fed. Reg. at 44,554). That was not commenters' obligation. EPA's "backwards approach to rulemaking is unacceptable. It cannot propose a rule based on a factual conclusion, provide no evidence for the same, and then, when confronted with the glaring inadequacy, attempt to backfill the record without public comment." *California v. Bernhardt*, —F. Supp. 3d—, 2020 WL 4001480, at *21 (N.D. Cal. July 15, 2020).

In any event, mere registration for carbon credits by 100 landfills reveals nothing about the degree and breadth of voluntary emissions reductions across all landfills or how such reductions compare to the ones that would be achieved from implementation of the Landfill Emission Guidelines nationwide. EPA does not even appear to have analyzed whether the landfills on these lists are ones that are newly required to implement control technologies by the Landfill Emission Guidelines. To the extent it sought to rely on voluntary compliance to excuse its obligation to consider emissions impacts, it was EPA's duty to determine how much, if any, effect voluntary compliance has on the Delay Rule's emissions impacts. It failed to do so. *See Nat'l Lifeline Ass'n,* 921 F.3d at 1111–14.

Nor could EPA avoid this duty by claiming "inherent uncertainties." JA___ (84 Fed. Reg. at 44,554). Commenters provided the agency with multiple approaches to assessing the potential impacts of its Delay Rule. *Supra* Arg. § II.A. Rather than adopt one or more of these approaches, EPA simply dismisses them and claims uncertainties due to voluntary actions. Just as EPA cannot rely on voluntary

compliance to mitigate excess emissions, nor can it assert that voluntary compliance renders its task—to analyze the costs of the Delay Rule—unworkable. EPA certainly may not use that assumption to baldly assert that inherent uncertainty precludes any real analysis of impacts, particularly where EPA successfully assessed the benefits and costs of its Landfill Emission Guidelines in 2016.

Agency claims of uncertainty may be appropriate where the underlying statute is precautionary in nature and the agency's regulation is designed to protect public health. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976) (court will not demand "rigorous step-by-step proof of cause and effect" where "a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator"). But where, as here, there are methods of ascertaining the health and welfare harms of the Delay Rule, which runs *against* statutory purpose and its precautionary nature, uncertainty is insufficient justification for not assessing the very real environmental and public health harms associated with the Delay Rule.

In a final effort to obscure the impacts of its Delay Rule, EPA also oddly attempts to disconnect the timing of actual emissions controls from the implementation of the Landfill Emission Guidelines that require those controls. JA___ (84 Fed. Reg. at 44,554); *see also* JA___–___ (Response to comments at 10–11) (claiming that because requirements for landfills to install emissions controls are based

on the "year in which a landfill reports reaching a designated emission threshold," the "emission control requirements are not tied to the date that state or federal plans are promulgated."). EPA's contortions make no sense. EPA has never before denied that there are landfills that will become subject to the Landfill Emission Guidelines the minute they are implemented, *i.e.*, when a state or federal plan is imposed. Nor has it suggested that landfills could be subject to requirements that have not yet been implemented. That some *additional* landfills may reach that threshold in the future does not render delay inconsequential.

* * *

At bottom, air pollutant emissions impacts, including impacts on environmental justice communities and tribes, are a critical consequence of EPA's rulemaking. EPA erred in completely ignoring these impacts, failing to consider the costs of its action, and in failing to adequately justify not doing so in light of its ability to assess these harms in its 2016 Landfill Emission Guidelines. These omissions independently render the Delay Rule arbitrary and capricious, and support vacatur of the entire Rule. *State Farm*, 463 U.S. at 43; *see Fox Television*, 556 U.S. at 515–16.

CONCLUSION

For the foregoing reasons, this Court should vacate EPA's Delay Rule to ensure that EPA issues a federal plan to implement its Landfill Emission Guidelines without further delay.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Petitioners' Proof Brief, dated August 12, 2020, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure and this Court's Rules. I certify that this brief contains 12,907 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ Julia K. Forgie
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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Petitioners' Proof Brief to be filed on August 12, 2020, using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Julia K. Forgie
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