

**States of California, Illinois, Maryland, New Jersey, New Mexico,
Oregon, Pennsylvania, Rhode Island, and Vermont;
and the California Air Resources Board**

January 3, 2019

*Via electronic submission to www.regulations.gov
ATTN: Docket ID No. EPA-HQ-OAR-2018-0695*

Andrew Wheeler
Acting Administrator
United States Environmental Protection Agency
Office of the Administrator Code 1101A
1200 Pennsylvania Ave NW
Washington, D.C. 20460

**Re: Comments on Proposed Rule, Adopting Subpart Ba Requirements in Emission
Guidelines for Municipal Solid Waste Landfills**

Dear Acting Administrator Wheeler:

The undersigned State Attorneys General and state agencies (collectively States) respectfully submit these comments opposing the United States Environmental Protection Agency's (EPA) proposed rule, Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 83 Fed. Reg. 54,527 (Oct. 30, 2018) (hereinafter Delay Rule). The proposed Delay Rule would extend EPA's unlawful delay of another rule, Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276 (hereinafter Landfill Emission Guidelines or Guidelines) which was finalized on August 29, 2016, and went into effect on October 28, 2016.

Had EPA complied with its mandatory duties to implement the Landfill Emission Guidelines, every state would have had an approved state or federal plan to reduce emissions from existing municipal solid waste landfills by November 30, 2017. 40 C.F.R. §§ 60.30f(b), 60.27(b) & (d). Now already one year overdue, EPA here proposes to further delay implementing the Guidelines by an additional *four years*.¹ EPA characterizes the proposed Delay Rule as a "procedural change" and denies that it will have any substantive impacts. *See* 83 Fed. Reg. at 54,532 ("This regulatory action is a procedural change and does not have any impact on human health or the environment."). In fact, the adverse impacts of the proposed Delay Rule on human health and welfare—the very things Congress has tasked EPA with safeguarding—will be significant.

This proposal is particularly troubling in that it is only the latest in a series of EPA's efforts to do what it is not allowed to do: stay the Guidelines while it reconsiders them. *See, e.g.,*

¹ Under EPA's proposal, the deadline for the agency to impose a federal plan for states without an approved state plan would not be until March 2023—six years and three months after the current deadline.

Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017) (“[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.”) (quoting *Nat’l Family Planning & Repro. Health Ass’n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992)). After EPA illegally stayed and then failed to enforce the Landfill Emission Guidelines, a coalition of states sued to enforce them; the proposed Delay Rule surfaced only when EPA was confronted with that litigation, days before a hearing that would resolve a critical legal issue going to EPA’s liability for its regulatory violations. The district court has since rejected EPA’s efforts to rely upon this proposal to defer or defeat judicial review. But EPA’s history of using improper procedural mechanisms to avoid implementing the Guidelines raises serious concerns about the agency’s compliance with law, and the integrity of its rationale for this latest proposal.

Certainly, there is no substantive reason to further delay protections now in place (albeit not properly enforced by EPA). When EPA issued the Landfill Emission Guidelines in 2016, it found that they would “significantly reduce” emissions of landfill gas. 81 Fed. Reg. at 59,279. Specifically, EPA estimated that the Guidelines would achieve reductions of 1,810 megagrams per year (Mg/year) in smog-forming, non-methane organic compounds (NMOC) (including volatile organic compounds, or VOCs, and hazardous air pollutants) and 285,000 metric tons of methane per year. *Id.* at 59,280. The latter is a powerful greenhouse gas (GHG); these emissions are the equivalent of more than 7.1 million metric tons of carbon dioxide (CO_{2e}) per year. *Id.* That is the annual equivalent of the GHGs emitted by more than 1.5 million cars.² The rule is expected to further reduce GHG emissions by displacing fossil fuel-generated electricity with electricity generated by the captured methane gas. 81 Fed. Reg. at 59,280. The expected benefits of the Landfill Emission Guidelines far outweigh the costs: EPA estimated that, by 2025, the annual net benefits Guidelines would be \$390 million (2012\$). *Id.* at 59,280. By delaying implementation of the Guidelines another four years, EPA is forfeiting reductions of tens of millions of metric tons of GHG emissions and at least \$1.5 billion in net benefits.

EPA’s proposed delay comes at a time when there is overwhelming and ever-growing evidence of the need for *immediate* reductions of GHG emissions. In October 2018, the leading international body of climate scientists—the Nobel-prize-winning Intergovernmental Panel on Climate Change (IPCC)—issued a new report finding that, absent substantial GHG reductions by 2030 and net zero emissions by 2050, warming above 1.5° C (2.7° F) is likely and would have wide-ranging and devastating consequences.³ And in November 2018, experts from thirteen federal agencies, including EPA, issued the second volume of the Fourth National Climate Assessment (the Assessment),⁴ which sounded yet another alarm about the devastating

² See EPA, Greenhouse Gas Equivalencies Calculator, <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator>, last visited Dec. 27, 2018.

³ See IPCC Press Release, *Summary for Policymakers of IPCC Special Report on Global Warming of 1.5° C Approved by Governments* (Oct. 8, 2018), <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/>. IPCC Special Report, *Global Warming of 1.5° C* (IPCC Special Report), <https://www.ipcc.ch/sr15/>. We hereby incorporate this report by reference and request that the full report (which is attached) be included in the administrative record.

⁴ U.S. Global Change Research Program, *Fourth National Climate Assessment Impacts, Volume II: Risks, and Adaptation in the United States* (D.R. Reidmiller et al., eds., 2018),

consequences of climate change on the United States and the imperative to take action *now*. The Assessment confirms that climate change is already having a serious impact on communities throughout the country and emphasizes that “more *immediate* and substantial global emissions reductions” are necessary to avoid the most severe long-term consequences.⁵

The sobering findings set forth in these and other reports should serve as a call to action to EPA and all other governmental entities to expedite measures to reduce GHG emissions. Instead, EPA—arguably the single most important government actor in this area, with significant authority, ability, and expertise to meaningfully address this issue—here proposes to delay until March 2023 implementing regulations that not only would achieve meaningful, near-term reductions, but that *should already have been implemented*.

The Supreme Court has said, “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.” *Michigan v. E.P.A.*, ___ U.S. ___, 135 S. Ct. 2699, 2707 (2015). By that simple metric, EPA’s proposed Delay Rule is demonstrably unreasonable. But more than that, the proposed Delay Rule is unlawful:

- First, the proposed Delay Rule flies in the face of EPA’s statutory responsibility under the Clean Air Act to reduce the emissions of air pollutants that endanger human health and the environment, particularly given the clear evidence showing that time is of the essence in implementing GHG reduction measures;
- Second, EPA fails to provide a reasoned explanation for its change of course, delaying by four more years implementation of the Landfill Emission Guidelines rather than complying with its long-overdue duties to implement them. And under the circumstances, the proposed Delay Rule is both *unjustified* and *unjustifiable* by reasoned explanation. Indeed, the timing of this proposal, and EPA’s past procedural history, strongly suggest that EPA is simply seeking to avoid enforcing the rule at all, contrary to the law. Further, EPA leaves unexplained the inconsistencies with its prior factual findings, rendering the rule arbitrary and capricious. *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency must provide detailed justification where it bases a new policy on facts that contradict prior policy); *Nat’l Cable & Telecomms. Ass’n, et al. v. Brand X Internet Servs., et al.*, 545 U.S. 967, 981 (2005) (agency must adequately explain reason for reversal of policy).
- Third, EPA failed to conduct a regulatory impact analysis or to otherwise analyze the foregone benefits resulting from the proposed Delay Rule (as it is required to do), dismissing the costs as “minimal” when in fact they are substantial;
- Fourth, EPA predicates the proposed Delay Rule on another proposed rule that does not on its face apply and is likely unlawful; and

https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf (Assessment). We hereby incorporate this report by reference and request that the full report (which is attached) be included in the administrative record.

⁵ *Id.* at 27 (Summary Findings, emphasis added).

- Finally, in proposing the Delay Rule, EPA failed to comply with various executive orders, including that it failed to determine whether the Rule would disproportionately impact low-income or minority populations.

The proposed Delay Rule is thus arbitrary, capricious, and unsupported by law. It would serve only to further EPA's blatant abdication of its statutory duties by enabling it to continue evading its clear duties to implement the Landfill Emission Guidelines. The States request that EPA withdraw the proposal and comply with its mandatory and long-overdue duty to implement the Guidelines immediately.

I. BACKGROUND

A. The Clean Air Act

The fundamental goal of the Clean Air Act (or CAA) is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b). The Act provides broad governing principles, such as the supremacy of public health. *Nat’l Res. Defense Counsel v. EPA*, 896 F.3d 459, 464 n.4 (D.C. Cir. 2018), citing 42 U.S.C. § 7619(b)(3) (in promulgating regulations relating to air quality monitoring, “the Administrator shall follow the principle that protection of public health is the highest priority”). It is understood that deference to this principle “could place some limits on EPA’s choice of rules.” *Id.*

Congress amended the Clean Air Act in 1970. As EPA itself has stated, this was because “Congress was dissatisfied with air pollution control at all levels of government and was convinced that relatively drastic measures were necessary to protect public health and welfare. The result was a series of far-reaching amendments which, coupled with virtually unprecedented statutory deadlines, required EPA and the States to take *swift and aggressive action*.” 40 Fed. Reg. 53,340, 53,342-43⁶ (emphasis added).

One feature of the 1970 amendments was the addition of Section 111, which addresses pollutants from stationary sources that are not regulated as criteria pollutants under Section 110 or hazardous pollutants under Section 112. Section 111 directs the EPA Administrator to list categories of stationary sources that “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A)). EPA must then prescribe federal “standards of performance” for emissions of pollutants from *new* sources in each category (that is, those sources newly built or significantly modified after the date the standards of performance are promulgated). *Id.* § 7411(b)(1)(B). EPA is required to review and if appropriate revise those rules every eight years. *Id.* As to *existing* sources (to which a standard of performance would apply if the sources were new), Congress directed EPA to “prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title [Clean Air Act section 110]” under which states would submit implementation plans to EPA. *Id.* § 7411(d). In keeping with that mandate, EPA promulgates

⁶ Air Programs; Standards of Performance for New Stationary Sources; State Plans for Control of Certain Pollutants from Existing Facilities (Nov. 17, 1975).

standards of performance for existing sources in “emission guidelines,” which it issues “[c]oncurrently upon or after proposal of standards of performance” for new sources. 40 C.F.R. §§ 60.21(e), 60.22(a).

The emission guidelines provide procedures for states to submit, and for EPA to approve or disapprove, individualized state plans, which specify the standards applicable to sources within a state, along with implementation measures. If a state elects not to submit a state plan, or does not submit a “satisfactory” plan, EPA must promulgate a federal plan that directly limits emissions from the state’s sources. 42 U.S.C. § 7411(d)(2).

EPA finalized the regulations implementing Section 111(d) in 1975, and they have remained largely unchanged since then. 40 C.F.R. part 60, subpart B (§§ 60.20-60.29). In keeping with Congress’s directive, EPA ensured that the Section 111(d) implementing regulations would be “similar to” the procedures set forth by Congress in Section 110. State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. at 53,341 (“The plan submittal, approval/disapproval, and promulgation procedures are basically patterned after section 110 of the Act and 40 CFR Part 51 (concerning adoption and submittal of State implementation plans under section 110).”) In the 1990 amendments to the Clean Air Act, Congress revised the timeline for submission and review of state implementation plans under Section 110, because, in the words of one report, “[e]xperience since passage of the Clean Air [Act] Amendments of 1970 has shown that nine months is not adequate time for States to prepare and submit implementation plans for new or revised ambient air quality standards.”⁷ However, Congress expressed no intent for EPA to make corresponding changes to Section 111(d)’s implementing regulations.

B. Landfill Emissions

Landfills are the third largest source of anthropogenic methane in the United States.⁸ Methane is a particularly powerful GHG: While short-lived, methane is 84 to 87 times more potent than CO₂ over a 20-year timeframe,⁹ which is to say one ton of methane contributes as much to climate change as 84 metric tons of CO₂. A twenty-five percent reduction in methane emissions by 2030 would reduce average surface warming by 0.2° C around 2040.¹⁰

In addition to reducing GHG emissions, the Guidelines would reduce emissions of volatile organic compounds (VOCs), and hazardous air pollutants, which EPA has found harm human health and welfare. 81 Fed. Reg. at 59,281. VOCs form ozone, which negatively impacts respiratory and cardiovascular health. *Id.*; see also National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292, 65,322 (Oct. 26, 2015) (detailing adverse health impacts of ozone

⁷ S. REP. 101-228, 1990 U.S.C.C.A.N. 3385, 3406, 1989 WL 236970 (Dec. 20, 1989).

⁸ See <https://www.epa.gov/lmop/basic-information-about-landfill-gas> (last visited Dec. 27, 2018).

⁹ See <https://www.epa.gov/ghgemissions/understanding-global-warming-potentials#Learn%20why> (last visited Dec. 27, 2018).

¹⁰ See EPA, Clean Air Act Advisory Counsel, Mobile Sources Technical Review Subcommittee Meeting (Oct. 29, 2013), Rachel Muncrief, Short Lived Climate Pollutants: Methane and Natural Gas, <https://www.epa.gov/sites/production/files/2014-09/documents/muncrief.pdf>.

exposure, particularly to children, older adults, and people with lung diseases). Similarly, exposure to hazardous air pollutants increases the risk of many cancer and noncancer health impacts, including respiratory and neurological illnesses. *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824, 35,837 (June 3, 2016).

C. The Landfill Emission Guidelines

EPA first proposed rules regulating landfill emissions in 1991.¹¹ In 1996, EPA listed landfills as a source category that contributes significantly to air pollution that may reasonably be anticipated to endanger public health and welfare, and concurrently promulgated new source performance standards (NSPS) and existing-source emission guidelines for states' development of implementation plans.¹² This was even before EPA's finding in 2009 that GHGs—the primary constituents of landfill emissions—endanger public health and welfare through their contribution to climate change.¹³ A review of the 1996 rules was ten years overdue by 2014, when EPA first noticed the rulemaking that led to the Guidelines that are the subject of the proposed Delay Rule.¹⁴

The Landfill Emission Guidelines are largely patterned after the regulations they supercede. The most salient changes made by the new regulations are that they change the timeframes used to classify landfills as “new” versus “existing,” lower the NMOC emission threshold at which a gas collection and control system (GCCS) must be installed (from 50 Mg/year to 34 Mg/year), and add a new method by which landfills can measure emissions for purposes of determining whether they must install controls. 81 Fed. Reg. at 59,278-79.

The Emission Guidelines require states to submit compliance plans by May 30, 2017 (nine months after the Guidelines were finalized), 40 C.F.R. § 60.30f(b), and require EPA to approve or disapprove those plans within four months of state submission—by September 30, 2017. *Id.* § 60.27(b). For states that failed to submit an approvable implementation plan, EPA has up to six months from the state submission deadline, or until November 30, 2017, to promulgate an adequate federal plan. *Id.* § 60.27(d).

D. Initial Stay and Lawsuit

Shortly after the Landfill Emission Guidelines went into effect, industry groups submitted petitions for reconsideration, which the Obama administration EPA did not grant. On May 5, 2017, however, the Trump administration EPA sent a letter to industry groups, stating its intent to grant their petition for reconsideration of the Guidelines on the basis that “the petition has raised several objections . . . that arose after the comment period or were impracticable to

¹¹ Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 56 Fed. Reg. 24,468 (May 30, 1991).

¹² Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905 (March 12, 1996).

¹³ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

¹⁴ Standards of Performance for Municipal Solid Waste Landfills, 79 Fed. Reg. 41,796 (July 17, 2014).

raise during the comment period” and that “are of central relevance to the outcome of the rule[s].”¹⁵ EPA also stated its intent to issue a 90-day stay of the Guidelines. EPA formally published notice of the stay on May 31, 2017 (one day after the May 30 deadline for states to submit compliance plans). 82 Fed. Reg. 24,878. (In the proposed Delay Rule, EPA notes at footnote 8 that its reconsideration proceeding is “ongoing.” 83 Fed. Reg. at 54,531.)

Two weeks later, Natural Resources Defense Council (NRDC) and the Clean Air Council (Petitioners) filed suit in the D.C. Circuit challenging EPA’s 90-day stay under Clean Air Act section 307(b)(1). *NRDC v. Pruitt*, No. 17-1157 (D.C. Cir. filed June 15, 2017). Petitioners argued that, contrary to EPA’s assertion, the criteria for mandatory reconsideration under Section 307(d)(7)(B) were not met, so EPA lacked legal authority to stay the Guidelines. *Id.*, Pet. Stmt. Of Issues, ECF No. 1685199 at 1-2 (July 20, 2017); *see also* Pet. Initial Opening Br., ECF No. 1705177 at 21-22 (Nov. 20, 2017).¹⁶ Shortly after that action was filed, in July 2017, EPA submitted to the Office of Management and Budget (OMB) a proposed rulemaking regarding the Guidelines, publicly stating, “EPA intends to further extend the [90-day] stay in this action. Sources will not need to comply with any requirements under these rules while the stay is in effect.”¹⁷ (Ultimately, EPA did not issue the proposal—which it would have lacked authority to do.)

Notwithstanding EPA’s statement in its rulemaking proposal to OMB, in its response to Petitioners’ brief in *NRDC v. Pruitt*, EPA argued that the case was moot because the 90-day stay had no impact on any of the Landfill Emission Guidelines’ compliance deadlines. Specifically, EPA stated, with regard to its obligations to implement the Guidelines, it had “four months, until September 31 [sic], 2017, to approve or disapprove any state plans that were timely submitted by May 30, and six months, until November 30, 2017, to promulgate a federal plan for states that did not timely submit state plans.” Respondents’ Initial Br., ECF No. 1714147 at 36 (Jan. 22, 2018). EPA acknowledged that these deadlines “have come and gone, and the Stay Decision had no effect on them.” *Id.* EPA also conceded it “has neither approved nor disapproved the state plans that were timely submitted, nor promulgated any federal [implementation] plans” and noted, citing 42 U.S.C. § 7604(a)(2), that “any remedy for EPA’s failure to act in this regard would lie in district court.” *Id.* at 37. On January 31, 2018, in light of EPA’s representations, Petitioners and EPA stipulated to voluntary dismissal of the case. *NRDC v. Pruitt*, Stip. Of

¹⁵ See Letter of May 5, 2017 from EPA Administrator E. Scott Pruitt to Mr. Carroll W. McGuffey III, et al., https://www.epa.gov/sites/production/files/2017-05/documents/signed_-_letter_-_municipal_solid_waste_landfills.pdf; *see also* Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878 (May 31, 2017) (noting that by this letter, EPA “convened a proceeding”).

¹⁶ On essentially the same facts, the D.C. Circuit had just invalidated EPA’s 90-day stay of regulations addressing methane emissions from oil and gas operations, because the court found the criteria for reconsideration were not met. *Clean Air Council v. EPA* (D.C. Cir. 2017) 862 F.3d 1.

¹⁷ See Stay of Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, RIN 2060-AT64, <https://reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=2060-AT64> (last visited Nov. 9, 2018).

Voluntary Dismissal Pursuant to Fed. R. App. Proc. 42(b), ECF No. 1715796 at 2-3 (Jan. 31, 2018).

E. Pending Lawsuit Challenging EPA's Failure to Enforce

Two states—California and New Mexico—timely submitted state plans by the May 30, 2017 deadline. (Arizona submitted its state plan on July 24, 2018, and, according to comments submitted in this proceeding, West Virginia submitted its state plan on September 13, 2018. *See* Dkt. No. EPA-HQ-OAR-2018-0696-0006 at 2 (Nov. 8, 2018).) To date, EPA has not responded to those state plans, nor did EPA promulgate a federal plan within the six-month deadline for those states that did not submit a state plan. EPA's failure to comply with these mandatory deadlines prompted several states to file a lawsuit under the Citizen Suit provision of the Clean Air Act. *State of California v. EPA*, Case No. 4:18-cv-03237-HSG (N.D. Cal. May 31, 2018).

EPA has not denied it committed the alleged violations.¹⁸ Rather, in a motion to dismiss, EPA admitted that its sole defense is that only *statutory* mandates can support an action under the Citizen Suit provision, and that the court therefore lacked jurisdiction to order EPA to perform its nondiscretionary *regulatory* duties. (This assertion is inconsistent with its statement to the court in *NRDC v. Pruitt* that any remedy for its failure to comply with the regulatory deadlines would lie in district court.) Shortly after the October 25, 2018 hearing on EPA's motion, but before the court issued its ruling, EPA moved to stay the action while it pursued this rulemaking, wherein the agency proposes to extend into the future the regulatory deadlines that plaintiff States seek to enforce in that action.

In a ruling issued on December 21, 2018, the court denied EPA's motion to stay and also its motion to dismiss, finding that Congress's intent to hold EPA accountable for failing to perform duties set forth in regulations under the Clean Air Act was "readily discernable." *California v. EPA*, Order Denying Defs.' Mot. to Dismiss and Mot. to Stay Case, Dkt. 82 at 7, citing *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 555 (D.D.C. 2015). That ruling resolves the legal issue underlying EPA's liability for the regulatory violations. On the merits of the plaintiff States' claims, all that remains is to determine the appropriate remedy. The court set a briefing schedule for the States' motion and EPA's cross-motion for summary judgment, with a hearing on April 25, 2019.

F. Climate Change

Our States are already experiencing the deleterious impacts of climate change. In an appendix to these comments (Appendix A), we describe in detail the climate change-related harms our individual states are already experiencing or face in the near future. These harms include successive record-breaking fire seasons in California resulting in unprecedented loss of life and billions of dollars in damages and economic harm; dramatic increases in the frequency and intensity of extreme rain storms across Rhode Island and Vermont that have caused severe

¹⁸ *See, e.g., NRDC v. Pruitt*, Respondents' Initial Br., ECF No. 1714147 at 37 (Jan. 22, 2018) ("EPA has neither approved nor disapproved the state plans that were timely submitted, nor has EPA promulgated any federal plans . . .").

flooding; extreme precipitation swings in Illinois and Pennsylvania that threaten agricultural yields; a sharp increase in unhealthy air days since 2013 in Oregon due to forest fires; sea level rise affecting the coasts of California, Maryland, Oregon, New Jersey, Oregon, Pennsylvania, and Rhode Island and expected to result in billions of dollars of damage to property and critical infrastructure; and extensive anticipated tree and forest mortality across New Mexico from increased temperatures, to name a few.

Recent reports confirm that we must act immediately to reduce GHG emissions to avoid their most serious consequences. On November 23, 2018, EPA and twelve other U.S. government agencies released the second volume of the Fourth National Climate Assessment (Assessment),¹⁹ which provides a thorough evaluation of the harmful impacts of climate change that different regions of the country are experiencing and the projected risks climate change poses to our health, environment, economy and national security.

The Assessment confirms that “[c]limate-related changes in weather patterns and associated changes in air, water, food, and the environment are affecting the health and well-being of the American people, causing injuries, illnesses, and death.”²⁰ It makes clear that we need to act *now* to reduce GHG emissions: “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 CO₂, mitigation deployment uncertainties, and the potential for abrupt consequences.”²¹ The Assessment cautions that “[i]n the absence of significant global mitigation action and regional adaptation efforts, rising temperatures, sea level rise, and changes in extreme events are expected to increasingly disrupt and damage critical infrastructure and property, labor productivity, and the vitality of our communities.”²² Furthermore, “[b]y the end of this century, thousands of American lives could be saved and hundreds of billions of dollars in health-related economic benefits gained each year under a pathway of lower GHG emissions.”²³

The Assessment represents the federal government’s most up-to-date and comprehensive analysis of climate science and the impacts of climate change on the United States.²⁴ It reflects the work of more than 300 governmental and non-governmental experts, was externally peer-reviewed by a committee of the National Academies of Sciences, Engineering and Medicine, and underwent several rounds of technical and policy review by the thirteen federal member agencies of the U.S. Global Change Research Program, including EPA.²⁵

A month before the Assessment was released, in October 2018, the IPCC issued a Special Report titled *Global Warming of 1.5 C*, wherein the IPCC concludes that global warming is

¹⁹ See Assessment, *supra*, n.4.

²⁰ *Id.* at 541.

²¹ *Id.* at 1351.

²² *Id.* at 25 (Summary Findings).

²³ *Id.* at 541.

²⁴ *Id.* at 1; see also Global Change Research Act of 1990, Pub. L. No. 101-606, 15 U.S.C. §§ 2921-2961.

²⁵ Assessment at iii, 2.

likely to reach 1.5° C between 2030 and 2052 if emissions continue to increase at the current rate.²⁶ We are already seeing the consequences of the 1° C of warming to date as demonstrated by more extreme weather, rising sea levels and diminishing arctic sea ice. The IPCC projects major damage to marine ecosystems such as coral reefs which are projected to decline 70–90 percent at 1.5°C, while essentially being eliminated worldwide at 2° C.²⁷

Several other recent findings are noteworthy:

- Global carbon emissions reached an all-time high in 2018.²⁸ (One article aptly characterized this as “an extraordinary watermark in Earth’s history that underscores the need for faster and stronger action to address accelerating climate change.”²⁹)
- In 2018, atmospheric CO₂ levels measured at the National Oceanic and Atmospheric Administration’s (NOAA) Mauna Loa Observatory exceeded the 410 parts per million (ppm) threshold for the first time, reaching 411 ppm in May 2018.
- The growth rate of global CO₂ levels is accelerating, averaging about 1.6 ppm per year in the 1980s and 1.5 ppm per year in the 1990s, but increasing to 2.2 ppm per year during the last decade.³⁰
- Global temperatures during the first half of 2018 were the hottest on record during a La Niña year.³¹

There is also evidence to show that many of the record-setting phenomena we have recently seen will become the new normal, or are likely to become even more extreme:

- A study of agricultural crop response to climate warming indicates that insect pests will consume important U.S. grain crops—wheat, rice and corn—at an increasing rate: While insects already consume 5-20 percent of major grain crops, models show yield lost to insects will increase by 10-25 percent per degree Celsius of warming.³²

²⁶ See IPCC Special Report (*supra*, n.3) at 65.

²⁷ *Id.* at 230 (Box 3.4).

²⁸ Le Quéré, C. et al., *Global Carbon Budget 2018*, 10 EARTH SYST. SCI. DATA 2141, Dec. 5, 2018, <https://doi.org/10.5194/essd-10-2141-2018>.

²⁹ Chelsea Harvey, *More CO₂ Released in 2018 Than Ever Before*, E&E News (Dec. 6, 2018); <https://www.eenews.net/climatewire/2018/12/06/stories/1060108875>.

³⁰ See <https://research.noaa.gov/article/ArtMID/587/ArticleID/2362/Another-climate-milestone-falls-at-NOAA%E2%80%99s-Mauna-Loa-observatory> [website currently unavailable due to government shutdown].

³¹ See *July Sees Extreme Weather with High Impacts*, WORLD METEOROLOGICAL ORG., <https://public.wmo.int/en/media/news/july-sees-extreme-weather-high-impacts> (last visited Dec. 27, 2018).

³² Deutsch, C. et al., *Increase in crop losses to insect pests in a warming climate*, 361 SCIENCE 916 (Aug. 31, 2018) (abstract); <http://science.sciencemag.org/content/361/6405/916>.

- Future hurricanes will have stronger maximum winds, move slower and drop more precipitation according to a modeling analysis by U.S. government scientists of 22 recent hurricanes.³³ The unprecedented rainfall totals associated with the “stall” of Hurricane Harvey over Texas in 2017 provide a notable example of the relationship between regional rainfall amounts and tropical-cyclone translation speed.³⁴ Similarly, before Hurricane Florence came ashore over the Carolinas in 2018, U.S. government and academic scientists forecasted rainfall amounts would be increased by over 50 percent due to warmer sea surface temperatures and available atmospheric moisture attributable to climate change.³⁵
- Climate change is intensifying droughts, which decrease mountain snowpack and threaten crop yields.³⁶ In 2015, “drought conditions caused about \$5 billion in damages across the Southwest and Northwest,” due to fallow farmland and reduced crop yields.³⁷ The occurrence of drought years in the past two decades has been greater in California than in the preceding century.³⁸ And human-induced climate change is expected to increase the likelihood of future warm-dry conditions that lead to droughts.³⁹ Climate change is also expected to increase the frequency of dry-to-wet precipitation events like California’s recent transition from multi-year drought to extreme wetness in 2016-2017. One study projects a 25-100% increase in these extreme dry-to-wet events.⁴⁰
- In August 2018—prior to the devastating Camp Fire—California released a report⁴¹ wherein, on the basis of numerous studies, it suggests large wildfires (greater than 25,000 acres) could become 50 percent more frequent by the end of century if GHG emissions are not reduced.⁴² The model produces more years with extremely high areas burned,

³³ Gutmann et al. *Changes in Hurricanes from a 13-Yr Convection-Permitting Pseudo-Global Warming Simulation*, 31 J. CLIMATE 3643–3657, Jan. 24, 2018, abstract, <https://doi.org/10.1175/JCLI-D-17-0391.1>

³⁴ Kossin, J., *A global slowdown of tropical-cyclone translation speed*, 558 NATURE 104 (June 7, 2018); <https://www.nature.com/articles/s41586-018-0158-3>.

³⁵ Reed, K., et al., *The human influence on Hurricane Florence*, <https://crd.lbl.gov/assets/Uploads/Wehner/climate-change-Florence-0911201800Z-final.pdf>.

³⁶ See Assessment, Report-in-Brief at 58, 67.

³⁷ *Id.* at 58.

³⁸ Diffenbaugh, et al., *Anthropogenic Warming Has Increased Drought Risk in California*, 112:13 Proceedings of the Nat’l Academy of Sci. 3931 (Mar. 31, 2015).

³⁹ *Id.*

⁴⁰ Swain, et al., *Increasing Precipitation Volatility in Twenty-First-Century California*, 8 NATURE CLIMATE CHANGE 427 (2018).

⁴¹ See Bedsworth, L., et al., (California Governor’s Office of Planning and Research, Scripps Institution of Oceanography, California Energy Commission, California Public Utilities Commission) 2018 Statewide Summary Report, California’s Fourth Climate Change Assessment (California Assessment), www.ClimateAssessment.ca.gov. We hereby incorporate this report by reference and request that the full report (which is attached) be included in the administrative record.

⁴² *Id.* at 9.

even compared to the historically destructive wildfires of 2017 and 2018.⁴³ By the end of the century, California could experience wildfires that burn up to 178 percent more acres per year than current averages.⁴⁴ Increased wildfire smoke will also lead to more respiratory illness.⁴⁵

Extreme weather events come at an extreme cost. For example, in 2017, Hurricanes Harvey, Maria, and Irma cost the U.S. approximately \$265 billion (\$125 billion, \$90 billion, and \$50 billion, respectively).⁴⁶ Costs to the states are also significant: in California, the cost of firefighting has tripled since 2013, to \$947.4 million at the end of the 2018 fiscal year.⁴⁷ These are just a few examples. With all such disasters, the costs do not end when the skies clear; there are also the costs of cleanup and rebuilding—which burden individuals, communities, insurance companies, and state and federal agencies alike.

Every day that implementation of the Landfill Emission Guidelines is delayed is another day that excess emissions are released to the atmosphere to exacerbate climate change and associated harms. By avoiding emissions in the near term—particularly methane emissions—we are not merely delaying the onset of severe consequences; we are increasing the likelihood that we can avoid such consequences—and their associated costs—altogether. The delays proposed by EPA are thus time that we cannot get back in the fight against climate change.

II. DISCUSSION

EPA’s proposed Delay Rule is unlawful and should be withdrawn. EPA provides no explanation for how the proposed Delay Rule serves its mandate under the Clean Air Act, and, in fact, the proposed Delay Rule *contravenes* that mandate. Moreover, EPA fails to offer good reasons for replacing the current deadlines in the Landfill Emission Guidelines. None of the bases that EPA provides for its promulgation are supportable, including its manufactured need to “align” implementation of the Guidelines with the implementation timeline set forth in the proposed Affordable Clean Energy (ACE) rule that would replace the Clean Power Plan (83 Fed. Reg. at 54,529; *see* 83 Fed. Reg. 44,746⁴⁸). Indeed, many of EPA’s justifications are contradicted by facts EPA fails to address. In addition, EPA has failed to conduct a regulatory impact analysis. By ignoring this and other analyses and procedural steps required by executive orders, EPA has unlawfully avoided assessing and disclosing the foregone benefits and other impacts that would result from its delay of the Landfill Emission Guidelines.

⁴³ *Id.*, Summary of Key Findings at 6, <http://www.climateassessment.ca.gov/state/docs/20180827-SummaryBrochure.pdf>.

⁴⁴ California Assessment at 30.

⁴⁵ *Id.* at 38; Summary of Key Findings at 8.

⁴⁶ *Hurricane Costs*, NOAA, www.coast.noaa.gov/states/fast-facts/hurricane-costs.html (last visited Dec. 21, 2018).

⁴⁷ *Emergency Fund Fire Suppression Expenditures (Dec. 2018)*, CAL. DEPT. OF FORESTRY AND FIRE PROTECTION, http://www.fire.ca.gov/fire_protection/downloads/SuppressionCostsOnepage.pdf.

⁴⁸ Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program (Aug. 31, 2018) (ACE Rule).

For each of these reasons, explained further below, EPA’s proposed action is arbitrary and capricious and contrary to law.

A. The Proposed Delay Rule Contravenes EPA’s Statutory Obligations Under the Clean Air Act

Under the Administrative Procedure Act, courts will set aside an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Courts have held that rules may be arbitrary and capricious where they fail to accomplish their statutory objectives. *See Chem. Mfrs. Ass’n v. EPA*, 217 F.3d 861, 867 (D.C. Cir. 2000) (rule establishing schedule for new emission standards was arbitrary and capricious absent evidence it would benefit human health and the environment: “Given the absence of environmental benefits—indeed, the possibility of environmental harm—EPA violated the basic requirement that its actions must ‘not deviate from or ignore the ascertainable legislative intent.’”) (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983)).

The proposed Delay Rule contravenes EPA’s congressional mandate 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). As established by a number of scientific reports—including the Assessment, which EPA itself contributed to and that it cannot ignore or downplay—there is significant evidence showing that climate change presents a grave threat to public health and welfare, both in the short and long term. Under those circumstances, EPA should be prioritizing implementation of measures such as the Landfill Emission Guidelines that will reduce GHG emissions, not delaying them.

In *Telecomms. Research & Action Ctr. v. F.C.C. (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984), the Supreme Court articulated the “contours” of a standard for evaluating whether an agency action was unreasonably delayed. The context at issue here is different (where an agency proposes to intentionally cause delay via a rulemaking), but the criteria are instructive nonetheless.

As a preliminary matter, the time agencies take to act must be governed by a “rule of reason,” to be supported by reference to the statutory scheme. *Id.* (internal citations omitted). Here, as discussed in detail below, EPA has cited no valid basis for its proposed delay, and its proposal wholly contravenes the purpose of the statute, which, as EPA has acknowledged, was to force “swift and aggressive action” on matters critical to human health and welfare. 40 Fed. Reg. at 53,343. The Delay Rule thus violates the rule of reason.

TRAC also notes that delays that might be reasonable in the sphere of economic regulation are “less tolerable when human health and welfare are at stake.” 750 F.2d at 80. The extent to which human health and welfare is at stake in this matter is discussed above, and cannot be overstated. Climate change is one of the greatest and most pressing challenges of our time. The impacts are already being widely felt and present a high risk of imminent crisis in many areas of the world, including our States. Not only has EPA failed to justify the delay it proposes, but, in light of the volume of evidence showing that urgent action is needed, it is hard to imagine

how any delay could be justified here. EPA's proposal is thus unlawful. *See Ctr. for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1197 (9th Cir. 2008) (invalidating "standards that are contrary to Congress's purpose in enacting the [relevant statute]").

If anything, EPA should be working to hasten the Landfill Emission Guidelines' implementation. The Guidelines, by their nature, seek to implement measures to control pollutants that EPA has determined endanger public health. It was Congress's intent that such rules be implemented expeditiously. 40 Fed. Reg. at 53,343. Moreover, the plans at issue are not particularly complex: They address emissions from a single source (landfills), and the technology that can achieve the reductions (gas collection and capture systems, or GCCS) is already widely deployed.⁴⁹ The only real change from the previous emission guidelines is that a landfill operator would be required to install GCCS at a lower emissions threshold. States already have plans in place that need only be updated or that can at the very least serve as a template for revised plans that meet the new requirements. Further, at this point, states have considerable experience and expertise in developing compliance plans for various Clean Air Act programs, and advances in communications and information-sharing technologies enable agencies to work more efficiently than they did in 1975.

It is true that Congress saw fit to extend the implementation timelines for Section 110. For reasons discussed below, however, this does not mean there is a reflexive need (or that it would be appropriate) to adjust the implementation timeline under Section 111(d) generally. In any case, there is no need to modify the implementation timeline for the Landfill Emission Guidelines. If Congress had intended for the amendments to Section 110 timelines to apply identically to Section 111(d), it could have made that intent clear. Without such a directive, EPA cannot justify extending the timelines for the Landfill Emission Guidelines, particularly given the environmental and human health harms that will result from such a delay.

The timing of EPA's announcement and publication of the proposed Delay Rule highlights the stark divide between the goals of the Clean Air Act and EPA's real intent here. EPA rushed this proposed Rule out just two days before oral argument in the States' lawsuit challenging EPA's failure to implement the Landfill Emission Guidelines. On the basis of this flawed proposal, EPA requested that the court stay its adjudication of the States' allegations that EPA has violated its mandatory duties under the Act, in an effort to stave off an order that it perform them. The court rejected this invitation, but the timing of EPA's proposal and the motion hearing strongly suggests that the proposal was motivated more by EPA's desire to evade review than any substantive evidence in the record.

At bottom, EPA's apparent disinclination to act cannot trump Congress's directive to address dangerous emissions sources, especially in light of overwhelming evidence of harm that EPA has itself acknowledged.⁵⁰ The courts have repeatedly cautioned EPA that "well-intentioned policy objectives" do not on their own support agency deviations from statute. *See, e.g.,*

⁴⁹ 638 landfills across the country already control their emissions using some form of GCCS. See 81 Fed. Reg. at 59,305, table 2.

⁵⁰ *See* 74 Fed. Reg. 66,496.

Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 460 (D.C. Cir. 2017) (Kavanaugh, J.). Here, Congress established Section 111(d) to ensure that both new and existing sources of dangerous pollutants would be properly controlled. EPA’s invented policy rationales to junk the current implementation framework may not even be well-intentioned, given its history of procedural delays. But the substantive content of the proposal—removing current deadlines, and then delaying emission protections from existing sources for half a decade or more—is inconsistent with Congress’s direction to put these protections in place. EPA’s proposal thus appears intended both to frustrate judicial review and to shirk Congressional obligations. Administrative agencies may not freelance based on their own policy preferences in this manner.

B. EPA Fails to Offer Valid Reasons for Reversing Course in the Proposed Delay Rule

An agency action is also arbitrary and capricious and subject to being set aside where the agency (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) is so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”).

An “agency changing its course . . . is obligated to supply a reasoned analysis for the change.” *Id.* at 42. The Supreme Court has clarified that while an agency need not show that a new rule is better than the rule it replaced, it must demonstrate that “there are good reasons” for the replacement. *F.C.C. v. Fox*, 556 U.S. at 515. Further, an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” when “its new policy rests upon factual findings that contradict those which underlay its prior policy.” *Id.* Any “unexplained inconsistency” between an existing rule and a proposal to delay it is “a reason for holding an interpretation to be an arbitrary and capricious change.” *Nat’l Cable & Telecomms. Ass’n*, 545 U.S. at 981. Moreover, an agency cannot suspend a validly promulgated rule without first “pursu[ing] available alternatives that might have corrected the deficiencies in the program which the agency relied upon to justify the suspension.” *Pub. Citizen v. Steed*, 733 F.2d 93, 103 (D.C. Cir. 1984); *see also Organized Village of Kake v. U.S. Dept. of Agric.*, 795 F.3d 956, 966-68 (9th Cir. 2015) (invalidating rule where agency failed to provide the “reasoned explanation” required by *Fox* for disregarding the facts and circumstances underlying prior rule).

1. There is no legal or practical need to align the Landfill Emission Guidelines’ implementation with the timeline set forth in Section 110

EPA’s primary justification for the Subpart Ba changes in the ACE Rule, and for the changes proposed here, is that they are necessary to align the Section 111(d) timeline with the statutory timeline for State Implementation Plans (SIPs) under Section 110. EPA thus implies that the changes are willed by Congress, but there is no evidence to support that proposition. The Clean Air Act requires that EPA regulations under Section 111(d) be “similar to” the provisions under Section 110, but nothing requires that they be identical. As EPA notes, “similar to” requires only that EPA “carefully consider the major structural features of CAA section 110 and,

where appropriate, adopt similar provisions in its regulations implementing CAA section 111(d).” 83 Fed. Reg. at 54,530 n.4 (emphasis added). We agree: Congress implicitly directed EPA to ensure the implementation framework under Section 111—while “similar” to that under Section 110—reflected the unique goals and approach of Section 111.

Absent a legal mandate to change the implementation timeline here, EPA relies on unsupported claims concerning the “time, work, and effort” required to prepare a state plan to comply with the Landfill Emission Guidelines and suggests it is equivalent to the time, work, and effort required to develop a SIP under Section 110. *Id.* at 54,530. This is unavailing. It is not reasonable to base the Guidelines’ deadlines on SIP deadlines. While both programs rely on a model of cooperative federalism, SIPs are inherently more complex than most Section 111(d) plans, and particularly the Guidelines at issue here. For one, SIPs require different and often extensive levels of controls across a broad range of sources to collectively reduce emissions as necessary to achieve a uniform health-based standard. The analyses supporting a SIP thus require significant coordination across sectors and complex modeling. The Landfill Emission Guidelines, on the other hand, address pollution from a single source category—landfills—and are based on a particular system of pollution control; the emission-reduction goals can be achieved by using the system that EPA relied on in developing the Guideline in the first place. Finally, the state plans here will not require certain elements that can further complicate the development of SIPs, including, for example, New Source Review permitting provisions or motor vehicle emission budgets.

EPA itself has conceded that the SIPs in Section 110 are generally far more complex than the state plans under Section 111(d). *See id.*, n.4 (“The EPA acknowledges that the procedural and substantive requirements established by Congress for the SIP 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 SIPs”). The difference in complexity between Sections 110 and 111(d) inherently warrants distinct timelines and more rigorous reviews to confirm completeness of state plan submissions. In the case of emission guidelines that are more complex, there may well be a need to allow more time to complete a state plan. For example, in its emission guidelines to control CO₂ emissions from existing power plants (the Clean Power Plan), EPA allowed states one year to submit their plans and also gave them the option of obtaining a two-year extension of that deadline. *See* 80 Fed. Reg. 64,662, 64,855.⁵¹

Moreover, while “experience” showed that nine months was not adequate time for states to submit SIPs under Section 110, such evidence is lacking in the context of Section 111(d). In the ACE Rule, EPA cites “years of experience with working with states to develop SIPs under section 110” (83 Fed. Reg. 44,769; *see also* 83 Fed. Reg. 54,530) but fails to explain why its experience with SIPs under Section 110 justifies more time under Section 111(d). In the proposed Delay Rule, EPA cites the fact that the majority of states failed to timely submit plans;

⁵¹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Oct. 23, 2015).

as discussed below, the better explanation for this is that EPA all but urged them not to because it was reconsidering (and thus, likely to change) the rules.

2. EPA has not adequately justified any single proposed extension; nor could it, based on the evidence

Implementation of the Landfill Emission Guidelines is a multistep process. The Delay Rule proposes an extension of every discrete deadline in that process, resulting in an aggregate delay of more than five years. EPA has not justified any of those discrete delays; nor could it based on the evidence. Moreover, EPA's addition of a six-month "completeness review" period is a transparent tactic for further unnecessary delay.

a. State plan submissions

When EPA finalized the 2016 Emissions Guidelines, it had confidence that "the majority of states will be able complete the process within the prescribed 9 months." EPA, Response to Public Comments at 31 (July 2016).⁵² It specifically denied the request of a few commenters for an extended timeline, explaining that while a "state may not be able to submit a revised plan within this timeframe due to the specific circumstances of the state's rulemaking process ... such circumstances will be the exception rather than the rule." *Id.* EPA now proposes to extend the present nine-month period for states to submit implementation plans to three years, but it offers no valid justification for this change of course. As bases for the proposed Delay Rule, EPA cites "the reasons proposed in the ACE Rule" (namely, to "harmonize" the implementation timeline for Clean Air Act section 111(d) with section 110, 83 Fed. Reg. at 44,748), and comments received on the 2015 proposed guidelines. 83 Fed. Reg. at 54,530, n.4. Neither of these justifies the proposed extension or explains the inconsistency between the proposed Delay Rule and EPA's prior policy, rendering the proposal arbitrary and capricious. *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 981.

First, EPA has offered no reasoned explanation in this proposal or in the ACE Rule proposal as to why it is appropriate to change course and adopt the *maximum* period allowed for SIP development under Section 110 (which allows for shorter periods as determined by EPA), in light of its concession that Section 111(d) plans are generally subject to considerably less detailed requirements than SIPs under Section 110. This is particularly true in the case of the Landfill Emission Guidelines: States already have existing state plans to comply with the prior emission guidelines; all that is required is to modify them to reflect the regulatory changes imposed by the Landfill Emission Guidelines, which, as noted above, are largely patterned after the prior guidelines. As a result, states do not need to write their compliance plans from scratch; rather, they can modify their existing plans to accommodate the new regulatory requirements.

Second, contrary to EPA's bald assertion, the circumstances surrounding the Landfill Emission Guidelines do not demonstrate that "states need more time to submit a plan." 83 Fed. Reg. at 54,530. Two states—California and New Mexico—timely submitted plans within the applicable nine-month deadline. Arizona and West Virginia have also since submitted their

⁵² <https://www.epa.gov/sites/production/files/2016-12/documents/landfill-nsps-eg-2016-rtc.pdf>.

plans, well ahead of the proposed three-year deadline. More importantly, on May 5, 2016—more than three weeks before states were required to submit their plans—EPA sent a letter to industry groups indicating its intent to grant their petition to reconsider the Guidelines, and to stay the rule “in [its] entirety” for 90 days while it did so. (The 90-day stay was made formal on May 31, 2017.⁵³) At the time, Arizona, Colorado, Delaware, Florida and likely a number of other states were in the process of developing plans; many had even completed a draft plan and had provided requisite notice of a public hearing.⁵⁴ They likely decided not to expend further resources on the effort given EPA’s announced intention to, at a minimum, delay implementation of the Guidelines.

Nowhere in the proposed Delay Rule does EPA address the effects of its own actions in discouraging the submittal of state plans. Regardless, EPA has no way of knowing why other states did not timely submit their plans and no basis to assert that it was because they had insufficient time to do so. Because EPA announced its intent to stay the 2016 rule *before* the nine-month period had expired, and has continued to advise states that they need not submit plans, it cannot be inferred from the non-submittal of plans that states *could not* have timely submitted plans. Again, where EPA genuinely believes that states need more time to complete plans for a particular emission guideline, it can give them more time across the board, as it did for the Clean Power Plan. *See* 80 Fed. Reg. at 64,855. Or EPA could extend the deadline on an individual basis where it finds, based upon the factual record before it, that a state has demonstrated the need for more time to submit its plan. 40 C.F.R. § 60.27(a) (“The Administrator may, whenever he determines necessary, extend the period for submission of any plan or plan revision or portion thereof.”)

Nor do comments submitted in response to the 2015 proposed guidelines provide any support for the notion that three years are necessary to develop state plans. The proposed Delay Rule cites the fact that “some” commenters objected to the nine-month period, due to time needed for rule development and required public processes. In fact, only four of the fifty states made such comments, and none of them requested *three years* to submit a plan. *See* 83 Fed. Reg. at 54,530 (citing July 2016 EPA Responses to Public Comments document, pp. 30-33). Specifically, Idaho requested two years, Iowa one year, Pennsylvania one year, and New Mexico one to one-and-a-half years. The National Association of Clean Air Agencies (NACAA), a nonpartisan organization representing air pollution control agencies in 40 states, the District of

⁵³ Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878 (May 31, 2017).

⁵⁴ *See, e.g.*, http://static.azdeq.gov/aqd/msw_sp.pdf (Arizona Dept. of Envi. Quality, State Plan submittal, noting at p.1 that the stay ended and was not renewed, and so the state was submitting its plan to fulfill the emission guidelines requirements); https://www.colorado.gov/pacific/sites/default/files/AP_FAQforLandfills_1.pdf (Colorado Air Pollution Control Div., Landfill Rule Change FAQ, Oct. 2016); <http://regulations.delaware.gov/register/july2017/MSWL%20State%20Plan.pdf> (Delaware Dept. of Nat. Res. and Envi. Control, State Plan, May 11, 2017); <https://floridadep.gov/air/air-business-planning/content/proposed-111d-state-plan-municipal-solid-waste-landfills>, <https://floridadep.gov/sites/default/files/2017-04-07-Pre-Hearing-Cf-111%28d%29-State-Plan-Submittal-Package.pdf> (Florida Dept. of Envi. Prot., information page and state plan).

Columbia, four territories and 116 metropolitan areas, recommended one year. Notably, despite its request for more time, New Mexico was in fact able to develop, approve, and submit a plan within the nine-month period. This is not to dismiss the legitimate concerns raised by the states with respect to the time required to conduct their requisite public process. But it is evidence that even in the face of such process requirements, the Landfill Emission Guidelines state plan is not so complex or burdensome that it cannot be prepared in less than a year. In any case, EPA has provided no reasons for establishing a period that is significantly longer than any state requested.

Creating a three-year delay before EPA could begin the process of federal implementation is particularly unnecessary where some states likely have no intention of ever submitting a state plan. Fifteen states currently operate under the federal plan (*see* 81 Fed. Reg. at 59,287) and although a number of states likely would have submitted plans but for EPA's stay of the rule, a number of others doubtless would not. In light of the fact that EPA has not shown a need to provide three years for states that *do* intend to submit plans, waiting three years before commencing action for states that *do not* intend to submit plans accomplishes nothing but unnecessary delay in addressing significant sources of GHGs and other pollutants. This delay is all the more egregious when combined with EPA's proposal to expand the time for federal implementation from six months to two years, discussed below.

Finally, EPA manufactures a newfound discomfort with its prior finding that nine months was sufficient time because there is a "federal backstop"—that is, where a state cannot meet the deadline, it is simply subject to a federal plan. *See* 83 Fed. Reg. 54530 (noting that its prior reliance on the "federal backstop" was "inadequate" to explain why nine months was sufficient time to prepare a state plan). This is unavailing. For one, EPA need not have relied on the "federal backstop" argument to explain why nine months' time is sufficient to prepare a state plan. There are other justifications for a nine-month timeline, including that plans under Section 111(d) are not particularly complex. At bottom, however, it is incumbent on EPA to secure reductions of harmful pollutants *as quickly as possible*, not to assist states in avoiding a "federal backstop." It was the clear goal of Congress, in promulgating the 1970 amendments to the Clean Air Act, to ensure "swift and aggressive action" on the part of both EPA and the states to implement air pollution-control measures that protect public health and welfare. 40 Fed. Reg. at 53,342-43. If a state did not want to be subject to a federal plan, it could prioritize development of its own plan. But where a state either chooses not to do so, or fails to act within a reasonable period of time, Congress wanted to ensure that public health and safety would not be compromised. Furthermore, just because a state is subject to a federal plan does not mean it is precluded from developing its own plan; it just means there is an incentive to "expedite[] a State's or Tribe's responsibility for implementing the emission guidelines as intended by Congress." 64 Fed. Reg. 60,689, 60,699.⁵⁵ And as discussed above, there is a relief valve where

⁵⁵ When it promulgated the current federal plan, EPA clarified, "Landfills covered in the State or Tribal plan are subject to the Federal plan until the State or Tribal plan is approved and becomes effective. Upon the effective date of the State or Tribal plan, the Federal plan no longer applies to landfills covered by the State or Tribal plan and the State, Tribe or local agency will implement and enforce the State or Tribal plan in lieu of the Federal plan." Federal Plan Requirements for Municipal Solid Waste Landfills That

EPA finds that a state has demonstrated the need for more time to submit its plan. *See* 40 C.F.R. § 60.27(a).

b. *Resubmittal of already-submitted state plans*

In addition to proposing to extend arbitrarily the deadline for state plan submissions, EPA also proposes to require states that have already submitted their plans (California, New Mexico, Arizona, and West Virginia) to resubmit them and requests comment on that proposal. 83 Fed. Reg. at 54,530. EPA asserts that such a requirement “would ensure consistent treatment of all states and state plans, avoid confusion regarding deadlines, and allow the EPA to undertake a completeness review for state plans already submitted to the EPA.” *Id.* None of these rationales for requiring resubmission and further delaying EPA’s approval of submitted state plans has merit.

As a preliminary matter, EPA denies or at least fails to acknowledge that the completeness criteria impose an additional burden on states. EPA claims the proposed Delay Rule (including its addition of completeness criteria) would “not alter any of the submission requirements states already have under any applicable emission guideline.” 83 Fed. Reg. at 54,530, n.6. But contrary to EPA’s inference, the proposed completeness criteria *would* alter the submission requirements by imposing *additional* requirements. As discussed below, these additional requirements are arbitrary and capricious and should not be imposed on any states, let alone those that have already submitted their plans.

Regardless of whether the criteria do or do not impose additional requirements, requiring states that have already submitted state plans to resubmit places a burden on these states that EPA fails to justify. For one, EPA has not explained how requiring resubmission would ensure “consistent treatment” across states or “avoid confusion regarding deadlines,” or why either alleged result justifies the added burden on compliant states. Given that the deadline for EPA’s review of three of the four submitted state plans has already passed (and in the case of West Virginia, a response is due on or about January 13, 2019), it becomes clear that the sole function of requiring compliant states to resubmit their state plans is to enable EPA to avoid liability for failing to timely review them.

EPA also solicits comment on whether, if EPA does not require resubmission, it should still evaluate the already-submitted plans for compliance with the proposed new completeness criteria. 83 Fed. Reg. at 54,530. This alternative is baseless for similar reasons. EPA already should have completed its review of these state plans. Applying the completeness criteria to the already-submitted plans would effectively result in the unlawful retroactive application of new, more burdensome criteria. In any event, as discussed below, EPA’s proposed completeness criteria are unwarranted and should not be applied to any state plans, let alone those already submitted.

Commenced Construction Prior to May 30, 1991 and Have Not Been Modified or Reconstructed Since May 30, 1991, 64 Fed. Reg. 60,689, 60,699 (Nov. 8, 1999).

c. *Completeness Review*

In the ACE Rule, EPA proposes to take six months to apply criteria to determine the completeness of state plans, separate and distinct from EPA's substantive evaluation of whether a state plan is "satisfactory." 83 Fed. Reg. at 44,772. EPA proposes to apply this "completeness review" to the Landfill Emission Guidelines. 83 Fed. Reg. at 54,530. There has been no need of a completeness review in the past, and EPA fails to justify it now, particularly as applied to the Guidelines.

The primary basis for EPA's proposal to conduct a separate "completeness review" is that a "similar" review is required under Section 110. 83 Fed. Reg. at 44,772. This is not a valid justification: Again, SIPs under Section 110 are inherently more complex, and "similar" does not mean "the same." The mere fact that EPA proposes to use "criteria" to determine whether a submission is complete is certainly no basis for an additional six months' delay. *See* 83 Fed. Reg. 54,530 ("Because the EPA is proposing to apply the completeness criteria [here] . . . it is important that the EPA have the opportunity to undertake a completeness review for all state plans.").

The fact that there is no valid basis for the proposed completeness review suggests it is nothing more than a delay tactic. For one, EPA claims, "the addition of completeness criteria in the framework regulations does not alter any of the submission requirements states already have under any applicable emission guideline." 83 Fed. Reg. at 54,530 n.6. While this is incorrect—as discussed below, the proposed criteria actually add several substantive requirements to what is currently required—if it were true, it would only demonstrate that the completeness criteria serve no purpose. And where EPA fails to conduct a review or to affirmatively deem a plan complete within the six-month period, there is no consequence; the submission is simply deemed complete by operation of law, and EPA's substantive review ensues. As noted in their comments on the proposed ACE Rule, the States have reason to be skeptical of EPA's intentions: Under the 2008 ozone NAAQS, for example, EPA has systematically disregarded deadlines for completeness determinations. *See, e.g.*, Order Granting in Part Motions and Cross-Motions for Summary Judgment, *Sierra Club v. McCarthy*, Case No. 4:14-cv-05091-YGR, 2015 WL 3666419, at *3-4 (N.D. Cal. May 7, 2015). In that case, EPA only complied with its mandatory duty to issue findings of failure to submit completed SIPs (which would trigger subsequent implementation deadlines under the statute) after a court ordered it to do so, causing long delays to an already lengthy process.

As noted above, contrary to EPA's claim, the completeness criteria actually impose several additional substantive requirements on states. Several of the criteria have no application in the context of the Landfill Emission Guidelines.⁵⁶ Others simply impose an undue burden to

⁵⁶ For example, under the proposed Delay Rule, states would be required to, among many other things, "[d]emonstrat[e] that the state plan submission is projected to achieve emissions performance under the applicable emissions guidelines" and "[i]dentify emissions standards for each designated facility." Subpart Ba Completeness Criteria, 8(d) & (b). For SIPs and state plans under some emission guidelines, this information might be useful, but it has no value here, where EPA has proposed an emission guideline on the basis of a best system of emission reduction (BSER) that essentially sets an emission standard that

no practical effect. For example, criterion 1 requires that a state include a “formal letter of submittal from the Governor or the Governor’s designee requesting EPA approval,” and criterion 5 requires that it provide “[e]vidence that the State followed all of the procedural requirements of the State’s laws and constitution in conducting and completing the adoption/issuance of the plan.” 83 Fed. Reg. 44,772. Another example is the requirement that a state show that each emission standard is “nonduplicative,” among other things (*id.*, criterion 8(f)), which requires the state to prove a negative—an impossible requirement to meet. EPA indicates no specific need for any of this information, nor does it explain how it furthers the statute’s purpose. The only purpose the additional requirements conceivably serve is to provide manufactured cover for EPA’s argument that the states need more time to complete their state plans and that EPA needs more time to review them.

Under the circumstances—where there is no demonstrated need to impose requirements that will only complicate and delay what should be a “swift and aggressive” process—the criteria are arbitrary and capricious. EPA should continue to evaluate whether a plan is “complete” within the scope of its substantive review and commit to issuing a decision on the submission within four months rather than the 18 months it proposes to give itself. Where, in the course of its substantive review, EPA notes that an element of the plan is incomplete or insufficient, it can—as it has always done—communicate the deficiency to the state and either proceed with the review while the state works concurrently to address the deficiency or, if necessary, suspend its review pending cure.

Finally, without justification, EPA has arbitrarily changed the trigger for subsequent deadlines from the date a state plan’s submittal is due—which is established by regulation—to the date EPA determines such submission is complete. It is wholly inappropriate to tether the successful implementation of emission guidelines to dates *un*-certain. (Were this the rule now, EPA would likely assert that it was not obligated to impose a federal plan on any state that failed to timely submit a state plan, because that clock—which is ultimately tied to EPA’s completeness determination—never started running.)

d. EPA review of state plans

In addition to creating an unjustified six-month period for completeness review, EPA also proposes to extend its deadline for reviewing and approving or disapproving submitted state plans from four months (including reviewing for completeness) to 12 months (following the new six-month completeness review period). This proposed delay is unsupported and unjustified and therefore arbitrary and capricious.

EPA attempts to justify this delay by first reiterating its explanation in the ACE Rule: “given the flexibilities that CAA section 111(d) and emission guidelines generally accord to states, and the EPA’s prior experience on reviewing and acting on SIPs under CAA section 110, it is appropriate to extend the period for the EPA’s review . . .” 83 Fed. Reg. at 54,530. But as

all affected facilities must meet. Compliance with the emission guideline will not be demonstrated by the attainment of a particular ambient air quality standard, but by monitoring emissions from each facility. *See, e.g.*, 40 C.F.R. § 60.39f(b).

explained above, it is unreasonable for EPA to equate the Section 111(d) timelines to the SIP timelines under Section 110 given the vastly different complexities of the state submissions under each section. And, as also explained above, such an extension is particularly unjustified here, where states are merely updating existing submissions, not starting from scratch.

EPA's remaining justification for extending its review period also lacks merit. EPA claims the delay "would provide adequate time for the EPA to review plans and follow notice-and-comment rulemaking procedures to ensure an opportunity for public comment on the EPA's proposed action on a state plan." *Id.* EPA thus implies (without support) that its proposed approval or disapproval of a state plan would fall within the scope of a notice-and-comment rulemaking under Clean Air Act section 307(d) (42 U.S.C. § 7607). To the extent EPA asserts this as basis for the proposed delay, it must justify that characterization.⁵⁷ Since EPA has provided no explanation to support its proposed extension here, its proposal is arbitrary and capricious.

e. Promulgation of federal plans

EPA states that it is "reiterating the rationale in the proposed ACE rule" for *quadrupling* from six months to two years the time for promulgating a federal plan if a state fails to submit an approvable plan. 83 Fed. Reg. at 54,531. The rationale asserted in the ACE rule is unavailing in the abstract, and particularly inappropriate as applied to the Landfill Emission Guidelines.

In the one paragraph devoted to the issue in the ACE proposal, EPA's only explanation for the proposed 18-month extension is that it is consistent with the deadline in Section 110 for Federal Implementation Plans (FIPs) under the NAAQS for criteria pollutants. 83 Fed. Reg. at 44,771. However, as discussed above, an implementation plan for a Section 111(d) guideline applicable to a single source category is not comparable in complexity to a NAAQS implementation plan. Timelines applicable to NAAQS SIPs and FIPs are therefore not inherently appropriate for Section 111(d) plans.

EPA attempts to justify the two-year period for federal plan development in the Landfill Emission Guidelines context, asserting that "the federal plan . . . may be more complex and time intensive since it must be tailored to meet the needs of many states." 83 Fed. Reg. at 54,531. However, EPA offers no explanation of the nature of such tailoring. The existing federal plan (codified at 40 C.F.R. Part 62, Subpart GGG) contains no provisions explicitly referencing the special needs of any particular state, and does not identify with particularity the affected facilities. Instead, it defines "designated facilities" generically, 40 C.F.R. § 62.14352, and

⁵⁷ EPA's approval or disapproval of state plans is not listed in Section 7607(d). States are required to provide a hearing on their proposed plans (with 30 days' notice). 40 C.F.R. §§ 60.23(c)(1), (d). They are further required to submit to EPA a list of all witnesses who appeared at the hearing and a summary of their testimony, and to retain for two years a record of the full text of any testimony. *Id.*, §§ 60.23(e), (f). There is no requirement that EPA provide a public hearing where it proposes to approve or disapprove a state plan. (In contrast, where EPA promulgates a federal plan for a state or proposes to revise the state's plan, notice and hearing are required. *See id.*, §§ 27(f), 60.29.)

provides that the federal plan applies to each designated facility that is not covered by an EPA-approved and currently effective state or tribal plan. 40 C.F.R. § 62.14350. EPA does not explain why a similar approach cannot be used for the current Landfill Emissions Guidelines.

3. It is irrelevant that the proposed Delay Rule is “beneficial” to EPA

EPA also justifies its proposed delay on the basis that this “would be beneficial to the EPA.” This is a wholly inappropriate justification for delaying the implementation of critical measures to control emissions of pollutants that EPA has found endanger human health and welfare. For one, nowhere does Congress indicate that EPA is to consider what might be “beneficial” to it in developing, implementing and enforcing the regulations that implement the Clean Air Act’s statutory mandates. For EPA to assert its own benefit generally is arbitrary and capricious under *State Farm*, 463 U.S. at 43. But it is beyond the pale under the circumstances here, where EPA has already flouted its nondiscretionary duties to implement valid measures to protect human health and welfare even though it is clear that time is of the essence in implementing such measures.

To the extent EPA is suggesting it lacks agency resources to timely implement the Landfill Emission Guidelines, this is improper justification for it to codify an otherwise unreasonable delay. *See Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 191 (D.C. Cir 2016) (lack of agency resources is not a sufficient reason to delay required agency action).

4. The possibility that market forces might compel early compliance does not justify regulatory delay

EPA further attempts to justify the proposed Delay Rule by stating that facilities have an incentive to install controls prior to being required to do so, as that would enable them to begin monetizing recovered gas sooner, decreasing the net costs of the controls. *See* 83 Fed. Reg. at 54,531. But as EPA acknowledges, “some sources may choose to wait until requirements are enacted prior to installing controls.” *Id.* Moreover, EPA cannot simply abdicate its responsibility to implement a regulation on the basis that market forces may eventually generate a result similar to what the regulation seeks to achieve. Indeed, regulatory action is generally needed to address market failures. It is improper to delay regulation on the assumption that the invisible hand will make the market function perfectly (contrary to how it has functioned in the past without regulation) and therefore not regulate.

C. EPA Has Not Conducted a Requisite Regulatory Impact Analysis and Has Therefore Ignored the Substantial Environmental and Human Health Costs That the Proposed Delay Rule Will Create

In the proposed rule, EPA declines to conduct a regulatory impact analysis (RIA) on the ground that, “although the costs and benefits of harmonizing the timing requirements of state plans cannot be quantified due to inherent uncertainties, the EPA believes that they will be minimal and requests comment on this.” 83 Fed. Reg. at 54,531. Indeed, EPA denies that the proposed Delay Rule will have any health and safety impacts whatsoever. *See id.* at 54,532 (concluding that this action is not subject to Executive Order 13045, which concerns the

protection of children from environmental health and safety risks, in part because the proposed Delay Rule “is a procedural change and does not have any impact on human health or the environment.”⁵⁸ But EPA cannot prejudice the outcome of any RIA as a means to justify not conducting one. That is especially true here, where the evidence overwhelmingly shows that any delay in reducing GHG emissions is likely to have catastrophic—and costly—consequences.

Pursuant to Executive Order 12291,⁵⁹ an RIA is required for significant and economically significant regulatory actions, as defined under sections 3(d)-(f) of Executive Order 12866.⁶⁰ An economically significant regulatory action is one that is likely to impose costs, benefits, or transfers of \$100 million or more in any given year, or “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” *Id.* § 3(f)(1).

EPA’s first error is in focusing only on the costs to states in delaying submission of their compliance plans. But those are not the only costs EPA must consider. “In addition, ‘cost’ includes more than the expense of complying with regulations; any disadvantage could be termed a cost . . . including, for instance, harms that regulation might do to human health or the environment.” *Michigan v. EPA*, 135 S. Ct. at 2707; *see also* OMB Circular A–94, *Guidelines and Discount Rates for Benefit–Cost Analysis of Federal Programs*, Appendix A (1992) (defining “benefit-cost analysis” as “[a] systematic quantitative method of assessing the desirability of government projects or policies when it is important to take a long view of future effects and a broad view of possible side-effects”).

By EPA’s own assessment, the monetized benefits of the Landfill Emission Guidelines—and thus the costs of the proposed Delay Rule—would be significant, and at any rate, greater than \$100 million annually. EPA stated, “the final rule’s estimated methane emission reductions and secondary CO₂ emission reductions in the year 2025 would yield global monetized climate benefits of \$200 million to approximately \$1.2 billion, depending on the discount rate. Using the average social cost of methane (SC–CH₄)⁶¹ and the average social cost of CO₂ (SC–CO₂), each at a 3-percent discount rate, results in an estimate of about \$440 million in 2025 (2012\$).” *See* 81 Fed. Reg. at 59,280. EPA further estimated the net *annual* benefits of the rule to be \$390 million by 2025. *Id.* at 59,280. (According to Table 1 in EPA’s 2016 RIA for the Guidelines, the average annual net benefits of the Guidelines from 2019 to 2025 would actually be greater—\$397 million.) Accordingly, the costs of the “disadvantages” imposed by the Delay Rule would thus be at least \$1.5 billion in forfeited net benefits over the course of the delay (four years additional

⁵⁸ Given the flaws in EPA’s analysis of the applicability of Executive Order 13045, EPA has not adequately justified why this proposed Delay Rule is not subject to that Executive Order.

⁵⁹ 46 Fed. Reg. 13,193 (Feb. 17, 1981), 3 C.F.R. 127 (1982).

⁶⁰ 58 Fed. Reg. 51,735 (Oct. 4, 1993), 3 C.F.R. 638 (1994).

⁶¹ “The SC–CH₄ and SC–CO₂ are the monetary values of impacts associated with marginal changes in methane and CO₂ emissions, respectively, in a given year. It includes a wide range of anticipated climate impacts, such as net changes in agricultural productivity, property damage from increased flood risk, and changes in energy system costs, such as reduced costs for heating and increased costs for air conditioning.” 81 Fed. Reg. at 59,280.

delay x \$390 million per year), and potentially a great deal more. This is not, as EPA suggests, “minimal.”

Without an RIA that properly accounts for benefits and costs, EPA’s proposal is procedurally flawed and must be withdrawn.

D. The Proposed Delay Rule Is Improperly Predicated on the Proposed ACE Rule

Contrary to EPA’s assertion, the proposed ACE Rule would not apply to the Landfill Emission Guidelines. In any event, the ACE Rule—including that part of the rule on which the proposed Delay Rule is predicated—is unlawful.

As proposed, the ACE Rule includes a new 40 C.F.R. Part 60, subpart Ba regulation that would “change the timing requirements for the submission of state plans, the EPA’s review of state plans, and the issuance of federal plans to more closely align the procedures to that provided under CAA section 110.” 83 Fed. Reg. at 54,529. EPA notes that the proposed Delay Rule is “predicated on the proposed timing requirements in 40 CFR part 60, subpart Ba,” and that it will need to “finalize the relevant sections of 40 CFR part 60, subpart Ba that pertain to this rule either prior to or concurrently with finalizing this rule.” *Id.*

1. As proposed, the ACE Rule’s implementation changes do not apply to the Landfill Emission Guidelines

EPA attempts to characterize the proposed Delay Rule as nothing more than a necessary housekeeping measure. Specifically, EPA asserts that the purpose of the proposed Delay Rule is simply to update the cross-references to the “old implementing regulations” in the Landfill Emission Guidelines and to “harmonize with the [ACE Rule’s] proposed new timing and completeness requirements for state and federal plans.” 83 Fed. Reg. at 54,527. “Without further action,” EPA continues, “the promulgation of the proposed new implementing regulations would not be sufficient to change the timing requirements for the [Emission Guidelines], even though it is an ongoing CAA section 111(d) action.” *Id.*

As proposed, the ACE Rule would not apply to the Landfill Emission Guidelines. *See* 83 Fed. Reg. at 44,803 (proposed 40 C.F.R. § 60.20a, which states: “Applicability. (a) The provisions of this subpart apply to States upon publication of a final emission guideline under § 60.22a(a), *if such final guideline is published after [date of publication of final rule in the Federal Register].*” (emphasis added)). The Landfill Emission Guidelines were published on August 29, 2016, two years (and counting) *before* the proposed ACE Rule will be published, if it is ever published. *See* 81 Fed. Reg. 59,276 (Aug. 29, 2016).

However, in the preamble to the proposed ACE Rule, EPA stated its intent to stretch the ACE Rule’s applicability to even *final* emission guidelines where state plans were still in the review process—rules that EPA characterized as “ongoing.” *See* 83 Fed. Reg. at 44,769 (“EPA is aware that there are a number of cases where state plan submittal and review processes are still ongoing for existing 111(d) emission guidelines. ... EPA is proposing to apply the changes to timing requirements ... to all ongoing emission guidelines already published under section 111(d).”).

To the extent EPA would characterize the Landfill Emission Guidelines as “ongoing” (because state plans have not yet been approved and thus “are still in the review process”), it would be capitalizing on its own wrongdoing: the only way the Guidelines could be considered ongoing at all is because EPA failed to comply with its mandatory duties to implement them. (This is likely another reason EPA would require compliant states to resubmit their state plans, to bolster EPA’s assertion that as to those states, too, the Guidelines are “ongoing.”) As California, Illinois, Maryland, New Mexico, Oregon, Rhode Island, Vermont, Pennsylvania, and the California Air Resources Board (ARB) have argued in *California v. EPA*, EPA’s failure to review and approve any submitted state plans or to promulgate a federal plan applicable to all other states by its own deadlines violates the Clean Air Act, 42 U.S.C. § 7604(a)(2). EPA cannot now rely on its unlawful failure to meet its own deadlines as a justification for applying the ACE Rule changes to the Landfill Emission Guidelines.

2. The proposed ACE Rule—and EPA’s proposed Subpart Ba regulations—are unlawful

Even if the ACE Rule would apply to the Landfill Emission Guidelines, it is unlawful as proposed. EPA cannot justify one proposed rule by relying on another, unlawful proposed rule. Both ARB and a coalition of 19 states and 8 other jurisdictions submitted extensive comments opposing the ACE Rule and articulating its legal and technical shortcomings.⁶² These comments highlight the logical fallacies, technical inaccuracies, and other issues that make the proposed ACE Rule unlawful and subject EPA to legal challenge if it were to finalize it, as proposed.

In federal court filings, EPA has stated that “even if EPA does not finalize the power plant portion of the ACE Rule proposal on the anticipated timeline, that does not preclude EPA from finalizing the potential changes to Subpart Ba separately by April 2019.” *California v. EPA*, EPA’s Reply ISO Mot. to Stay, Dkt. 76 at 7. This does not get EPA very far: Not only is the proposed ACE Rule unlawful as a whole, so too are the proposed Subpart Ba regulations that EPA now claims would be applicable to the Landfill Emission Guidelines. Thus, finalizing the proposed Subpart Ba regulation separately would not shield that regulation from legal challenge.

The proposed Subpart Ba regulation would make broad changes to the implementing requirements under Section 111(d). Some of these changes are patently unlawful, including EPA’s proposal to remove the term “emission guideline,” which “arguably required EPA to provide a presumptive emission standard,” and to use instead the term “guidance document,” which “does not require EPA to provide a presumptive emission standard.” *See* 83 Fed. Reg. at

⁶² *See* Comments of the Attorneys General of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota (by and through its Minnesota Pollution Control Agency), New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, the cities of Boulder (CO), Chicago, Los Angeles, New York, Philadelphia, and South Miami (FL), and the County of Broward (FL) on [ACE Rule], Oct. 31, 2018, Doc. ID: EPA-HQ-OAR-2017-0355-21117; California Air Resources Board’s Comments on Proposed [ACE] Rule, Oct. 31, 2018, Doc. IDs: EPA-HQ-OAR-2017-0355-24806, EPA-HQ-OAR-2017-0355-24810. We hereby incorporate these comments by reference and request that the full comments (which are attached) be included in the administrative record.

44,770, table 4. Section 111(d) is designed to ensure that the best systems of emission reduction (BSER), as determined by EPA, are actually implemented, via state or, if necessary, federal plans. Yet, by shifting terminology, the proposed regulation instead appears to afford states improper authority to depart from EPA’s BSER conclusions and to potentially avoid imposing controls. Functionally, the proposed changes eviscerate Section 111(d)’s core purpose of driving state-level emissions planning in response to a firm federal emissions target, replacing it with a series of hortatory guidance documents that would likely fail to protect public health. The Subpart Ba proposal departs from statute and cannot be a basis for further illegal actions in this context.

EPA’s proposed changes to the Section 111(d) implementation timelines are also legally suspect, because EPA has not provided, nor could it provide, any valid justification for a change that will significantly delay EPA’s implementation of important air-pollution-control measures. EPA has stated that it is necessary to change the implementation timeline for emission guidelines to “appropriately align” with the timeline under Section 110. 83 Fed. Reg. 44,769. Yet, as discussed above, EPA itself has admitted this is not legally required; nor do any practical considerations counsel otherwise. Again, EPA cites the amount of “work, effort, and time” required to develop a state plan. But earlier, when EPA was *not* trying to write a get-out-of-jail-free card for itself, it recognized that “Section 111(d) plans [are] much less complex than the SIPs,” *see* 40 Fed. Reg. at 53,345, 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.” *Id.*

EPA has thus provided no valid justification for its proposal in the ACE Rule to delay implementation of Section 111(d) emission guidelines. And, because EPA’s proposed Subpart Ba regulations are arbitrary and capricious, they cannot support the proposed Delay Rule. For reasons discussed above, and in keeping with the purpose of the Clean Air Act, EPA should be working to implement emission guidelines *more* quickly, not *less*.

E. EPA Has Failed to Comply with its Executive Order Mandates

To satisfy its obligations to comply with various executive orders, EPA states that the proposed Delay Rule will not have certain “implications” that would subject it to those orders. But EPA’s conclusory statements, with no analyses, are insufficient and, in many respects, contravened by facts in the record. Further analyses are required.

1. EPA has failed to consider fundamental cooperative federalism principles, in violation of the Clean Air Act and Executive Order 13132

Although it is required to fully consider federalism implications under Executive Order 13132,⁶³ EPA claims the proposed Delay Rule “does not have federalism implications” because “[i]t will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.” 83 Fed. Reg. at 54,532. In fact, the proposal—which leaves states without

⁶³ 64 Fed. Reg. 43,255 (Aug. 10, 1999).

a coherent federal framework for controlling landfill GHG emissions—improperly departs from the successful federalism structure of the Clean Air Act.

The Act’s current form reflects the importance of federal standards acting as critical adjuncts to state pollution control. The standards prevent races to the bottom on regulatory leniency, ensure a fair regulatory playing field among the states, and ensure states need not expend undue resources of their own working to address national problems. The Act recognizes the need for “Federal financial assistance and leadership”⁶⁴ and is rooted in a cooperative federalism structure for these reasons;⁶⁵ Section 111’s balanced state and federal planning process reflects this core cooperative federalism structure.

The proposed Delay Rule is inconsistent with this structure. It (1) fails to establish a meaningful and effective unified federal regulatory framework for years to come despite Section 111’s directive; (2) fails to curb harmful GHGs that are already having devastating impacts on our States; and (3) requires individual states to spend their own resources if they wish to control the emission of harmful pollutants in their jurisdictions in the absence of federal support, funds, and enforcement tools that would accompany a Section 111(d) planning process. In effect, the proposed Delay Rule shirks EPA’s federal duties while leaving states with a complex regulatory problem that will demand state resources and be more difficult to solve without federal leadership. These are substantial direct effects on the states that militate against proceeding with the proposal; at the very least, they should be properly disclosed.

EPA’s blanket statement that there are no impacts, without any analysis or consideration of these principles, does not satisfy the intent of the Clean Air Act or Executive Order 13132. Moreover, the proposed Delay Rule does in fact impact states, and arguing otherwise is illogical: it changes the time in which states must submit state plans, adds additional criteria states must meet to satisfy the “completeness criteria” requirements, could require states that have already submitted their state plans to resubmit them, and will result in increased emissions of NMOC and GHGs. The only conceivable benefit this proposed Delay Rule offers is for the regulated industry to postpone installing the required controls and for EPA to extend its unlawful de facto stay of the Guidelines.

2. EPA has arbitrarily dismissed the environmental justice impacts of the proposed Delay Rule, contravening the requirements of Executive Order 12898

Under Executive Order 12898,⁶⁶ federal agencies such as EPA must identify and address “disproportionately high and adverse human health and environmental effects” of their actions on minority and low-income communities. EPA argues that the proposed Delay Rule is not subject to Executive Order 12898 in part because it “is only implementing a procedural change

⁶⁴ 42 U.S.C. § 7401(a)(4).

⁶⁵ *See, e.g., GenOn REMA LLC v. U.S. EPA*, 722 F.3d 513, 516 (3d Cir. 2013) (collecting cases to this effect).

⁶⁶ 59 Fed. Reg. 7629 (Feb. 16, 1994).

and EPA does not anticipate that it will have any material impact on human health or the environment.” 83 Fed. Reg. at 54,532. This assertion is not supported by the evidence.

As discussed above, emission reductions have already been delayed more than a year and would be delayed an additional four years under the proposed Delay Rule, resulting in the annual excess emission of 1,810 metric tons NMOC and 7.1 million metric tons CO_{2e}. Communities located in the vicinity of landfills would most directly and immediately benefit from implementation of the Guidelines (because of the adverse health effects associated with landfill gases) and thus be disproportionately impacted by the proposed delay. Such communities tend to be low-income and minority communities. These communities are also disproportionately impacted by the effects of climate change insofar as individuals may lack resources necessary to mitigate or avoid certain harms attributable to climate change. By failing to acknowledge that low-income and minority populations will be disproportionately impacted by the proposed Delay Rule and failing to analyze the extent of that impact, EPA has not met the requirements of Executive Order 12898.

3. EPA has failed to consult Native American Tribal Governments, as required by Executive Order 13175

Contrary to its obligation under Executive Order 13175,⁶⁷ EPA has not consulted and/or coordinated with Native American Tribal Governments. EPA admits that there are three tribes with landfills but argues they are not impacted. EPA’s assertion is not supported by fact. EPA has failed to consult with tribes to determine whether the tribes with landfills on their lands are impacted. And EPA has failed to analyze impacts to tribal members that live near other landfills.

Adopting the proposed Delay Rule without consultation undermines Tribal sovereignty and is likely to decrease air quality on Tribal lands. Contrary to EPA’s conclusory and unsupported assertions, this proposal will impact native peoples by harming tribal health and accelerating climate change. Many tribal communities are impacted by air pollution and/or they are seeing the effects of climate change through increased storm surge, erosion, flooding, prolonged droughts, wildfires, and forests being devastated by insect pest outbreaks. Native people 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. Because the proposed Delay Rule may thus have disproportionately high, adverse impacts on native tribes and indigenous populations, EPA must consult with Native American Tribal Governments.

III. CONCLUSION

EPA notes in a footnote of the proposed Delay Rule that it is “separate and distinct from the ongoing reconsideration proceeding related to the [Guidelines].” 83 Fed. Reg. at 54,531. It is apparent that the function of the proposed Delay Rule is thus to enable EPA to avoid implementing the Landfill Emission Guidelines (and also to evade a judicial order requiring it to comply with its regulatory obligations) while it works to revise—and likely weaken—them. In

⁶⁷ 65 Fed. Reg. 67,249 (Nov. 9, 2000).

light of the overwhelming evidence that time is of the essence in addressing climate change, any action that will delay or weaken measures that will reduce GHG emissions and that has no valid justification is inherently arbitrary, capricious, and contrary to law.

In proceeding with this rulemaking, EPA must give full weight to the available evidence (including the scientific facts and findings presented in the Assessment and IPCC Special Report), and consider the implications of that evidence for its proposed action. It must also provide a “detailed justification” where it proposes to take action on the basis of factual findings that contradict previous findings. *F.C.C. v. Fox*, 556 U.S. at 515. EPA must also conduct a thorough regulatory impact analysis to fully disclose the actual costs of its actions and other analyses required by executive orders. It has failed to do all of those things here. The States strongly urge EPA to withdraw the Delay Rule and to comply with its mandatory duties to implement the Landfill Emission Guidelines immediately.

Sincerely,

For the STATE OF CALIFORNIA,
XAVIER BECERRA
Attorney General of California
GARY E. TAVETIAN
DAVID A. ZONANA
Supervising Deputy Attorneys General
JULIA K. FORGIE
Deputy Attorneys General

/s/ Elizabeth B. Rumsey
ELIZABETH B. RUMSEY
Deputy Attorney General
1515 Clay St., 20th Floor
Oakland, California 94612
(510) 879-0860
liz.rumsey@doj.ca.gov

For the STATE OF MARYLAND
BRIAN FROSH
Attorney General of Maryland

/s/ Joshua M. Segal
JOSHUA M. SEGAL
Assistant Attorney General
Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
Tel: (410) 576-64464
jsegal@oag.state.md.us

For the STATE OF ILLINOIS
LISA MADIGAN
Attorney General of Illinois

/s/ Daniel I. Rottenberg
DANIEL I. ROTTENBERG
Assistant Attorney General
Environmental Bureau
Illinois Attorney General’s Office
69 W. Washington St., 18th Floor
Chicago, Illinois 60602
(312) 814-3816
DRottenberg@atg.state.il.us

For the STATE OF NEW JERSEY
GURBIR S. GREWAL
Attorney General of New Jersey

/s/ Aaron A. Love
AARON A. LOVE
Deputy Attorney General
Division of Law
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, New Jersey 08625
(609) 376-2762
aaron.love@law.njoag.gov

For the STATE OF NEW MEXICO
HECTOR BALDERAS
Attorney General of New Mexico
ARI BIERNOFF

/s/ William Grantham

WILLIAM GRANTHAM
Assistant Attorney General
201 Third Street NW, Suite 300
Albuquerque, New Mexico 87102
(505) 717-3520
wgrantham@nmag.gov

For the STATE OF OREGON
ELLEN F. ROSENBLUM
Attorney General of Oregon
PAUL GARRAHAN
Attorney-in-Charge

/s/ Steve Novick

STEVE NOVICK
Special Assistant Attorney General
Natural Resources Section
Oregon Department of Justice
1162 Court Street, N.E.
Salem, Oregon 97301-4096
(971) 673-1891
steve.novick@doj.state.or.us

For the COMMONWEALTH OF PENNSYLVANIA
JOSH SHAPIRO
Attorney General of Pennsylvania

/s/ Michael J. Fischer

MICHAEL J. FISCHER
Chief Deputy Attorney General
Pennsylvania Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
(215) 560-2171
mfischer@attorneygeneral.gov

For the STATE OF RHODE ISLAND
PETER F. NEROHNA
Attorney General of Rhode Island

/s/ Gregory S. Schultz

GREGORY S. SCHULTZ
Special Assistant Attorney General
RI Office of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400
gschultz@riag.ri.gov

For the CALIFORNIA AIR RESOURCES BOARD

/s/ Richard W. Corey

RICHARD W. COREY
Executive Officer
California Air Resources Board
1001 "I" Street
Sacramento, CA 95814

For the STATE OF VERMONT
THOMAS J. DONOVAN, JR.
Attorney General of Vermont

/s/ Nicholas F. Persampieri

NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186
nick.persampieri@vermont.gov