Administrator Scott Pruitt
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Mail Code 1101A

Re: Docket Id No. EPA-HQ-OAR-2010-0505-7736
Submitted electronically to www.regulations.gov

Dear Administrator Pruitt:

The Environmental Protection Network (EPN) appreciates this opportunity to provide comments to you and your staff on the United States Environmental Protection Agency's (EPA) proposal to delay for two years certain compliance dates in the most recent Clean Air Act Oil and Gas New Source Performance Standards, promulgated in 2016 ("the 2016 NSPS").[1] The EPN is a nonprofit network comprised of former EPA officials and employees with significant expertise in the regulatory process under both political parties and over the many years of EPA's history. EPN's mission is to preserve and advance the nation's bipartisan legacy of progress towards clean air, water and land and climate protection for all Americans.

The 2016 NSPS, as required by Section 111 of the Clean Air Act, requires reasonable and cost-effective pollution reduction measures in various aspects of oil and gas production and transmission that would result in better air quality and improved public health. As summarized below and described in more detail in this letter, EPN opposes EPA's proposal to delay compliance requirements of the rule.

- The proposed stay would delay public health protections associated with reduced air pollution and fewer methane emissions, yet the proposal outright fails to discuss, much less analyze, these lost health benefits. This is inconsistent with EPA's statutory mission to protect public health and its obligation to fully analyze the costs and benefits of its proposed action.

- The proposal fails to give adequate—or really any—reasonable justification or legal basis for its proposed delay. If an EPA Administrator chooses to reconsider a lawfully promulgated rule for policy reasons, he must follow the applicable legal requirements when doing so. By failing to consider the proposed action's public health and environmental impacts, as well as the provisions of CAA

[1] 82 FR 27645, June 16, 2017.

section 111(a), the proposed action fails to comply with the law and cannot move forward.

- The proposal, along with many other recently proposed or final actions to invalidate or delay lawfully adopted environmental rules, flies in the face of the animating principles of the Clean Air Act and the steady progress this country has made to protect Americans from the adverse health effects of pollution and to provide legal and economic stability to the regulated community and states, principles that have been honored under both Republican and Democratic administrations and upon which the nation's steady progress in environmental protection depends.

1. The proposed delay would adversely impact public health, and the proposal provides no analysis of these impacts or any meaningful justification for such impacts

Emissions of air pollutants from oil and gas activities affect public health, as demonstrated in the original rulemaking. The oil and natural gas industry emits a wide range of pollutants in enormous volumes, including methane, volatile organic compounds (VOC), and toxic air pollutants such as benzene. 81 FR 35833, 839-40. Millions of people live in close enough proximity to oil and gas production and transmission activities to be impacted by these air pollutants.[2] Methane is the second most prevalent greenhouse gas emitted in the United States from human activities, and approximately one third of those emissions comes from oil production and the production, transmission and distribution of natural gas.[3] EPA estimated that the 2016 NSPS would result in 6.9 million fewer metric tons of carbon dioxide equivalent (CO2e) in 2020 and 11 million fewer in 2025, with climate benefits of $690 million.[4] Emissions of VOC contribute to ground level ozone, which can adversely affect the respiratory and cardiac systems. These impacts can increase the frequency and severity of asthma attacks, cause adverse symptoms in healthy individuals, and cause premature death. The significant contribution of oil and gas activities to ground level ozone formation is illustrated by the fact that elevated, unhealthy ozone levels have been measured during the wintertime (usually the off-season for ozone formation) in and around the oil and gas fields of Utah.[5] EPA projected that the 2016 NSPS would reduce emissions of VOC by 150,000 tons per year in 2020.[6] 81 FR

[2] For example, there are approximately 4.5 million Americans across the Midwest who live within a half mile of oil and gas sites and/or equipment. Fractracker, oil & gas threat map, available at http://oilandgasthreatmap.com/.
[3] https://www.epa.gov/sites/production/files/2016-09/documents/epa-oilandgasactions-may2016_presentation.pdf
[4] https://www.epa.gov/sites/production/files/2016-09/documents/epa-oilandgasactions-may2016_presentation.pdf
[5] http://www.noaanews.noaa.gov/stories2014/20141001_utahwinterozonestudy.html.
[6] The EPA National Emissions Inventory (NEI) estimated total VOC emissions from the oil and natural gas sector to be 2,729,942 tons in 2011. This ranks second of all the sectors estimated by the NEI and first of all the anthropogenic sectors in the NEI. 81 FR at 35840. This rule would reduce those emissions on the order of 5%--a significant number for a single regulatory measure.

35827. Overall, EPA estimated that the benefits of the rule outweighed the costs by at least $170 million.[7]

This proposal would delay these important protections. Yet the justification for this proposed stay considers only the costs that industry would save. It ignores the public health and environmental benefits of the rule, and the impacts of delaying these benefits. EPA's one-sided analysis reports total discounted costs saved between $172 and $173 million, depending on the discount rate. These cost savings are annualized at $60-61 million. The costs avoided stem largely from foregone annual operating and maintenance costs for the fugitive emission requirements and the pneumatic pump requirements for 2017-2019. There is no discussion of the additional costs associated with adverse public health, air quality or climate impacts that would be borne by people exposed to the excess air pollution that will be emitted during that two-year delay. Indeed, the proposal assumes--without justification or analytic support--that there will be none. And yet the Regulatory Impact Assessment and the final rule make clear that the benefits of the rule significantly outweigh the costs. 81 FR 35890.

This analysis fails to conform to the requirements of Executive Orders 12866 and 13563, both of which require agencies to do thorough and careful analyses of costs *and benefits*. To comply with those Executive Orders, the proposal should quantify and monetize benefits where possible, and identify benefits even if they cannot be quantified. Without such analysis it is impossible to estimate the full health and welfare effects and economic impact of the proposed stay. The absence of any identification of foregone benefits to accompany the cost analysis violates the letter and intent of the system for rigorous analysis to support regulatory actions, to which presidential administrations of both parties have contributed over more than three decades.

Moreover, as we discuss below, these defects cannot be cured by issuing an updated analysis as part of a final action. The law requires that the public have an opportunity to comment on the agency's views on these important points, which to date it has not discussed at all.

We note that the limited analysis of this proposal, which addresses only costs avoided by industry, contrasts starkly with the quality and extent of the cost-benefit analysis supporting the 2016 NSPS. The Regulatory Impact Analysis (RIA) identified the wide range of public health benefits from VOC and hazardous air pollutant reductions that would result from the rule.[8] EPA could have used this information, as it did for costs to industry, to assess the benefits the proposed delay would forego. Yet the proposal does not even acknowledge that these types of benefits will be lost.

---

[7] This number is an underestimate, because not all of the health benefits were able to be quantified. https://www.epa.gov/sites/production/files/2016-09/documents/epa-oilandgasactions-may2016_presentation.pdf.

[8] https://www3.epa.gov/ttnecas1/docs/ria/oilgas_ria_nsps_final_2016-05.pdf, Chapters 4.4-4.6.

EPA also found in the 2016 NSPS that the emissions being addressed would have a disproportionate effect on children.[9] Yet the EPA proposal dismissively states that no such impacts would occur because the two-year proposed stay period is too short for effects to manifest.[10] This is inadequate. EPA must conduct a proper analysis of the issue, accounting not only for the long-term health and climate effects from methane releases discussed at 81 FR 35894, but also from the effects of ozone exposure, since VOC and methane are ozone precursors.[11] It also defies common sense. The effects of ozone on children, especially children with asthma, are measured in hours and days, not years. Two years' delay means two more years where children will be exposed to pollutants that exacerbate asthma and hazardous air pollutants associated with a range of adverse health outcomes. These are exposures that would be avoided by the timely implementation of the rule.

Finally, the proposal completely fails to acknowledge or quantify the lost benefits of greenhouse gas (GHG) reduction from methane emissions control during the period of the stay. The 2016 rule's finding, well-supported by peer review, that the rule generates significant benefits from methane emission reductions based on a social cost of methane analysis must be confronted in any analysis supporting the proposed stay.[12]

These foregone benefits are not just a minor inconvenience of the proposed stay. They are the essence of any assessment of the impact of the proposed stay with respect to the core public health and welfare aims of the Clean Air Act, and cannot be ignored without justification. The proposed rule provides no such justification and no analysis of foregone benefits. It is indefensibly flawed on this point alone.

2. There is no legal basis for the proposed delay under the Clean Air Act and Administrative Procedure Act

[9] 81 FR 35893-94.

[10] 82 FR 27650.

[11] See US EPA "Policy Assessment for the Review of the Ozone National Ambient Air Quality Standard" (EPA-452/R-14-006 (August, 2014)) at 3-81 ("children are considered to be at greater risk from O3 exposure because their respiratory systems undergo lung growth until about 18-20 years of age are therefore thought to be intrinsically more at risk for O3-induced damage") and id. at pp. 3-81 to 83 (clinical, epidemiologic, and toxicological studies showing children are an at-risk population — i.e. even more susceptible than the general population — from ozone exposure).

[12] The social cost of methane measure "includes a wide range of anticipated climate impacts, such as net changes in agricultural productivity and human health, property damage from increased flood risk, and changes in energy system costs, such as reduced costs for heating and increased costs for air conditioning." See Center for Biological Diversity v. NHTSA, 538 F. 3d 1172 (9th Cir. 2008) (failure to provide some monetized estimate of social cost of carbon is arbitrary and capricious where rule purported to set standard at point where marginal benefits exceeded costs). However, it does not encompass all climate related impacts from methane emissions, and does not account for the secondary climate impacts of the non-methane emissions to be controlled under the 2016 rule. EPA must do an equivalent analysis of net benefits from control costs saved and emission reduction benefits foregone for the period of the proposed stay.

EPA's proposal to stay (delay) the methane rule for two years fails to justify a stay, or even provide a valid basis for that justification. It cannot rely on CAA § 307(d)(7)(B), and it has presented no analysis or justification that would support a delay of compliance dates under any other provision of law.

The proposal rests exclusively on the Agency's assumption that it can simply extend a stay of that rule under CAA § 307(d)(7)(B). This section authorizes the Agency to stay a rule for no more than 90 days if a petitioner can show that it could not have raised an issue of "central relevance" during the comment period. This is the only provision in the Clean Air Act that allows an Administrator to stay a promulgated rule. EPA's proposal is for a period of time much longer than the 90 days allowed by § 307(d)(7)(B) and, in any event, the D.C. Circuit Court of Appeals has determined that the foundational basis for even a 90-day stay under § 307(d)(7)(B) does not exist.[13]

With § 307(d)(7)(B) ruled out, EPA could justify a delay of compliance dates in the original rule only by using the full range of originally required rulemaking procedures to amend that rule under the originally applicable substantive legal standards. See Pruitt, Slip Opinion at 11-12. Moreover, it would have to meet those standards to the same extent and with the same rigor as the original rule. If a lesser standard applied, the requirements for an agency's effective repeal repeal of a rule would be weaker than the standards for establishing it in the first place, since the agency could simply issue repeated stays under the more lenient standard.

Since EPA issued the methane rule under CAA §111, EPA must meet the requirements of that section to stay it. Accordingly, EPA must determine and select the best system of emission reduction that is adequately demonstrated, taking into account emissions reductions, impact on innovation, cost, non-air quality health and environmental impacts, and energy implications. See CAA §111(a)(1); Sierra Club v. Costle, 657 F. 2d 298, 326 (D.C. Cir. 1981).[14] EPA's proposal does none of this.

Finally, although the proposal does not articulate any authority other than §307(d) for a stay or provide any other factual justification, we note that there would be no other justification available to the agency. Assuming that in theory a stay other than one authorized by §307(d) were available to EPA, this proposal certainly doesn't make a case for it, and it is unlikely that the agency could make the findings necessary to justify a stay. In the D.C. Circuit, "the standard for a stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test applied in this Circuit." Sierra Club v. Jackson, 833 F. Supp. 2d 11, 30 (D.D.C. 2012) (interpreting section 705 of the APA

[13] Clean Air Council v. Pruitt, No. 17-1145 (D.C. Cir. July 3, 2017).

[14] The only statutory factor to which EPA makes reference (albeit entirely in passing) is cost. See 82 FR 27647/2. Costs under section 111 (a) (1) are not considered to be unreasonable unless "exorbitant", "greater than the industry could bear and survive", or "excessive". Lignite Energy Council v. EPA, 198 F. 3d 930 (D.C. Cir. 1999); Portland Cement Ass'n v. EPA, 513 F. 2d 506, 508 (D.C. Cir. 1975); Sierra Club v. Costle, 657 F. 2d at 343. The administrative record provides no evidence that could support such a finding.

in the context of an administrative attempt to stay a Clean Air Act rule). This requires EPA to consider, and weigh, (1) the likelihood that the party seeking the stay will prevail on the merits of any appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Id.

To make a case for a stay, EPA would have to issue a proposal showing why it thought such an action would be justified under the CAA and the D.C. Circuit's stay test, invite public comment on it, and respond to those comments in its final action. EPA has done none of this, nor could they make such findings under the circumstances presented by this rule.

With the demise of the lack of notice argument, EPA has shown absolutely no reason why the rule would be vulnerable to a legal challenge. The changes in the rule to which the Agency points were made in part in response to comments by the regulated community and concern secondary aspects of the rule. No court with which we are familiar would consider them grounds for invalidating the rule. Indeed, they look at very worst like the kinds of uncertainty about the details of implementation that frequently arise and that are worked out cooperatively without even considering a rule stay. If such issues justify a stay, then EPA can effectively stay any of its rules at will.

For these same reasons, there is no prospect of substantial harm – much less "irreparable harm" to regulated parties if the rule stays in effect. The RIA for the final rule, as well as the rest of the administrative record, contains no suggestion that the costs of these provisions would result in irreparable harm to industry. See, e.g., Final RIA[15] at 3-16, 3-25, and 3-26.

Finally, the public interest certainly weighs in favor of keeping the rule in place, which avoid potential harm to other entities. The core purpose of the CAA is to promote public health and welfare by reducing air pollution. CAA §101(b)(1). The 2016 NSPS achieves this purpose by requiring substantial reductions in VOC, benzene and methane emissions – all pollutants that EPA has found pose a danger to human health and welfare. EPA found in issuing the rule that all the statutory factors had been satisfied and that the rule's benefits exceeded its costs.

3. By disregarding issues of critical relevance, the proposal also disregards the procedural requirements of the Clean Air Act.

EPA's failure to propose legitimate grounds for staying these provisions, and its failure to consider the issues of public health and welfare critical to that decision, render the proposal arbitrary and capricious. Motor Vehicle Mfr's Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 49-51 (1983) (agency failure to consider or address critical issues is not reasoned decisionmaking, and is therefore arbitrary and capricious). Moreover, CAA §307 (d)(3) requires all proposals to include a statement of basis and purpose addressing factual data on which the

[15]EPA-452/R-16-002 (May 2016).

proposal relies; methodology used in obtaining and analyzing data; and major legal interpretations. The proposal includes none of these, resting as it does on irrelevant and impermissible grounds. EPA thus cannot take any further action on its proposal, other than withdrawing it, without starting anew.

4. The proposal is contrary to decades of progress through multiple administrations towards cleaner air and better public health as required by the Clean Air Act.

During its nearly 50 year history, EPA has achieved steady progress in improving environmental quality and public health. An important factor in this record of accomplishment has been the stability and continuity of environmental policy from one presidential administration to the next. With rare exceptions, EPA administrators have built on the work of their predecessors. This resulting strong foundation of basic protections has been durable and lasting, creating confidence that high standards for air and water quality and waste disposal will remain intact despite turnover in the White House.

The predictability and certainty of environmental requirements have been vital for states, who are the front-line implementers of federal environmental laws and carry out national programs at the local level, and for industry, which relies on a stable regulatory framework for long-term compliance planning and investment. Rulemakings are major undertakings, lasting up to several years, a substantial part of a president's term in office. If these requirements were eliminated or revised every four years, the result would be chaos and confusion, with states and industry scrambling to keep pace with an ever-changing regulatory landscape.

Different administrations of course have their own priorities and approaches to environmental protection. In limited cases, this has resulted in reconsideration of final rules. For example, the George W. Bush EPA sought to rescind the drinking water standard for arsenic adopted by the Clinton EPA, and the Obama EPA proposed to tighten the national ambient air quality standard (NAAQS) for ozone adopted by the Bush EPA. The ultimate result in both instances was to leave the predecessor rule in place. But these efforts have been relatively few in number, targeted, and most frequently the result of court actions. The great majority of rules issued by EPA administrators have been implemented by their successors, and with only a few brief extensions, the compliance dates set by prior administrations have nearly always been respected.

The Trump EPA has departed radically from these historical norms. The number of Obama EPA rules which it is reexamining is dramatically greater than those which previous administrations have reexamined, and includes nearly all the major environmental rules issued

in the second Obama term, from air and water regulations to farmworker protections.[16] In most cases, the Trump EPA has proposed lengthy delays of the effective or compliance dates of these regulations.

The result of this proposed stay could put environmental and public health protections, determined to be necessary following lengthy rulemaking, on hold for years. In addition, states and industry will be plunged into a regulatory limbo that could continue for years. Overall, resources and expertise that could have been used to realize health and environmental benefits will be diverted to revisiting legal and technical issues that have already been vetted fully through the rulemaking process. This will lower the credibility of the nation's environmental protection system and of EPA. Particularly troubling is the Trump EPA's assumption that it is entitled to postpone the compliance dates of final and effective rules merely because it wants to reconsider them.

Conclusion

The current EPA administration has articulated a commitment to focus on the "basics" of environmental protection, to carrying out the law regardless of ideological preference, and to providing certainty to regulated industry. A true focus on the basics would not delay public health protections to American families for two years. A true commitment to certainty would leave in place a rule with reasonable costs and significant benefits that industry has already begun to comply with.[17] The 2016 NSPS does not differ in any substantial way from scores of new source performance standards that EPA has issued since Congress enacted NSPS authority in 1970. It breaks no new ground in the types of sources it covers or the controls it requires. It was issued after full notice and comment and no analytical flaws in the Agency's decision have been identified. It has not been found legally flawed, either substantively or procedurally, by any court. Indeed, the D.C. Circuit has found that changes EPA made in the final rule were an appropriate outgrowth of the notice provided at proposal, and in many instances were direct results of comments submitted by industry.

Case law shows us that final and effective rules cannot be stayed or postponed without close examination of factors EPA has thus far ignored: notably, the substantive requirements of CAA section 111, and the public health and environmental impacts of the proposed action. Measured against these criteria, the proposed two-year extension of the 2016NSPS is plainly

[16] These include the Clean Power Plan; New Source Performance Standards for Greenhouse Gas Emissions from Steam-Electric Electric Generating Units; The Clean Water Rule; 2016 New Source Performance Standards (NSPS) for methane and VOC emissions from oil and gas operations; The Farmworker Protection Rule; Effluent Limitation Guidelines for steam-electric power generation units; Mercury and Air Toxics Standards (MATS); Risk Management Plan (RMP) Rule; Ozone NAAQS; Landfill Methane Rule; Trailer Requirements in Heavy-Duty Truck Emission Rule. See also https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=2060-AT60.

[17] "Oil and gas companies say they're complying with U.S. EPA's methane rule for new wells as they watch the legal pingpong match about implementation of the rule." https://www.eenews.net/energywire/2017/07/17/stories/1060057451.

deficient. It is hard to see any principled reason why the Agency should be devoting its increasingly – and designedly - scarce resources to this topic.

In summary, it appears that this proposal simply tries to delay compliance with a legally adopted rule while it reviews the 2016 NSPS broadly with intent that requirements will be weakened or eliminated. This is unlawful, it is bad policy (bad for public health, bad for states and industry), and it is a poor way for government to do business.

Thank you for your consideration of these comments.

Environmental Protection Network
Email: info@environmentalprotectionnetwork.org