

The EPA Administrator, E. Scott Pruitt, signed the following final rule on 6/9/2017, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of public comment. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDsys website (<http://fdsys.gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OEM-2015-0725. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 68

[EPA-HQ-OEM-2015-0725; FRL-9963-55-OLEM]

RIN 2050-AG91

Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule, delay of effective date.

SUMMARY: The Environmental Protection Agency (EPA) is delaying the effective date of the Risk Management Program Amendments for an additional 20 months, to allow EPA to conduct a reconsideration proceeding and to consider other issues that may benefit from additional comment. The new effective date of the rule is February 19, 2019. The Risk Management Program Amendments were published in the **Federal Register** on January 13, 2017. On January 26, 2017 and on March 16, 2017, EPA published two documents in the **Federal Register** that delayed the effective date of the amendments until June 19, 2017. The EPA proposed in an April 3, 2017 **Federal Register** action to further delay the effective date until February 19, 2019 and held a public hearing on April 19, 2017. This action allows the Agency time to consider petitions for reconsideration of the Risk Management Program Amendments and take further regulatory action, as appropriate, which could include proposing and finalizing a rule to revise or rescind these amendments.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

DATES: The effective date of the rule amending 40 CFR part 68 published at 82 FR 4594 (January 13, 2017), as delayed at 82 FR 4594 (January 26, 2017) and 82 FR 13968 (March 16, 2017), is further delayed until February 19, 2019.

ADDRESSES: The EPA has established a docket for the rule amending 40 CFR part 68 under Docket ID No. EPA-HQ-OEM-2015-0725. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: James Belke, United States Environmental Protection Agency, Office of Land and Emergency Management, 1200 Pennsylvania Ave., NW (Mail Code 5104A), Washington, DC, 20460; telephone number: (202) 564-8023; email address: belke.jim@epa.gov, or: Kathy Franklin, United States Environmental Protection Agency, Office of Land and Emergency Management, 1200 Pennsylvania Ave., NW (Mail Code 5104A), Washington, DC, 20460; telephone number: (202) 564-7987; email address: franklin.kathy@epa.gov.

Electronic copies of this document and related news releases are available on EPA's website at <https://www.epa.gov/rmp>. Copies of this final rule are also available at <https://www.regulations.gov>.

SUPPLEMENTARY INFORMATION:

I. General Information

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

A. *Does this action apply to me?*

This final rule applies to those facilities, referred to as “stationary sources” under the Clean Air Act (CAA), that are subject to the chemical accident prevention requirements at 40 CFR part 68. This includes stationary sources holding more than a threshold quantity (TQ) of a regulated substance in a process. Table 5 provides industrial sectors and the associated NAICS codes for entities potentially affected by this action. The Agency's goal is to provide a guide for readers to consider regarding entities that potentially could be affected by this action. However, this action may affect other entities not listed in this table. If you have questions regarding the applicability of this action to a particular entity, consult the person(s) listed in the introductory section of this action under the heading entitled FOR FURTHER INFORMATION CONTACT.

Table 5—Industrial Sectors and Associated NAICS Codes for Entities Potentially Affected by This Action

Sector	NAICS code
Administration of Environmental Quality Programs	924
Agricultural Chemical Distributors:	
Crop Production	111
Animal Production and Aquaculture	112
Support Activities for Agriculture and Forestry Farm	115
Supplies Merchant Wholesalers	42491
Chemical Manufacturing	325
Chemical and Allied Products Merchant Wholesalers	4246
Food Manufacturing	311
Beverage Manufacturing	3121
Oil and Gas Extraction	211
Other	44, 45, 48, 54, 56, 61, 72
Other manufacturing	313, 326, 327, 33
Other Wholesale:	
Merchant Wholesalers, Durable Goods	423
Merchant Wholesalers, Nondurable Goods	424
Paper Manufacturing	322

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Table 5—Industrial Sectors and Associated NAICS Codes for Entities Potentially Affected by This Action

Sector	NAICS code
Petroleum and Coal Products Manufacturing	324
Petroleum and Petroleum Products Merchant Wholesalers	4247
Utilities	221
Warehousing and Storage	493

B. How do I obtain a copy of this document and other related information?

This final action and pertinent documents are located in the docket (see Addresses section). In addition to being available in the docket, an electronic copy of this document and the response to comments document will also be available at <https://www.epa.gov/rmp/final-amendments-risk-management-program-rmp-rule>.

C. Judicial review.

Under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit (the Court) by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review.

II. Background

On January 13, 2017, the EPA issued a final rule amending 40 CFR part 68, the chemical accident prevention provisions under section 112(r)(7) of the CAA (42 U.S.C. 7412(r)). The amendments addressed various aspects of risk management programs, including prevention programs at stationary sources, emergency response preparedness requirements, information

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

availability, and various other changes to streamline, clarify, and otherwise technically correct the underlying rules. Collectively, this rulemaking is known as the “Risk Management Program Amendments.” For further information on the Risk Management Program Amendments, see 82 FR 4594 (January 13, 2017).

On January 26, 2017, the EPA published a final rule delaying the effective date of the Risk Management Program Amendments from March 14, 2017, to March 21, 2017, see 82 FR 8499. This revision to the effective date of the Risk Management Program Amendments was part of an EPA final rule implementing a memorandum dated January 20, 2017, from the Assistant to the President and Chief of Staff, entitled “Regulatory Freeze Pending Review.” This memorandum directed the heads of agencies to postpone until 60 days after the date of its issuance the effective date of rules that were published prior to January 20, 2017 but which had not yet become effective.

In a letter dated February 28, 2017, a group known as the “RMP Coalition,”¹ submitted a petition for reconsideration of the Risk Management Program Amendments (“RMP Coalition Petition”) as provided for in CAA section 307(d)(7)(B) (42 U.S.C. 7607(d)(7)(B)).² On March 13, 2017, the Chemical Safety Advocacy Group (“CSAG”) also submitted a petition for reconsideration and stay.³ On March 14, 2017, the EPA received a third petition for reconsideration and stay from the State of Louisiana, joined by Arizona, Arkansas, Florida,

¹ The RMP Coalition is comprised of the American Chemistry Council, the American Forest & Paper Association, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the Utility Air Regulatory Group.

² A copy of the RMP Coalition petition is included in the docket for this rule, Docket ID No. EPA-HQ-OEM-2015-0725.

³ A copy of the CSAG petition is included in the docket for this rule, Docket ID No. EPA-HQ-OEM-2015-0725. CSAG members include companies in the refining, oil and gas, chemicals, and general manufacturing sectors with operations throughout the United States that are subject to 40 CFR part 68.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Kansas, Kentucky, Oklahoma, South Carolina, Texas, Wisconsin, and West Virginia. The petitions from CSAG and the eleven states also requested that EPA delay the various compliance dates of the Risk Management Program Amendments.

Under CAA section 307(d)(7)(B), the Administrator may commence a reconsideration proceeding if, in the Administrator's judgement, the petitioner raises an objection to a rule that was impracticable to raise during the comment period or if the grounds for the objection arose after the comment period but within the period for judicial review. In either case, the Administrator must also conclude that the objection is of central relevance to the outcome of the rule. The Administrator may stay the effective date of the rule for up to three months during such reconsideration.

In a letter dated March 13, 2017, the Administrator announced the convening of a proceeding for reconsideration of the Risk Management Program Amendments (a copy of "the Administrator's Letter" is included in the docket for this rule, Docket ID No. EPA-HQ-OEM-2015-0725).⁴ As explained in the Administrator's Letter, having considered the objections raised in the RMP Coalition Petition, the Administrator determined that the criteria for reconsideration have been met for at least one of the objections. EPA issued a three-month (90-day) administrative stay of the Risk Management Program Amendments, which delayed the effective date of the Risk Management Program Amendments rule for 90 days, from March 21, 2017 until June 19, 2017 (see 82 FR 13968, March 16, 2017). EPA will prepare a notice of proposed rulemaking in the near future that will provide the RMP Coalition, CSAG, the states, and the

⁴ Pruitt, E. Scott. March 13, 2017. Letter to Justin Savage of Hogan Lovells Regarding Convening a Proceeding for Reconsideration of the Final Rule Entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," published on January 13, 2017, 82 FR 4594. Office of the Administrator, US Environmental Protection Agency, Washington, DC.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

public an opportunity to comment on the issues raised in the petitions that meet the standard of CAA section 307(d)(7)(B), as well as any other matter we believe will benefit from additional comment.

III. Proposal to Delay the Effective Date

The Administrator's authority to administratively stay the effectiveness of a CAA rule pending reconsideration (without a notice and comment rulemaking) is limited to three months (see CAA section 307(d)(7)(B)) EPA believed that three months was insufficient to complete the necessary steps in the reconsideration process for the Risk Management Program Amendments and to consider other issues that may benefit from additional comment.⁵ Since we expect to take comment on a broad range of legal and policy issues as part of the Risk Management Program Amendments reconsideration, on April 3, 2017 (82 FR 16146), we proposed to further delay the effective date of the Risk Management Program Amendments to February 19, 2019.

The statutory authority for this action is provided by section 307(d) of the CAA, as amended (42 U.S.C. 7607(d)), which generally allows the EPA to set effective dates as appropriate unless other provisions of the CAA control, and section 112(r)(7) of the CAA (see section IV.A below).

IV. Summary of Public Comments Received

EPA received a total of 54,117 public comments on the proposed rulemaking. Several public comments were the result of various mass mail campaigns and contained numerous copies of letters or petition signatures. Approximately 54,000 letters and signatures were contained in these several comments. The remaining comments include 108 submissions with unique content

⁵ See the proposed rule notice published April 3, 2017, 82 FR at 16148 –16149.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

(including representative copies of form letter campaigns and joint submissions), and nine duplicate submissions. EPA also held a public hearing on April 19, 2017 where EPA received five written comments and 28 members of the public provided verbal comments (three of the speakers later submitted their testimony as written comments). Comments received during the public hearing are included in the 107 submissions with unique content. A transcript of the hearing testimony is available as a support document in the docket EPA-HQ-OEM-2015-0725 for this rulemaking. A summary of public comments and EPA's response to the comments can be found in the Response to Comments document, also available in the docket.⁶

A. *Comments regarding EPA's legal authority to delay the effective date*

In the proposed rulemaking, EPA noted that under CAA section 307(d), the Agency may set effective dates as appropriate through notice and comment rulemaking unless another provision of the CAA controls. In the past, EPA has used this authority in conjunction with the reconsideration process when the administrative stay period of three months, which the Administrator may invoke without notice and comment, would be insufficient to complete the necessary process for reconsideration.

Several industry trade associations agreed that EPA had authority under CAA section 307(d) to conduct a notice and comment rulemaking delaying the effective date for this rulemaking. Some noted that, unlike other CAA provisions, there are no provisions in CAA section 112(r)(7) requiring a specific, earlier effective date. Some pointed out that, in contrast to several other CAA provisions (*see, e.g.*, CAA section 112(e)(1), CAA section 112(i)(3)(A), and

⁶ June 2017. EPA. Response to Comments on the 2017 Proposed Rule Further Delaying the Effective Date of EPA's Risk Management Program Amendments (April 3, 2017; 82 FR 16146). This document is available in the docket for this rulemaking.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

CAA section 112(j)(5)), CAA section 112(r)(7)(A) gives the Administrator the flexibility to make a rule effective with no specific outside date beyond that which “assur[es] compliance as expeditiously as practicable.” In light of EPA’s commitment to take further regulatory action in the near future, with the potential for a broad range of rule revisions (82 FR 16148 through 16149, April 3, 2017), and the substantial resources required to prepare for compliance mentioned in the final Risk Management Program Amendments (82 FR 4676, January 13, 2017), these commenters agreed that the 20-month delay in the effective date would be as expeditiously as practicable. Several of these commenters also identified 5 U.S.C. 705 in the Administrative Procedure Act as a potential vehicle for postponing the effective date indefinitely in connection with the pending litigation.

Other commenters contested EPA’s authority to delay the effective date as proposed. A group of advocacy organizations, as well as a legal institute affiliated with a law school, argued that the 90-day stay provision in CAA section 307(d)(7)(B) is the maximum period that a rule can be stayed or have its effectiveness delayed in connection with a reconsideration. Noting that, except for the 90-day stay provision, the subparagraph provides that “reconsideration shall not postpone the effectiveness of the rule,” one commenter contends no additional exceptions can be implied. The commenter supports its position by citing *Natural Resources Defense Council v. Reilly*, 976 F.2d 36, 40 -41 (D.C. Cir. 1992). Another commenter argues that EPA had “no excuse” for not seeking comment on its first two delays of effectiveness, making further delay impermissible.

More generally, commenters opposed to the proposed delay of effectiveness sought to rely on previous findings in the rulemaking record for the Risk Management Program

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Amendments. Noting that CAA section 112(r)(7)(B) provides that the regulations under that paragraph should provide for the prevention and detection of, and the response to, accidental releases “to the greatest extent practicable,” one commenter argues that a 20-month delay in effectiveness would run counter to the statute when EPA in the Risk Management Program Amendments already determined it was practicable to implement these regulations sooner. The commenter notes that paragraph (B) of CAA section 112(r)(7) requires rules to be applicable to a stationary source no later than three years after promulgation, so extending the effective date 20 months would “inevitably result in pushing some or all of the compliance deadlines far beyond three years.” The commenter viewed EPA as needing a more complete justification than if it were setting “a new policy created on a blank slate.” According to the commenter, EPA failed to justify its changed position. In the view of the commenter, EPA’s discussion of compliance dates for new provisions in the Risk Management Program Amendments final rule (82 FR 4675-80, January 13, 2017) demonstrates that the 20-month delay in effectiveness does not comply with “as expeditiously as practicable” under CAA section 112(r)(7)(A).

Commenters also dispute the basis for convening a reconsideration proceeding by criticizing the BATF West finding itself and whether its publication two days before the close of comments made it impracticable to comment on the report. One commenter noted several of the parties requesting reconsideration in fact mentioned the BATF West finding in their comments. Another commenter objected to EPA not specifying what other issues met the reconsideration standard. More generally, commenters opposed to the delay of effectiveness found EPA lacked sufficient detail in its explanation of the basis for proposing to delay effectiveness of the Risk Management Program Amendments for them to be able to comment. Commenters further

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

asserted that a further delay makes it more likely that another incident like the West Fertilizer explosion and other events discussed in the record, will occur. Commenters also expressed a concern that EPA could repeatedly delay the effective date based on the logic in the proposed rule.

Response: EPA notes that CAA section 112(r)(7)(A) does not contain any language limiting “as expeditiously as practicable” to an outside date (e.g., “in no case later than date X”). The volume of comments received on the proposed rule validates our expectation that there will be a high level of interest in the broad range of issues we expect to take comment on. For example, in this rulemaking, several commenters have criticized the methodology of the BATF West finding and raised substantive concerns about various rule provisions. We have consistently stated that, beyond those issues that meet the CAA section 307(d)(7)(B) standard for reconsideration, we intend to raise other matters that we believe would benefit from additional comment (see, the Administrator’s Letter).⁷ Many of the decisions underlying the Risk Management Program Amendments are policy preferences based on weighing factors in the record that could be rationally assessed in different ways. We continue to believe that evaluating these issues will be difficult and time consuming. A delay of effectiveness will allow EPA time for a comprehensive review of objections to the Risk Management Program Amendments rule without imposing the rule’s substantial compliance and implementation resource burden when the outcome of the review is pending.

A delay of 20 months is a reasonable length of time to engage in the process of revisiting

⁷ Pruitt, E. Scott. March 13, 2017. Letter to Justin Savage of Hogan Lovells Regarding Convening a Proceeding for Reconsideration of the Final Rule Entitled “Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act,” published on January 13, 2017, 82 FR 4594. Office of the Administrator, US Environmental Protection Agency, Washington, DC.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

issues in the underlying Risk Management Program Amendments. Contrary to some commenters assertions (and contrary to the urging of those commenters who asked that we invoke the Administrative Procedure Act (APA) section 705), we did not propose and are not finalizing an indefinite delay of effectiveness. During this period, the pre-Amendments 40 CFR part 68 rules will remain in effect. As we noted when we proposed and finalized the Risk Management Program Amendments, “[t]he [Risk Management Program] regulations have been effective in preventing and mitigating chemical accidents in the United States” (see 82 FR 4595, January 13, 2017). We discuss additional bases for the delay of effectiveness for 20 months in section V of the preamble. For all of these reasons, we conclude that the delay of effectiveness for 20 months is as expeditious as practicable for allowing the rule to go into effect.

We disagree with the view that the three month stay provision in CAA section 307(d)(7)(B) prohibits the use of rulemaking to further delay the effectiveness of rules that are not in effect. As an initial matter, were no reconsideration involved, a rule with a future effective date could have its effective date delayed simply by a timely rulemaking amending its effective date before the original date. *Cf. NRDC v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982) (discussing application of rulemaking procedures to action to postpone effective date of rule); *NRDC v. Abraham*, 355 F.3d 179, 203 (2d Cir. 2004) (discussing amendment of effective date of rule through notice-and-comment process). While one commenter criticizes the initial delay of effectiveness for relying on the good cause exception (arguing that, in lieu of the initial good cause delay, we should have used a notice and comment procedure to delay the effective date), and the subsequent 90-day stay for continuing that delay, neither of those actions were challenged. There is no reasonable dispute that the Risk Management Program Amendments are

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

not yet in effect. EPA has explained in both the proposed rule and in the Administrator's Letter of March 13, 2017,⁸ that part of its purpose in proposing to delay the effective date 20 months is to not only to conduct a reconsideration on the issues identified in that letter but also to solicit comment on any other matter that will benefit from additional comment. The interpretation of CAA section 307(d)(7)(B) urged by the commenters would say that EPA's ability to use a notice and comment procedure to delay the effective date for these matters that EPA seeks to solicit additional comment on is negated when there is a reconsideration ongoing as well.

We also disagree with the commenters' view that the phrase "reconsideration shall not postpone the effective date of the rule" is meant to prohibit using a notice and comment procedure or any means other than the three month stay in CAA section 307(d)(7)(B) to delay a rule that is not in effect. In quoting the statute, the comment omits the word "[s]uch." In context, "such reconsideration" follows a discussion of the process for convening reconsideration and precedes the three month stay provision. A natural reading of the language is that the act of convening reconsideration does not, by itself, stay a rule but that the Administrator, at his discretion, may issue a stay if he has convened a proceeding. The three-month limitation on stays issued without rulemaking under CAA section 307(d)(7)(B) does not limit the availability or length of stays issued through other mechanisms. Furthermore, CAA section 307(d) expressly contemplates the "revision" of rules to which it applies. See CAA section 307(d)(1); see also CAA section 112(r)(7)(E) (regulations under CAA section 112(r) "shall for purposes of sections 113 . . . and 307 . . . be treated as a standard in effect under subsection (d) of [section 112]").

⁸ Pruitt, E. Scott. March 13, 2017. Letter to Justin Savage of Hogan Lovells Regarding Convening a Proceeding for Reconsideration of the Final Rule Entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," published on January 13, 2017, 82 FR 4594. Office of the Administrator, US Environmental Protection Agency, Washington, DC.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

EPA is issuing this rule as a revision of the Risk Management Program Amendments.

The case of *Natural Resources Defense Council v. Reilly*, 976 F.2d 36 (D.C. Cir. 1992) (*NRDC*) does not prohibit EPA from using rulemaking procedures under CAA section 307(d) to modify and delay the effective date of the Risk Management Program Amendments. In that case, EPA had made the finding that radionuclides were hazardous air pollutants under the pre-1990 CAA. That finding, in turn, triggered a series of mandatory duties under the CAA that required promulgation of emission standards. EPA did so after several court orders but, under a series of rules under CAA section 301 and the pre-1990 CAA section 112, continuously stayed the effectiveness of those rules. The 1990 Amendments added special provisions for radionuclides, saving the former rules, delaying the effectiveness of a category of rules impacting medical facilities regulated by the Nuclear Regulatory Commission (NRC), and establishing specific procedures for exempting NRC-licensed sources. See CAA section 112(d)(9), CAA section 112(q). EPA conducted a rulemaking under CAA section 112(d)(9) but lacked sufficient data to promulgate an exemption for most NRC-licensed facilities. Nevertheless, EPA promulgated a stay of effectiveness of the radionuclide rules, using CAA section 301, while it gathered the necessary information to establish exemptions. (See *NRDC* at 38 – 39.) EPA characterized its rule as a transitional rule necessary to implement the intent of the 1990 Amendments. *Id.* at 40.

The *NRDC* court observed that the pre-1990 CAA had a highly circumscribed schedule for promulgating hazardous air pollutant rules. *NRDC* at 41. Recognizing that its past precedents did not allow the grant of general rulemaking authority to override specific provisions of the CAA, the court held that “[i]n the face of such a clear statutory command, we cannot conclude that section 301 provided the EPA with the authority to stay regulations that were subject to the

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

deadlines established by [former] section 112(b)." *Id.*

In contrast to the "clear statutory command" to promulgate rules for radionuclides once they were found to be hazardous air pollutants, CAA section 112(r) contains no similar mandate to promulgate the Risk Management Program Amendments. There is no dispute that EPA discharged its mandatory duty under CAA section 112(r)(7)(B) to promulgate "reasonable regulations" when it promulgated the Risk Management Program rule in 1996. These rules have been in effect and stationary sources that have present a threshold quantity of a regulated substance must comply with 40 CFR part 68 as in effect. The Risk Management Program Amendments were not promulgated to comply with a court order enforcing a mandatory duty. In contrast to the specific deadlines in the pre-1990 CAA for hazardous air pollutant regulation and the detailed structure in CAA section 112(d)(9) and CAA section 112(q) for addressing radionuclides under the amended CAA, CAA section 112(r)(7)(A) provides the Administrator substantial discretion regarding the setting of an effective date. The statutory framework for a discretionary rule under CAA section 112(r)(7) differs greatly from the "highly circumscribed schedule" analyzed by the *NRDC* court. Absent an otherwise controlling provision of the CAA, CAA section 307(d) allows EPA to set a reasonable effective date.

We view the provision in CAA section 112(r)(7)(B) regarding when regulations shall be "applicable" to a stationary source to not prohibit the delay of effectiveness we promulgate in this rule. First, we note that February 2019 is before January 2020 (three years after the January 2017 promulgation), so even assuming the provision in question requires compliance by three

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

years after promulgation of the Risk Management Program Amendments,⁹ it is speculative to say that it is “inevitable” that some compliance dates will be “pushed off far beyond three years” from promulgation. Even if the commenter’s intuition is correct, the argument is premature. A challenge to compliance dates after January 2020 should be brought in litigation over a rule that establishes such a date. Second, the appropriate rule to challenge compliance dates set in the Risk Management Program Amendments would be the underlying rule (i.e., the Risk Management Program Amendments rule promulgated on January 13, 2017) that established compliance dates. This rule does not impact compliance dates except for those dates that would be triggered prior to February 2019. If EPA proposes amending compliance dates beyond January 13, 2020, then this issue will need to be addressed.

While CAA section 112(r)(7)(B) contains a requirement that EPA’s regulations “provide, to the greatest extent practicable,” for prevention, detection, and response to accidental releases, that subparagraph places this requirement in the context of a mandate for the regulations to be “reasonable.” The phrase “to the greatest extent practicable” does not prohibit weighing the difficulties of compliance planning and other implementation issues.

This action itself is not the convening of reconsideration, therefore, the questions of whether the arson finding by the BATF was proper are outside the scope of this rule. Even if the comment were within the scope of this rulemaking, the mention of the BATF finding in a few scattered comments does not mean that it was practicable for the public generally and the

⁹ EPA does not concede that the provision requires all compliance deadlines to be set three years from the date of any rule under CAA section 112(r)(7)(B)(i). This provision more naturally is read to refer to the earliest possible compliance date for a newly-regulated stationary source. This reading is confirmed by the rest of the sentence, which refers to when a stationary source with a newly-listed substance must comply with CAA section 112(r)(7)(B) regulations. The Risk Management Program Amendments itself describes the rationale for when already-regulated sources must comply with the Risk Management Program Amendments.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

hundreds of commenters to meaningfully address the significance of the finding for a rule with multiple issues and hundreds of supporting documents. EPA is not taking action under APA section 705 at this time.

B. Comments supporting a delay of the effective date

Many commenters supported EPA's proposal to delay the effective date of the final rule to February 19, 2019. These commenters included industry associations, regulated facilities, state government agencies, and others. These commenters gave various reasons for delaying the final rule's effective date.

1. Comments arguing that EPA finalized provisions that were not discussed in the proposed rule

Several commenters indicated the final rule included changes on which the public was never offered an opportunity to comment as required by the CAA. These commenters highlighted a new provision in the final rule requiring regulated facilities to disclose any information relevant to emergency planning to local emergency planners, and a new final rule trigger for third-party audits allowing an implementing agency to require such an audit due to "conditions at the stationary source that could lead to the release of a regulated substance" as issues that warrant reconsideration and delaying the effective date of the final rule. These commenters argued that the public was deprived of effective notice and opportunity to comment on the new provisions.

Response: EPA agrees that the final rule included some rule provisions that may have lacked notice and would benefit from additional comment and response.

2. Comments regarding the arson finding for the West Fertilizer explosion

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Many commenters indicated that the finding by the Bureau of Alcohol, Tobacco, and Firearms (BATF) that the West Fertilizer explosion was caused by arson undermined the basis for the rule and that this necessitates delaying the final rule's effective date, in order to reconsider its provisions, in light of the BATF finding. Some complained the timing of BATF's announcement a few days before the end of the rule comment period precluded the development and submission of meaningful comments addressing this change in circumstances and its implications.

Response: EPA agrees that the timing of the BATF finding on the West Fertilizer incident made it impracticable for many commenters to meaningfully address the significance of this finding in their comments on the rule. Additionally, delaying the effective date of the final rule to February 19, 2019, will give the Agency an opportunity to consider comments on the BATF finding and take further action to reconsider the rule, propose any necessary changes, and provide opportunity for public comment on any changes made.

3. Other comments raised

Many commenters indicated that the effective date of the rule should be delayed because its information disclosure provisions create security risks, and these risks have not been adequately addressed by EPA in the final rule. Other commenters objected to other specific provisions of the final rule (e.g., third-party audits, safer technology and alternatives analysis (STAA), incident investigation requirements, etc.), indicating that EPA had provided no evidence that these provisions would produce the benefits claimed by EPA, and that EPA should delay the effective date of the final rule either to provide such evidence or remedy these deficiencies by making substantive changes to the rule. Numerous commenters argued that EPA

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

failed to show that the benefits of the final rule outweigh its costs and made other flaws in the regulatory impact analysis, which the commenters contended were grounds for delaying the effective date of the final rule and reconsidering its provisions. One trade association stated that the Risk Management Program Amendments are not needed and that the current Risk Management Program has been effective in identifying and reducing risks and preventing offsite impacts based on EPA data showing that between 2004 and 2013 there has been a decrease of over 60% of all RMP-reportable events. Another trade association believes that the amendments raise substantial questions of policy and significantly increase the regulatory burden without corresponding benefits and should be considered for repeal under Executive Orders 13771, “Reducing Regulation and Controlling Regulatory Costs”¹⁰ and 13777, “Enforcing the Regulatory Reform Agenda.”¹¹

A commenter representing a group of State agencies argued that the effective date should be delayed because the final rule created unjustified burdens on state and local emergency responders. Several commenters indicated that EPA did not adequately coordinate with OSHA during the rulemaking process, and that EPA should delay the effective date of and reconsider the rule in order to coordinate any amendments to the Risk Management Program with changes made by OSHA to its Process Safety Management standard.

¹⁰ See *Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs* which was signed on January 30, 2017 and published in the Federal Register on February 3, 2017 (82 FR 9339). Executive Order 13771 requires that any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations
<https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs>.

¹¹ See *Executive Order 13777: Enforcing the Regulatory Reform Agenda* which was signed on February 24, 2017 and published in the Federal register on March 1, 2017 (82 FR 12285). Executive Order 13777 tasks each Federal agency with identifying regulations that are unnecessary, ineffective, impose costs that exceed benefits, or interfere with regulatory reform initiatives and policies for repeal, replacement, or modification
<https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda>.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Some commenters also argued that the effective date should be delayed because EPA did not adequately address small business concerns, or made other procedural errors during the rulemaking process.

Response: While it is not necessary for EPA to address the substance of these claims in this rulemaking, we note they represent a wide-ranging and complex set of policy and procedural issues. Some of these issues would not meet the standard for reconsideration under CAA section 307(d)(7)(B), but present substantial policy concerns that EPA may wish to address while it conducts the reconsideration process for issues that meet that reconsideration standard. Whether or not EPA agrees with commenters on the merits of these claims, the Agency believes the existence of such a large set of unresolved issues demonstrates the need for careful reconsideration and reexamination of the Risk Management Program Amendments. Therefore, while EPA does not now concede that it should make the particular regulatory changes that these commenters have recommended, or that the Agency made errors in its regulatory impact analysis or rulemaking procedures, EPA concurs with commenters to the extent that they argue for finalizing the proposed delay in the effective date of the Risk Management Program Amendments rule in order to conduct a reconsideration proceeding. That proceeding will allow EPA to address commenters' issues as appropriate.

C. Comments opposing a delay of the effective date

Many commenters opposed EPA's proposal to further delay the effective date of the final rule to February 19, 2019. These commenters included environmental advocacy groups, other non-governmental organizations, private citizens, an association representing fire fighters, an academic institution, and others. These commenters gave various reasons for opposing EPA's

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

proposal to delay the final rule's effective date, which are discussed individually below.

1. Comments arguing that a further delay of the rule's effective date will cause harm

Many commenters indicated that EPA should not delay the effective date because delaying the rule's implementation will fail to prevent or mitigate chemical accidents that will cause harm to workers at regulated facilities and members of the public in surrounding communities.

Response: EPA disagrees that further delaying the final rule's effective date will cause such harm. EPA notes that delaying the effective date of the Risk Management Program Amendments rule simply maintains the status quo, which means that the existing RMP rule remains in effect. EPA also notes that compliance dates for most major provisions of the Risk Management Program Amendments rule were set for four years after the final rule's effective date, so EPA's delay of that effective date has no immediate effect on the implementation of these requirements. As EPA has previously indicated, the existing RMP rule has been effective in preventing and mitigating chemical accidents, and these protections will remain in place during EPA's reconsideration of the Risk Management Program Amendments.¹²

2. Comments arguing that the EPA's proposal to further delay the rule's effective date is arbitrary and capricious

Three commenters claimed that EPA's rulemaking to extend the effective date of the Risk Management Program Amendments rule to February 19, 2019 is arbitrary and capricious. Commenters stated several reasons that the proposed delay is arbitrary and capricious, including: the issues presented for reconsideration do not meet the statutory requirement for reconsideration

¹² See 82 FR 4595, January 13, 2017.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

under CAA section 307(d)(7)(B), and, even if any met the CAA section 307(d)(7)(B) standard, EPA lacks authority to extend a rule's effective date beyond 90 days pending reconsideration; EPA failed to explain why it is appropriate to forgo the benefits of the rule during the period of the stay; EPA failed to adequately justify its change in position; and EPA has not shown that a delay of 20 months assures compliance "as expeditiously as practicable", as required under CAA section 112(r)(7)(A) or provides to "the greatest extent practicable" for prevention, detection, and response, as required under CAA section 112(r)(7)(B). One commenter also stated that EPA appeared "to pick the duration it proposes – 20 months – out of a hat," and provided no explanation or justification for this timeframe.

Response: EPA disagrees that this rulemaking is arbitrary and capricious. In order to conduct a rulemaking that is reasonable, and therefore not arbitrary and capricious, the courts have held that an agency must "set forth its reasons" for its decision and "establish a rational connection between the facts found and the choice made.¹³" EPA has done so here. First, the reconsideration process that EPA has initiated does meet the statutory test for such a process. As EPA stated in the proposed rule, under CAA section 307(d)(7)(B), the Administrator must commence a reconsideration proceeding if, in the Administrator's judgement, the petitioner raises an objection to a rule that was impracticable to raise during the comment period or if the grounds for the objection arose after the comment period but within the period for judicial review, and the objection is of central relevance to the outcome of the rule.

The Administrator's Letter of March 13, 2017,¹⁴ specified at least one issue – BATF's

¹³ See Torous Records, Inc. v. D.E.A., 259 F.3d 731, 736 (D.C. Cir. 2001).

¹⁴ Pruitt, E. Scott. March 13, 2017. Letter to Justin Savage of Hogan Lovells Regarding Convening a Proceeding for Reconsideration of the Final Rule Entitled "Accidental Release Prevention Requirements: Risk Management

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

West finding – met the CAA section 307(d)(7)(B) standard for reconsideration. The letter does not reach conclusions on other issues in the RMP Coalition petition that meet this standard, but notes that at least some issues may have lacked notice and would benefit from additional comment and response. All three petitioners argued that the final rule included new requirements that were not included in the proposed rule, requirements that petitioners would have strongly objected to if they had been afforded an opportunity to comment. In particular, the petitioners cited a provision in the final rule requiring regulated facilities to disclose any information relevant to emergency planning to local emergency planners and a requirement to perform a third-party audit when an implementing agency requires such an audit due to “conditions at the stationary source that could lead to the release of a regulated substance.” Without conceding that these provisions lacked adequate notice, EPA recognizes that these provisions include core requirements for major rule provisions, and so are of central relevance to the outcome of the rule. Thus, BATF’s West finding meets the criteria for reconsideration under CAA section 307(d)(7)(B), and it make practical sense for EPA to provide an opportunity for comment on these other issues in the reconsideration proceeding.¹⁵

EPA also disagrees with one commenter’s assertion that the lack of discussion in the proposed rule of the forgone benefits of the rule during the period of the delay of effectiveness

Programs Under the Clean Air Act,” published on January 13, 2017, 82 FR 4594. Office of the Administrator, US Environmental Protection Agency, Washington, DC.

¹⁵ Even if no issue met the statutory standard for when the Administrator must convene a proceeding for reconsideration under CAA section 307(d)(7)(B), the Administrator retains the discretion to convene a reconsideration process. *See Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (“Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.”); *Dun & Bradstreet Corp. Found. V. U.S. Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991) (“It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review.”)

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

makes the delay arbitrary and capricious. As an initial matter, the regulatory impact analysis for the Risk Management Program Amendments was unable to conclusively show that the benefits of the final rule exceeded its costs. The lack of a quantification of benefits in the final rule regulatory impact analysis would make a quantification of forgone benefits during the period of a delay speculative at best. However, as noted above, most provisions have a compliance date of 2021, therefore any benefits from compliance would not be impacted.

In deciding whether to implement a regulation, EPA may reasonably consider not only its benefits, but also its costs. Petitioners have claimed that the final Risk Management Program Amendments' new provisions that were not included in the proposed rule may actually increase the risks and burdens to states, local communities, emergency responders, and regulated entities rather than fixing the problems identified in the proposed rule. It is completely reasonable for EPA to delay implementation of and reexamine the Risk Management Program Amendments when the Agency becomes aware of information, such as that provided by petitioners, that suggests one or more of these provisions may potentially result in harm to regulated entities and the public.

Petitioners' claims that the new final rule provisions may cause harm to regulated facilities and local communities, and the speculative but likely minimal nature of the forgone benefits, form another rational basis for EPA to delay the effectiveness of the Risk Management Program Amendments and determine whether they remain consistent with the policy goals of the Agency.

EPA also disagrees with a commenter's assertion that delaying the final rule's effective date by 20 months violates the requirement under CAA section 112(r)(7)(A) to assure

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

compliance as expeditiously as practicable, or the requirement under CAA section 112(r)(7)(B) to promulgate reasonable regulations to the greatest extent practicable. EPA believes that the language of these sections of the CAA gives the Administrator broad authority to determine what factors are relevant to establishing effective dates that are practicable (unlike other sections of the CAA, where Congress constrained “as practicable” to include certain defined time limits). In exercising this authority, EPA believes effective dates must account for all relevant factors. In this case, delaying the effective date of the rule during the reconsideration proceeding is reasonable and practicable because the Agency does not wish to cause confusion among the regulated community and local responders by requiring these parties to prepare to comply with, or in some cases, immediately comply with, rule provisions that might be changed during the subsequent reconsideration. This is particularly true for provisions that might result in unanticipated harm to facilities and local communities, as petitioners have alleged may occur. The Agency notes that compliance with most major provisions in the final rule would not be required until 2021, so delaying the effective date of the final rule would have minimal effect on the benefits derived from compliance with these provisions.

Lastly, EPA disagrees that it picked the 20-month duration for the proposed delay in effective date “out of a hat,” or provided no explanation or justification for this timeframe. As EPA explained in the proposed rule (82 FR 16148 through 16149, April 3, 2017): “As with some of our past reconsiderations, we expect to take comment on a broad range of legal and policy issues as part of the Risk Management Program Amendments reconsideration...,” and,

“This timeframe would allow the EPA time to evaluate the objections raised by the various petitions for reconsideration of the Risk Management Program Amendments, consider other issues that may benefit from additional comment, and take further regulatory action. This schedule allows time for developing and publishing any notices that focus comment on specific

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

issues to be reconsidered as well as other issues for which additional comment may be appropriate. A delay of the effective date to February 19, 2019, provides a sufficient opportunity for public comment on the reconsideration in accordance with the requirements of CAA section 307(d), gives us an opportunity to evaluate and respond to such comments, and take any possible regulatory actions, which could include proposing and finalizing a rule to revise the Risk Management Program amendments, as appropriate.”

This rationale for the proposed duration of the effective date is neither arbitrary nor capricious.

3. Comments arguing inadequate rationale was provided for further delay of effective date

Several commenters argued that EPA did not provide a valid basis or reasoned explanation for its proposal to delay, for why the petitions should take more than three months to consider, or how the 20-month delay period was determined.

Response: The three petitions for reconsideration cover numerous policy and legal issues with the Risk Management Program Amendments. As stated in the April 3, 2017 proposal (82 FR 16148 through 16149) these issues may be difficult and time consuming to evaluate, and given the expected high level of interest from stakeholders in commenting on these issues, we proposed a longer delay of the effective date to allow additional time to open these issues for review and comment. Additionally, in both the Administrator’s Letter of March 13, 2017¹⁶ as well as the proposed delay of effectiveness rule, EPA indicated it may raise other matters we believe will benefit from additional comment (82 FR 16148 through 16149, April 3, 2017).

Resolution of issues may require EPA to revise the amendments through a rulemaking process, which would involve a developing a proposal to focus comment of specific issues as well as

¹⁶ Pruitt, E. Scott. March 13, 2017. Letter to Justin Savage of Hogan Lovells Regarding Convening a Proceeding for Reconsideration of the Final Rule Entitled “Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act,” published on January 13, 2017, 82 FR 4594. Office of the Administrator, US Environmental Protection Agency, Washington, DC.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

other issues for which additional comment may be appropriate, allowing sufficient opportunity for public comment, review and respond to comments, and develop any final revisions. The rulemaking process also must allow time for Agency, inter-agency and OMB review of the proposed and final rule. Based on EPA rulemaking experience, EPA decided that a 20-month delay was warranted. Some industry commenters have pointed out that without such a delay, regulated parties would need to expend resources to prepare for compliance with the Risk Management Program Amendments final rule provisions while further changes to the program are being contemplated.

4. Comments indicating that the BATF arson finding should not affect the basis of the rule

Many commenters indicated that the BATF finding of arson should not cause EPA to reconsider the final rule. These commenters indicated that Executive Order 13650 was not specifically based on the West Fertilizer event, and that EPA did not justify the Risk Management Program Amendments rule on that single incident, but rather that EPA indicated an average of approximately 150 chemical accidents have occurred each year, and the rule's provisions were intended to address all such accidents. Other commenters noted that conditions at West Fertilizer enabled the fire to escalate into a massive detonation, and lack of effective communication contributed to the needless deaths of emergency responders – issues that some rule amendments addressed by improving emergency preparedness. Some commenters also stated that the BATF finding was not actually based on evidence of arson, but rather relied on a process of elimination called “negative corpus” to project a conclusion without evidence, and therefore the BATF finding does not provide grounds for the petitioner’s objection to the final rule.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Response: As an initial matter, the Agency's decision to convene a proceeding for reconsideration was made in a separate action – the Administrator's Letter of March 13, 2017. The merits of that decision are not properly subject to collateral attack in this rule. The substantive impact of the BATF finding on the policy issues opened in the reconsideration-related proposed rule may be addressed in the notice and comment period for that rule. The focus of this delay of effectiveness rule is to provide sufficient time to conduct a proceeding on the complex set of issues identified by the petitions as well as other issues that merit additional comment.

EPA disagrees that the BATF finding of arson as the cause of the West Fertilizer explosion does not provide grounds for reconsideration of the Risk Management Program Amendments final rule. While EPA agrees that the incident was not the sole justification for Executive Order 13650, and the Agency did not solely rely on it as justification for the Risk Management Program Amendments, there is no question that the event was the proximate trigger for Executive Order 13650¹⁷ and prominently featured in the Agency's Risk Management Program Amendments proposed rule.¹⁸ EPA believes the prominence of the incident in the policy decisions underlying Executive Order 13650 and the Risk Management Program Amendments rule makes the BATF finding regarding the cause of the incident of central

¹⁷ See Executive Order 13650, Actions to Improve Chemical Safety and Security – A Shared Commitment; Report for the President, May, 2014, pp 1: “The West, Texas, disaster in which a fire involving ammonium nitrate at a fertilizer facility resulted in an explosion that killed 15 people, injured many others, and caused widespread damage, revealed a variety of issues related to chemical hazard awareness, regulatory coverage, and emergency response. The Working Group has outlined a suite of actions to address these issues...”

¹⁸ In the proposed rule, EPA referred to the West Fertilizer event more than 15 times. For example, see 81 FR 13640, column 1: “In response to catastrophic chemical facility incidents in the United States, including the explosion that occurred at the West Fertilizer facility in West, Texas, on April 17, 2013 that killed 15 people, President Obama issued Executive Order 13650, “Improving Chemical Facility Safety and Security,” on August 1, 2013.”

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

relevance to the rule amendments. If the cause of the West Fertilizer explosion had been known sooner, the Agency may have possibly given greater consideration to potential security risks posed by the proposed rule amendments. All three of the petitions for reconsideration and many of the commenters discuss potential security concerns with the rule's information disclosure requirements to LEPCs and the public. The RMP Coalition petition and some commenters argue that knowing that the West Fertilizer incident was an intentional, rather than an accidental act, would likely have resulted in more focus on enhanced facility security measures and justifications for the need for third-parties to obtain facility information, with protections on data use and further disclosure.

Clearly, EPA does not desire to establish regulations that increase security risks. While EPA has not concluded that the final rule would increase such risks, the petitioner's concerns, which are echoed by many other commenters, require careful consideration, and cannot be dismissed out of hand.

Regarding these commenters claims that the BATF relied on an invalid form of reasoning (i.e., "negative corpus") to reach its conclusion regarding the cause of the West Fertilizer explosion, EPA cannot evaluate these commenters claims without obtaining detailed information on the BATF investigation. The decision to reconsider simply acknowledges the fact that BATF made this finding, that the finding went to issues of central relevance to the Risk Management Program Amendments and that the finding was late enough in the comment period to make it impracticable for many commenters to meaningfully comment on the finding's significance for the rule. The substantive merits of the BATF methodology and its conclusion would be more appropriate to consider in a reconsideration rulemaking process addressing the Risk Management

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Program Amendments issues impacted by the finding. To the extent questions remain concerning the cause of the West Fertilizer explosion, EPA believes these argue for finalizing the delay of effective date of the Risk Management Program Amendments in order to give the Agency time to better understand the basis for BATF's conclusions.

Accordingly, EPA has decided to finalize the proposed delay of the effective date to February 19, 2019. This delay will give the Agency an opportunity to reconsider the Risk Management Program Amendments rule, propose changes to the rule as necessary, and provide additional opportunity for members of the public to submit comments on the proposal to EPA.

5. Comments arguing that the petitioners' other claims are without merit

Some commenters stated that EPA and the petitioners for reconsideration failed to identify objections that either arose after the period for public comment or were impracticable to raise during this period, as required under CAA section 307(d)(7)(B). One of these commenters stated that most of the objections that were raised by petitioners were "simply recycled from the comment period" and that the "remainder address issues that cannot possibly be considered "of central relevance" to the "Chemical Disaster Rule." This commenter also indicated that several parties commented on the BATF finding during the public comment period for the Risk Management Program Amendments rulemaking, and that this demonstrated that it was not impracticable to raise the issue during the comment period. This commenter noted that EPA had responded to these comments and found that "it would be inappropriate to suspend the rulemaking based on outcomes of the incident investigation of the West Fertilizer explosion."

Response: EPA disagrees that petitioners have failed to identify one or more objections that either arose after the period for public comment or were impracticable to raise during that

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

period. The decision to convene a proceeding for reconsideration was made in the Administrator's Letter of March 13, 2017.¹⁹ The substance of that decision is a separate action from this rule on the length of a delay of effectiveness. Petitioners, as well as numerous commenters, including industry trade associations, regulated facilities, state government agencies, and others asserted the final rule imposed extensive new requirements on covered facilities that were not contained in the proposed rule. These commenters maintained that two major provisions of the final rule were not contained in the proposal, including a new provision in the final rule requiring regulated facilities to disclose any information relevant to emergency planning to local emergency planners, and a new trigger for third-party audits. EPA agrees that these concerns warrant additional public comment and can be incorporated into the reconsideration process for the Risk Management Program Amendments rule.²⁰

While EPA acknowledges that several commenters included the BATF arson finding in their comments on the Risk Management Program Amendments proposed rule, the Agency does not view two days (i.e., the amount of time between BATF's announcement of its arson finding and the close of the public comment period for the Risk Management Program Amendments proposed rule) as a sufficient time period to evaluate the full implications of such important new information. Several commenters also noted that the BATF's arson finding was announced too late for them to adequately consider this information within their comments to EPA.

Also, when EPA stated, in responding to comments on the proposed Risk Management

¹⁹ Pruitt, E. Scott. March 13, 2017. Letter to Justin Savage of Hogan Lovells Regarding Convening a Proceeding for Reconsideration of the Final Rule Entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," published on January 13, 2017, 82 FR 4594. Office of the Administrator, US Environmental Protection Agency, Washington, DC.

²⁰ See footnote 15, above.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Program Amendments, that it would be inappropriate to suspend the rulemaking based on outcomes of the incident investigation of the West Fertilizer explosion, the Agency had not yet received the petitions that prompted its reconsideration proceeding, as well as comments on the proposal to delay the rule's effective date, both of which assert that the information disclosure provisions contained in the final Risk Management Program Amendments may actually increase or introduce new security risks to RMP facilities, emergency responders, and communities. EPA believes it would be remiss for the Agency to allow the final rule to become effective without fully evaluating this new information. As previously indicated, EPA does not desire to establish regulations that increase security risks.

Finally, several commenters also stated that EPA added more than 100 new documents to the rulemaking docket after the close of the comment period, and indicated that several of these documents were used by EPA to support the Agency's position on core provisions of the final rule, including the STAA and third-party audit provisions. These commenters stated that because the comment period had already closed when this information was added to the docket, the public was denied an opportunity to review and comment on the additional information. Without taking a position on whether these documents required additional comment under the rulemaking procedures of CAA section 307(d), a benefit of reopening comment on the topics that meet the reconsideration standard of CAA section 307(d)(7)(B) will be to allow for comment on some or all of these documents.

6. Other comments on the proposed delay of the effective date

While noting their opposition to many provisions of the final regulation, an association of state and local emergency planning officials recommended that EPA allow the emergency

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

response coordination activities provisions of § 68.93 and the emergency response program provisions of § 68.95 (and particularly paragraph (c))²¹ to go into effect immediately. This association argued that these two requirements are simple, direct, not burdensome, and in the case of § 68.95(c), essentially identical to requirements contained in the Emergency Planning and Community Right-to-Know Act (EPCRA).

Response: EPA disagrees that the emergency response coordination activities provisions of § 68.93 should immediately go into effect. These provisions contain language (i.e., “Coordination shall include providing to the local emergency planning and response organizations...any other information that local emergency planning and response organizations identify as relevant to local emergency response planning”) for which two petitioners (the RMP Coalition and Chemical Safety Advocacy Group) specifically objected, based on their concerns that the rule included no limitations on the information requested to be disclosed or how sensitive information can be protected. In agreeing to convene a proceeding for reconsideration of the final rule, EPA agreed to provide the public with an opportunity to comment on other issues that may benefit from additional comment and response. By finalizing these provisions immediately, EPA would not be allowing the public an additional opportunity to comment on them. Additionally, § 68.93(b) requires coordination to include consulting with local emergency response officials to establish appropriate schedules and plans for field and tabletop exercises required under § 68.96(b). As § 68.96(b) is a new section created in the final rule, EPA cannot finalize § 68.93(b) as currently written without also finalizing § 68.96(b).

²¹ Section 68.95(c) pertains to coordination of a facility’s emergency response plan with the community emergency response plan and providing necessary information to local officials to develop and implement the community response plan.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Regarding this commenter's recommendation that EPA allow the emergency response program provisions of § 68.95, and particularly paragraph (c), to immediately go into effect, EPA notes that § 68.95(a)(4) also contains a reference to the new exercise requirements of § 68.96, and therefore this provision cannot go into effect without § 68.96. However, § 68.95(c) is already contained in the existing rule. In the Risk Management Program Amendments final rule, EPA simply replaced the phrase "local emergency planning committee" with the acronym "LEPC." therefore, this requirement will remain in effect with or without the Risk Management Program Amendments final rule becoming effective.

V. Additional Twenty Month Delay of Effectiveness

EPA is delaying the effective date of the Risk Management Program Amendments final rule until February 19, 2019. Given the degree of complexity with the issues under review, and the likelihood of significant public interest in this reconsideration, we believe the delay we are adopting in this action is adequate and necessary for the reconsideration. While it is possible that we may require less time to complete the reconsideration, we believe delaying the effective date by a full 20 months is reasonable and prudent. This additional delay of the effective date enables EPA time to evaluate the objections raised by the various petitions for reconsideration of the Risk Management Program Amendments, provides a sufficient opportunity for public comment on the reconsideration in accordance with the requirements of CAA section 307(d), gives us an opportunity to evaluate and respond to such comments, and take any possible regulatory actions, which could include proposing and finalizing a rule to revise or rescind the Risk Management Program Amendments, as appropriate. During the reconsideration, EPA may also consider other issues, beyond those raised by petitioners, that may benefit from additional comment, and take

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

further regulatory action.

The EPA recognizes that compliance dates for some provisions in the Risk Management Program Amendments coincided with the rule's effective date, while compliance dates for other provisions would occur in later years, i.e. 2018, 2021, or 2022, depending on the provision. Compliance with all of the rule provisions is not required as long as the rule does not become effective. The EPA did not propose and is not taking any action on any compliance dates at this time, as EPA plans to propose amendments to the compliance dates as necessary when considering future regulatory action.

Section 553(d) of the APA, 5 U.S.C. Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. EPA is issuing this final rule under § 307(d)(1) of the CAA, which states: “The provisions of section 553 through 557 * * * of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies.” Thus, section 553(d) of the APA does not apply to this rule. EPA is nevertheless acting consistently with the policies underlying APA section 553(d) in making this rule effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. APA section 553(d) provides an exception when the agency finds good cause exists for a period less than 30 days before effectiveness. We find good cause exists to make this rule effective upon publication because a delay of effectiveness can only be put in place prior to a rule becoming effective. Waiting for 30 days for this rule to establish the new effective date of February 19, 2019 at this time would cause the Risk Management Amendments to become temporarily effective on June 19, 2017 (existing effective date). Avoiding this situation alleviates any potential confusion and implementation difficulties that could arise were the Risk

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Management Program Amendments to go into effect for a 30-day period and then be stayed during reconsideration or modified as a result of the reconsideration process.

The effective date of the Risk Management Program Amendments, published in the **Federal Register** on January 13, 2017 (82 FR 4594), is hereby delayed to February 19, 2019.

VI. Statutory and Executive Orders

Additional information about these statutes and Executive Orders can be found

at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

- A. *Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

- B. *Paperwork Reduction Act (PRA)*

This action does not impose an information collection burden under the PRA. This final rule would only delay the effective date of the Risk Management Program Amendments finalized on January 13, 2017 (see 82 FR 4594) and does not contain any information collection activities.

- C. *Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This final rule would not impose a regulatory burden for small entities because it only delays the effective date of the Risk Management Program Amendments finalized on January 13, 2017 (see 82 FR 4594). We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It 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.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This final rule would only delay the effective date of the Risk Management Program Amendments finalized on January 13, 2017 (see 82 FR 4594) and does not impose new regulatory requirements. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This final rule only delays the effective date of the Risk Management Program Amendments finalized on January 13, 2017 (see 82 FR 4594) and does not impose any regulatory requirements.

I. National Technology Transfer and Advancement Act (NTTAA)

This action does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This final rule only delays the effective date of the Risk Management Program Amendments finalized on January 13, 2017 (see 82 FR 4594) and does not impose any regulatory requirements.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Only one major rule provision of the Risk Management Program Amendments has a compliance date that will be extended by delaying the effective date to February 19, 2019. As a result, the costs for that provision are delayed and will not be incurred by the regulated community while the rule is not yet in effect. As discussed below, the costs for this delayed compliance date is small relative to the total costs of the Risk Management Program Amendments and thus, the rule further delaying the effective date is not a major rule.

In the Risk Management Program Amendments, EPA finalized the following compliance dates:

- March 14, 2018 - Require compliance with emergency response coordination activities within one year of an effective date of a final rule;
- Provide three years for the owner or operator of a non-responding stationary source to develop an emergency response program in accordance with § 68.95. No specific date was established in the final rule. Instead, the three-year timeframe begins when the owner or operator determines that the facility is subject to the emergency response program requirements of § 68.95;
- March 15, 2021-Comply with new provisions (i.e., third-party compliance audits, root cause analyses as part of incident investigations, STAA, emergency response exercises, and information availability provisions), unless otherwise stated, four years after the original effective date of the final rule; and
- March 14, 2022-Provide regulated sources one additional year (*i.e.*, five years after the original effective date of the final rule) to correct or resubmit RMPs to reflect new and revised data elements.

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

The compliance dates of March 15, 2021 and March 14, 2022 are not affected by this rule. Therefore, the costs for the majority of the rule provisions are not affected by this rule (i.e., third-party compliance audits, root cause analyses as part of incident investigations, STAA, emergency response exercises, and information availability provisions). We are also delaying costs associated with minor rule provisions that would have become immediately effective on June 19, 2017. However, we did not estimate any costs for these provisions. These provisions include:

- § 68.48 Safety information – revised to change “Material Safety Data Sheets” to “Safety Data Sheets (SDS);”
- § 68.50 Hazard review – revised to clarify that the hazard review must include findings from incident investigations;
- 68.54 & 68.71 Training – revised to clarify that employee training requirements apply to supervisors responsible for directing process operations (under 68.54) and supervisors with process operational responsibilities (under 68.71);
- § 68.60 & 68.81 Incident investigation – revised to require incident investigation reports to be completed within 12 months of the incident, unless the implementing agency approves, in writing, an extension of time;
- § 68.65 Process safety information – revised to require that process safety information be kept up-to-date;
 - Also, changed the note to paragraph (b): to replace “Material Safety Data Sheets” with “Safety Data Sheets (SDS);” and

This document is a prepublication version, signed by the EPA Administrator, E. Scott Pruitt, on 6/9/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

- § 68.67 Process hazard analysis – revised to require that the PHA must now address the findings from all incident investigations required under § 68.81, as well as any other potential failure scenarios.

The only major rule provision that would be affected by this rule (because its March 14, 2018 compliance date is before the delayed effective date of this rule) is the emergency response coordination provision, which has an estimated annualized cost of \$16 M.²² ²³ Therefore, based on the costs of the provisions that would be affected by this action, EPA has concluded that this action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 68

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: _____

E. Scott Pruitt,
Administrator.

²² See EPA, Regulatory Impact Analysis, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7), December 16, 2016, pp 71, Docket ID No. EPA-HQ-OEM-2015-0725.

²³ The new compliance date for the emergency response coordination provision will be February 19, 2019, unless we propose and finalize a revised compliance date in conjunction with future revisions to the Risk Management Program Amendments.