NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 17-1157

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

NATURAL RESOURCES DEFENSE COUNCIL, CLEAN AIR COUNCIL, CLEAN WISCONSIN, AND CONSERVATION LAW FOUNDATION,

Petitioners,

v.

SCOTT PRUITT, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

ON PETITION FOR REVIEW OF AGENCY ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RESPONDENTS' INITIAL BRIEF

JEFFREY H. WOOD
Acting Assistant Attorney General

DANIEL R. DERTKE
Senior Attorney
Environmental Defense Section
Environment and Natural Resources Div.
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-0994
daniel.dertke@usdoj.gov

Of Counsel:
ELLIOTT ZENICK
KAREN PALMER
DIANE MCCONKEY
Office of the General Counsel
U.S. Environmental Protection Agency
Washington, DC

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici.

Petitioners: Natural Resources Defense Council (NRDC), Clean Air Council, Clean Wisconsin, and Conservation Law Foundation.

Respondents: Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency.

Respondent-Intervenors: By Order dated August 10, 2017, Doc. No. 1688116, the Court granted leave to intervene to the following parties: National Waste & Recycling Association, Solid Waste Association of North America, Inc., Waste Management, Inc., Waste Management Disposal Services of Pennsylvania, Inc., and Republic Services, Inc.

B. Rulings Under Review.

The agency action under review is EPA's Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, published at 82 Fed. Reg. 24,878 (May 31, 2017).

C. Related Cases.

Respondents are aware of the following cases that are related to this matter and that are currently pending before this Court:

(1) *National Waste & Recycling Association, et al. v. EPA*, D.C. Cir. No. 16-1371, consolidated with D.C. Cir. No. 16-1374; and

(2) *National Waste & Recycling Association, et al. v. EPA*, D.C. Cir. No. 16-1372.

The Court has ordered these cases held in abeyance and has further ordered the parties to file motions to govern further proceedings by April 3, 2018.

s/ *Daniel R. Dertke*
DANIEL R. DERTKE

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FEDERAL REGISTER

* Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

EPA	U.S. Environmental Protection Agency
Mg	megagram
Mg/year	megagrams per year
Stay Decision	Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878 (May 31, 2017)

STATEMENT OF JURISDICTION

The Court lacks jurisdiction over the petition for review because Petitioners fail to demonstrate standing and because Petitioners' challenge to the decision by the U.S. Environmental Protection Agency ("EPA") to stay for ninety days two Clean Air Act rules governing gas emissions from municipal solid waste landfills (the "Stay Decision") is moot.

STATEMENT OF THE ISSUES

1. Whether Petitioners have standing where they fail to demonstrate an injury fairly traceable to the Stay Decision.

2. Whether Petitioners' challenge is moot where Petitioners have not demonstrated that the Stay Decision, which lasted until August 28, 2017, has any continuing effects.

3. Whether the Stay Decision is reasonable on its merits.

PERTINENT STATUTES AND REGULATIONS

Except for 42 U.S.C. § 7411 and 42 U.S.C. § 7607(d), which are in the addendum to Petitioners' Brief, all applicable statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Introduction

EPA issued the Stay Decision in May, 2017. 82 Fed. Reg. 24,878 (May 31, 2017) (JAxxxx). Pursuant to EPA's authority under Section 307(d)(7)(B) of the Clean

Air Act, 42 U.S.C. § 7607(d)(7)(B), the Stay Decision stayed for ninety days, until August 29, 2017, two 2016 Clean Air Act rules governing gas emissions from municipal solid waste landfills.

Petitioners assert they have standing, claiming that the Stay Decision harms their members by delaying compliance with the 2016 landfill regulations. But the three specific landfills to which Petitioners point are not actually affected by the 2016 regulations: one is too small in capacity, one is too low in emissions, and one is already controlling its emissions in exactly the same way as the 2016 regulations would require. Even if the Stay Decision had never existed, the 2016 regulations would not require any of these landfills to do anything differently.

Petitioners also point to harms that they claim flow from all landfills that are covered by the 2016 regulations, taken as a group, but those harms are neither particularized nor imminent, nor are they any more traceable to the Stay Decision, nor redressable by its vacatur, than are the harms Petitioners claim flow from the three specific landfills their members actually identify.

Turning to mootness, the Stay Decision does not, as Petitioners assert, push back all of the compliance deadlines in the 2016 regulations. Instead, the Stay Decision only affects deadlines in the 2016 regulations that would have otherwise applied during the 90 days in which the stay was in effect. There are only two such deadlines: a landfill that commenced construction, reconstruction, or modification between March 2, 2017, and June 1, 2017, would have had to submit a design capacity

report within the stay period, and if its design capacity meets or exceeds a regulatory design capacity threshold, the landfill would also have had to submit an emission rate report during the stay period. EPA is not aware of any landfills that commenced construction, reconstruction, or modification within that March 2 to June 1 window, and Petitioners do not identify any. And, even if such a landfill exists, the Stay Decision simply moved that landfill's deadline to August 30, 2017, the day after the stay expired. That is a delay of at most 90 days, and possibly less. For example, if the deadline fell on the last day of the stay period, the delay arising from the stay would only be a single day.

Because Petitioners fail to identify any continuing impact of the Stay Decision, the Court lacks jurisdiction regardless of whether the Court analyzes this case in terms of mootness or in terms of standing.

B. Statutory Background

Section 111 of the Clean Air Act "directs the EPA Administrator to list 'categories of stationary sources' that 'in [his] judgment … caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (quoting 42 U.S.C. § 7411(b)(1)(A)). For each category, EPA must prescribe federal "standards of performance" under Section 111(b) for emissions of pollutants from new or modified sources. 42 U.S.C. § 7411(b)(1)(B).

In addition, EPA "shall prescribe regulations" under Section 111(d) with respect to existing sources for pollutants not covered under certain other programs. *Id.* § 7411(d). These regulations are not designed to regulate existing sources directly, but instead "establish a procedure" for "each State" to submit to EPA a plan that establishes "standards of performance" for any existing source of the relevant pollutant. *Id.* Under its regulations implementing the statute, EPA promulgates Section 111(d) regulations in the form of "emission guidelines." *See* 40 C.F.R. Pt. 60, Subpt. B. These guidelines provide procedures for states to submit, and for EPA to approve or disapprove, individualized state plans, which specify the standards applicable to particular sources within a state, along with implementation measures. 42 U.S.C. § 7411(d)(1). Under EPA's Subpart B regulations, §§ 60.20 – 60.29, states must submit to EPA an implementation plan within 9 months of the promulgation of an emission guideline, unless the emission guideline specifies a different deadline. 40 C.F.R. § 60.23(a)(1). EPA must approve or disapprove a state's plan within four months after the deadline for the state to submit the plan. 40 C.F.R. § 60.27(b). If a state fails to submit a plan, EPA must promulgate a federal plan within six months after the deadline for the state to submit a plan. *Id.* § 60.27(d).

C. Regulatory Background

EPA first issued performance standards for emissions from new municipal solid waste landfills, and emission guidelines for emissions from existing municipal

solid waste landfills, in 1996. *See* 61 Fed. Reg. 9,905 (Mar. 12, 1996) (JAxxxx).[1] EPA's 2016 regulations retain the same basic structure as the 1996 regulations: all municipal solid waste landfills must submit a design capacity report; landfills with a design capacity of at least 2.5 million megagrams of waste by mass, or 2.5 million cubic meters of waste by volume, must monitor their emissions of non-methane organic compounds; and landfills with emissions over a certain threshold must design and implement controls on a specific schedule. The 2016 regulations changed the timeframes used to classify landfills as new versus existing, lowered the threshold at which a landfill must install emission controls, and added a new method by which landfills can determine whether they must install controls.

1. The 1996 regulations

The 1996 regulations established different requirements for landfills based on construction date, design capacity (by mass and volume of waste), and the rate of emissions of non-methane organic compounds. Larger landfills emit more non-methane organic compounds, therefore larger landfills are required to do more reporting and potentially install controls.

In the 1996 regulations, EPA defined existing landfills as those for which construction, modification, or reconstruction commenced prior to May 30, 1991, and

[1] For purposes of this brief we generally use the phrase "new landfills" to refer to new, modified, or reconstructed landfills, and we refer to the commencement of "construction" instead of construction, reconstruction, or modification.

that have accepted waste since November 8, 1987. The Agency promulgated emission guidelines for existing landfills as Subpart Cc. 40 C.F.R. §§ 60.30c – 60.36c. New landfills, defined as those for which construction, modification, or reconstruction commenced on or after May 30, 1991, or began accepting waste after that date, were governed by new source performance standards codified in Subpart WWW. 40 C.F.R. §§ 60.750 – 60.759.

Under the 1996 regulations, landfills that are below a defined design capacity threshold (2.5 million megagrams of waste by mass, or 2.5 million cubic meters of waste by volume) must file a design capacity report. 40 C.F.R. §§ 60.33c(d) (existing); 60.752(a) (new).[2] For existing landfills, that report was due 90 days after EPA approved the relevant state's implementation plan. *Id.* § 60.35c(a). For new landfills that commenced construction before March 12, 1996, that design capacity report was due by June 10, 1996; for all other new landfills, that design capacity report was due 90 days after construction commenced. *Id.* §§ 60.757(a)(1)(i), (ii).

The 1996 regulations provide that if a landfill's design capacity is equal to or over the design capacity threshold, the landfill must calculate its annual non-methane organic compound emission rate, using a 3-tier system for that calculation. *Id.* §§ 60.33c(e) (existing); 60.757(b) (new). A landfill must submit additional emission rate reports annually, unless its estimated emissions are less than 50 megagrams per year

[2] One megagram ("Mg") is the equivalent of one metric ton.

("Mg/year") for each of the next 5 years, in which case the landfill can provide an estimate of its emission rate for each of the next 5 years, instead of an annual report. *Id.* §§ 60.33c(e)(1)(i) (existing); 60.757(b)(1)(ii) (new). If the landfill's non-methane organic compound emission rate exceeds 50 Mg/year, the landfill must submit a design plan within one year of the emission rate report, and must install and operate a gas collection and control system within 30 months of that report. 40 C.F.R. §§ 60.35c(b) (existing); 60.752(b)(2) (new). *See also* 61 Fed. Reg. at 9,907/2 (landfills that emit more than 50 Mg/year are required to install controls) (JAxxxx), *id.* at 9,911/3 (design plans are subject to agency approval) (JAxxxx).

2. The 2016 regulations

In 2016, EPA issued revised emission guidelines by promulgating Subpart Cf, 81 Fed. Reg. 59,276, 59,313-330 (Aug. 29, 2016) (codified at 40 C.F.R. §§ 60.30f – 60.41f) (JAxxxx-xxxx), and revised performance standards by promulgating Subpart XXX. 81 Fed. Reg. 59,332, 59,368-384 (Aug. 29, 2016) (codified at 40 C.F.R. §§ 60.760 – 60.769) (JAxxxx-xxxx). As noted above, the 2016 regulations retain the same basic structure and design capacity threshold as the 1996 regulations. However, EPA made three changes which are relevant here: (1) EPA revised the timeframes for classifying landfills as new versus existing, (2) EPA lowered the threshold at which a landfill must install emission controls, and (3) EPA added a new method by which a landfill can determine whether it must install controls.

First, EPA revised the start dates by which landfills are classified as either new or existing. Landfills where construction commenced before May 30, 1991, which were considered existing landfills under the 1996 rule, remain existing landfills under the 2016 rule and remain covered by Subpart Cc (the 1996 regulations for existing landfills) until an updated state plan is approved, at which point those landfills would be covered by Subpart Cf (the 2016 regulations for existing landfills). Landfills where construction commenced between May 30, 1991, and July 17, 2014, which were considered new landfills under the 1996 rule and thus covered by Subpart WWW, are now considered existing landfills with respect to the 2016 regulations and will likewise become subject to state plans promulgated under Subpart Cf, 40 C.F.R. § 60.31f(a). Landfills where construction commenced after July 17, 2014, are considered new landfills with respect to the 2016 regulations, and are covered under Subpart XXX, 40 C.F.R. § 60.760(a).

Second, EPA lowered the threshold at which a landfill must implement emission controls. As noted above, emission guidelines are not self-executing, but instead are implemented through state plans that must be reviewed and approved by EPA. Subpart Cf requires states to submit a state plan to EPA by May 30, 2017, to implement the 2016 emission guidelines for existing landfills. 40 C.F.R. § 60.30f. Existing landfills must then submit a design capacity report no later than 90 days after EPA's approval of a state plan. 40 C.F.R. § 60.38f(a). Existing landfills at or above the 2.5 million Mg/2.5 million cubic meters design capacity threshold, which was not

changed from the 1996 regulations, must also submit an emission rate report within 90 days after EPA's approval of a state plan. 40 C.F.R. § 60.38f(c).

New landfills that commenced construction after July 17, 2014, but before August 29, 2016, must submit a design capacity report and, if they meet or exceed the design capacity threshold, an emission rate report, by November 28, 2016. 40 C.F.R. § 60.767(a)(1)(i) (landfills that commenced construction before July 17, 2014, are considered existing landfills with respect to the revised standards and will be regulated under state plans submitted under Subpart Cf). New landfills that commence construction after August 29, 2016, must submit a design capacity report and, if they meet or exceed the design capacity threshold, an emission rate report, within 90 days after construction commences. *Id.* § 60.767(a)(1)(ii).

Under the 1996 regulations, the modeled emission rate which triggers the obligation to design, install, and operate a gas collection and control system was 50 Mg per year, but EPA lowered that threshold to 34 Mg per year. *Id.* §§ 60.33f(e), 60.32f, 60.33f(b)(1)(i) (existing landfills), 60.762(b) (new landfills).

The deadlines that apply to landfills whose emissions exceed the emission threshold did not change. A design plan is still due within one year of the emission rate report, and controls must still be installed and operating within 30 months of that report. *Id.* § 60.32f (existing landfills); §§ 60.762(b)(1)(i), 60.762(b)(1)(ii) (new landfills).

Third, in the 2016 regulations EPA offered landfills a new method for evaluating emissions to determine whether they must install controls. Under the 1996 rules, landfills could use increasingly landfill-specific modeling (Tier 1, 2, or 3) to estimate their annual emissions for comparison with the 50 Mg/year threshold. In the 2016 rules, EPA created a new Tier 4 option for landfills whose emission estimate fell between the old 50 Mg/year and the new 34 Mg/year threshold. Unlike Tiers 1-3, which are premised on modeling, Tier 4 involves direct physical monitoring of surface emissions from a landfill. The new Tier 4 thus gives landfills a way to demonstrate that they do not need to install emission controls, even if the modeled emissions under Tiers 1, 2, or 3 suggest that they do need to install those controls.

3. The Administrative Petition

The 2016 regulations went into effect on October 28, 2016. That same month, industry groups submitted a petition for reconsideration to EPA. In their reconsideration petition, the industry groups asserted, among other things, that EPA was required to reconsider its requirement to use wind barriers for Tier 4 monitoring in certain circumstances because "there was no indication in any of EPA's proposals that would suggest wind barriers were under consideration," and because "[n]either [the industry groups] nor any other commenters submitted comment on use of a wind barrier as an alternative to the wind-speed restrictions." Reconsideration Petition at 32 (JAxxxx).

When EPA proposed to revise the 1996 regulations, it indicated that it was concerned that wind speed could affect monitoring, and therefore it proposed to limit Tier 4 use if the average wind speed exceeded 5 miles per hour and the instantaneous wind speed exceeded 10 miles per hour. 80 Fed. Reg. 52,100, 52,135–36 (Aug. 27, 2015) (JAxxxx-xxxx). In the final 2016 regulations, however, EPA imposed a new requirement that it had neither proposed nor presented for public comment—to use a wind barrier whenever "average wind speed exceeds 4 miles per hour or 2 meters per second or gust[s] exceeding 10 miles per hour." 40 C.F.R. §§ 60.35f(a)(6)(iii)(A), 60.764(a)(6)(iii)(A); *see generally* 81 Fed. Reg. at 59,290/3 (JAxxxx), *id.* at 59,356/1 (JAxxxx).

In their reconsideration petition, industry groups raised various concerns with the new wind barrier requirement. For example, they contended that "[a]lthough almost every landfill that uses Tier 4 will be required to employ wind barrier technology, EPA has provided no direction on how to implement the wind barrier requirement in a consistent manner across the United States." Reconsideration Petition at 35 (JAxxxx). Industry groups further contended that such barriers would prove infeasible in practice due to various technical problems, and questioned whether such barriers would work reliably at a majority of landfills. *Id.* at 35-36 (JAxxxx-xxxx).

4. The Stay Decision

On May 5, 2017, EPA announced that it was convening a proceeding to reconsider certain topics in the 2016 regulations, including Tier 4 surface emission monitoring. Then, on May 31, 2017, EPA issued the Stay Decision, which stayed the 2016 rules for 90 days, from May 31, 2017, until August 29, 2017. 82 Fed. Reg. at 24,878 (JAxxxx). In the Stay Decision, EPA announced that it was staying Subpart Cf (the 2016 regulations for existing landfills) and Subpart XXX (the 2016 regulations for new landfills). EPA did not purport to stay any other provision.

In the Stay Decision, EPA indicated that it had convened a reconsideration proceeding based on the criteria in Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B). *See* 82 Fed. Reg. at 24,879 (JAxxxx). EPA noted that it was impracticable for interested persons to comment during the public comment period on certain restrictions on the Tier 4 monitoring option, including the mandatory use of wind barriers imposed by the final 2016 regulations. EPA had solicited public comment on restricting monitoring based on wind speed. *See, e.g.*, 79 Fed. Reg. 41,772, 41,789 (July 17, 2014) (JAxxxx). But EPA never hinted during the rulemaking process that it was considering requiring wind barriers during Tier 4 monitoring, and no commenter suggested using wind barriers as an optional or required component of the monitoring methodology. EPA thus concluded that it was impracticable for commenters to address the wind barrier requirement. 82 Fed. Reg. at 24,879 (JAxxxx).

EPA also found that the industry groups' objections, including the objection to the new wind barrier requirement, were of central relevance to the 2016 regulations. 82 Fed. Reg. at 24,879 (JAxxxx). The Tier 4 monitoring option is an important feature of the 2016 regulations – it is intended to provide landfills with a new, alternative site-specific emission threshold methodology for when a landfill must install and operate emission controls pursuant to the 2016 regulations. As EPA explained, the restrictions on Tier 4, including use of a wind barrier, restrict the ability of landfill owners and operators to use that monitoring methodology. *Id.* EPA concluded that if it had the benefit of public comment, it might have structured the 2016 regulations "in such a way as to minimize any potential impacts on flexibility." *Id.* EPA therefore promulgated a 90-day stay of Subparts Cf and XXX.

D. Procedural Background

Petitioners filed a motion for summary vacatur on August 4, 2017, which EPA opposed. On September 28, 2017, the Court denied the motion and directed the parties to address in their merits briefs the issues presented in the motion for summary vacatur, and whether the case is moot because the stay only existed until August 29, 2017.

SUMMARY OF ARGUMENT

Petitioners assert three types of injuries, but none are sufficient to demonstrate standing to challenge the Stay Decision. Petitioners first assert injury from direct impacts of emissions from specific landfills on individual members. Even assuming

these assertions establish a concrete, particularized, imminent injury-in-fact, they are not traceable to the Stay Decision, nor can they be redressed if the Stay Decision were to be vacated, because none of the specific landfills identified are required to install any new controls or conduct any additional monitoring under the 2016 regulations. Completely apart from the Stay Decision, one of the landfills Petitioners point to is too small in size and a second is too small in its reported emissions rate to trigger any of the 2016 regulations' emission control requirements, and the third has already implemented the same emission controls as are in the 2016 regulations.

Petitioners next assert injuries related to climate change, but these assertions are too generalized and hypothetical to satisfy the injury-in-fact requirement, and are also no more traceable to or redressable by the Stay Decision than are Petitioners' other asserted injuries. Petitioners' third category of injury, lost procedural protections, also fails because it is not tied to any injury-in-fact and because Petitioners still cannot demonstrate causation. Standing alone, Petitioners' asserted procedural injury is insufficient to confer standing.

Petitioners' challenge is also moot. Contrary to Petitioners' interpretation, the Stay Decision only affects deadlines in the 2016 regulations that would have fallen within the 90-day period of the stay. No existing landfills, and only the narrow subset of new landfills which commenced construction between March 2, 2017, and June 1, 2017, possibly could have deadlines falling within those 90 days, and none of those deadlines are for emission control requirements.

For existing landfills, Petitioners assume that the Stay Decision delays the deadline for states to submit implementation plans, but that deadline had, in fact, already expired by the time the Stay Decision took effect. Furthermore, the deadline for EPA to take action, either on submitted state plans or in the absence of a timely submitted state plan, is determined under a different set of EPA procedural regulations that were not affected by the Stay Decision. *See* 40 C.F.R. §§ 60.20 – 60.29 (EPA's Subpart B regulations). Accordingly, if a state plan, or EPA action on a state plan, is past due, such untimeliness has nothing to do with the Stay Decision and cannot be remedied by an order vacating the Stay Decision.

Turning to the subset of new landfills that potentially could have been affected by the Stay Decision, Petitioners have shown no actual impact of the Stay Decision here. Landfills constructed between March 2 and June 1, 2017, would have had to submit design capacity reports within 90 days, *i.e.*, within the period of the stay. However, if their design capacity is below the regulatory threshold, the 2016 regulations do not require emission reports, much less emission controls. And, even for landfills that are above the design capacity threshold and thus must report their emission rate, only those landfills with emissions between 34 Mg/year and 50 Mg/year must start the process to design and implement emission controls. Petitioners do not point to, and EPA is not aware of, any landfills that fall within this narrow category. Yet it is only these landfills, if any exist, for which a deadline could possibly have been delayed by the Stay Decision. Even if any such landfills exist, that

delay is at most 90 days, for a landfill whose deadline fell on the first day of the stay period; deadlines closer to the end of the stay period were stayed for less time.

If the Court reaches the merits, the Stay Decision should be upheld. EPA reasonably found that it was impracticable to raise during the comment period an objection to the required use of wind barriers in certain circumstances in Tier 4 monitoring, and EPA reasonably found that industry's objection to the required use of wind barriers is of central relevance to the outcome of the 2016 regulations. Therefore, EPA reasonably exercised authority under Section 7607(d)(7)(B) to stay the regulations for a period of 90 days.

STANDARD OF REVIEW

The Clean Air Act sets forth the standard of review if the Court were to reach the merits of the Stay Decision, and provides in pertinent part that challenged portions of an agency action may not be set aside unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). This standard presumes the validity of agency action. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520-21 (D.C. Cir. 1983). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. Petitioners Lack Standing To Challenge The Stay Decision.

"[A]s a matter of constitutional duty," the Court "must assure itself of its jurisdiction to act in every case." *CTS Corp. v. EPA*, 759 F.3d 52, 57–58 (D.C. Cir. 2014). The Court's jurisdiction depends on at least one petitioner satisfying the "irreducible constitutional minimum" requirements of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Petitioners claim associational standing based on alleged injuries to their members. Pet. Br. at 12-17. To establish associational standing, Petitioners must demonstrate that: (1) at least one identified member would have standing to sue in his or her own right; (2) the interests they seek to protect are germane to the organization's purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *See Sierra Club v. EPA*, 754 F.3d 995, 998–99 (D.C. Cir. 2014); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 494-97 (2009) (to have associational standing, an organization must identify a specific member with a specific, concrete injury). Petitioners fail to meet the first requirement.

To establish that an identified member would have standing, Petitioners must show that (1) the member has suffered an injury-in-fact that is both concrete and particularized and actual or imminent rather than conjectural or hypothetical; (2) there is a causal connection between the claimed injury and the challenged action and that

the injury is not the result of the independent action of some third party; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560–61; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408–09 (2013). Moreover, because Petitioners are not themselves "the object of the government action or inaction" that they are challenging, "standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (citations omitted).

Petitioners provide declarations from six members whom they allege have sufficient injuries-in-fact that are caused by the Stay Decision. Their asserted injuries can be grouped into three categories: injuries due to the actual landfill emissions, such as smelling bad odors; injuries due to the landfill emissions' contribution to climate change, such as increased flooding and more frequent bad ozone days; and injuries due to lost procedural rights, such as a lack of notice of the Stay Decision. (A seventh declarant, Ms. Trujillo, addresses Petitioner NRDC's membership and mission but does not assert an injury.) None of these asserted injuries is sufficient to confer standing to challenge the Stay Decision.

A. No asserted injuries due to landfill emissions are traceable to the Stay Decision.

Petitioners first point to declarants who assert injuries directly from emissions from landfills, *i.e.*, injuries other than those related to climate change. Pet. Br. at 13-15. Although Petitioners provide declarations from six members (Mr. Gooding, Ms.

Almy, Ms. Nekola, Ms. Molyneaux, Mr. Minott, and Mr. Foy), only three of them (Mr. Gooding, Ms. Almy, and Ms. Nekola) assert injuries directly tied to emissions from specific landfills. Even assuming these three declarants assert a concrete injury-in-fact, they (along with the other three declarants, who assert a more nebulous injury) all fail both the traceability and redressability elements for one simple reason: none of the landfills they point to are regulated by the 2016 regulations, so the Stay Decision could not possibly affect those landfills.

1. Mr. Gooding's injuries are not traceable to the Stay Decision because emissions from the landfill near his home are below the 34 Mg/year threshold.

Mr. Gooding's asserted injuries are that he can smell the "noxious emissions" from a landfill less than a mile from his home, and that he spends less time outdoors in order to avoid "breathing the polluted air." Pet. Br. at 13. *See also* Decl. of Craig Gooding (July 26, 2017) ¶ 7 (a "strong unpleasant odor" reaches his house when the wind comes from the direction of the landfill) (Pet. Add. 78); *id.* ¶ 8 (describing closing windows and staying inside when the smell is strong) (Pet. Add. 78).[3]

Mr. Gooding lives near the Charleston County Landfill in Charleston, South Carolina. Gooding Decl. ¶ 4 (Pet. Add. 77). The maximum estimated emissions of

[3] Mr. Gooding also states his "worry about the possible impacts of pollution from the landfill on the natural area," including wetlands in which he kayaks which are to the west of the landfill. Gooding Decl. ¶ 11 (Pet. Add. 79). However, fear that something may occur "does not amount to the actual, imminent, or 'certainly impending' injury required to establish standing." *Center for Biological Diversity v. United States Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009).

non-methane organic compounds from this landfill is only 27.6 Mg/year. *See* Nov. 17, 2014, Letter from Brian J. Almond, South Carolina DHEC Bureau of Air Quality, to Robert Lawing, Charleston County Environmental Services (attached as Ex. 1 to Declaration of Robin Dunkins, U.S. EPA) (Resp. Add. 105). This is well below the 34 Mg/year threshold for implementing gas controls, and therefore this landfill would not be required to install any controls under the 2016 regulations.

Petitioners acknowledge this flaw, recognizing that emissions from the Charleston County Landfill are "below the 1994 [sic] rule's 50-ton [sic] emission threshold," but attempt to avoid its consequence by asserting that the emissions are "likely to exceed the 2016 Landfill Rule's 34-ton [sic] threshold for installing controls." Pet. Br. at 16. Yet Petitioners do not point to anything to support this speculation. In contrast, in 2014 the landfill produced a 5-year estimate of the non-methane organic compound emission rate for each of the next five years (*i.e.*, through 2019), as allowed under both the 1996 and the 2016 regulations. *See* 40 C.F.R. §§ 60.33c(c)(1) (existing landfills under the 1996 regulations); 60.757(b)(1)(ii) (new landfills under the 1996 regulations); 60.38f(c) (existing landfills under the 2016 regulations); 60.767(b) (new landfills under the 2016 regulations). This emission rate report, which the State of South Carolina reviewed, estimated emission rates of 23.41 Mg/year for 2017, 25.56 Mg/year for 2018, and 27.61 Mg/year for 2019. Resp. Add. 105. Although the estimated emissions rate is increasing, there is simply no basis for

Petitioners' assertion that this landfill is likely to exceed the 34 Mg/year threshold any time soon, and certainly not that it did so during the 90-day duration of the stay.[4]

Because the Charleston County Landfill is below the 34 Mg/year threshold, the 2016 regulations do not require the installation of any gas collection and control system. Mr. Gooding's injuries, therefore, cannot be traced to the stay of the 2016 regulations.

2. Ms. Almy's injuries are not traceable to the Stay Decision because the design capacity of the landfill near her home is below the regulatory design capacity.

Ms. Almy lives approximately two miles from the Lebanon Landfill and Recycling Center in West Lebanon, New Hampshire. Decl. of Susan Almy (July 18, 2017) ¶ 11 (Pet. Add. 84). Ms. Almy asserts that methane emissions contribute to the formation of ozone smog, which aggravates her asthma, *id.* ¶ 10 (Pet. Add. 84), and that the landfill near her home emits methane, *id.* ¶ 11 (Pet. Add. 84-85), but acknowledges that the landfill already collects its methane emissions and burns them using a flare system. Ms. Almy's declaration also describes being able to smell landfill gas when she drives by the landfill. Almy Decl. ¶ 10 (methane emissions contribute to ozone smog which aggravates asthma) (Pet. Add. 84); *id.* ¶¶ 11-12 (describing how the

[4] Petitioners also misstate the impact of the Stay Decision on the deadline for South Carolina to submit a state plan to implement the 2016 emission guidelines, Subpart Cf. Petitioners assert that absent the stay, South Carolina would have had to submit its plan by May 30, 2017. Pet. Br. 16. As discussed in Argument I.B and in Argument II, the Stay Decision took effect on May 31, 2017, and had no effect on South Carolina's or any other state's deadline, which had already expired.

smell of landfill gas is sometimes noticeable, especially when driving past the landfill, despite a flare system that burns methane gas) (Pet. Add. 84-85).

Whether Ms. Almy's asserted injuries are concrete, particularized, and actual or imminent, is debatable. Ms. Almy does not claim that the landfill's emissions currently injure her. Nor does she claim that the 2016 regulations would require any different emission controls than those currently employed, even if the 2016 regulations applied to that landfill (which, as explained below, they do not).

In any event, the Stay Decision cannot be the cause of any injury Ms. Almy may suffer because the design capacity of the Lebanon landfill is below the regulatory design capacity threshold. Although Petitioners do not mention it, the design capacity for the Lebanon landfill is only 1.88 million Mg, which is below the regulatory design capacity threshold of 2.5 million Mg/2.5 million cubic meters. *See* Draft Permit Application Review Summary, City of Lebanon Solid Waste Facility, 370 Plainfield Road, West Lebanon, NH, Dec. 20, 2017, at 1 (design capacity of active unit is 1.26 million Mg, design capacity of entire landfill is 1.88 million Mg) (attached as Ex. 2 to Declaration of Robin Dunkins, U.S. EPA) (Resp. Add. 107); *see also* Temporary permit for City of Lebanon Solid Waste Facility, 370 Plainfield Road, West Lebanon, NH, Jan. 21, 2014, at 3 (same) (attached as Ex. 3 to Declaration of Robin Dunkins, U.S. EPA) (Resp. Add. 118).

Ms. Almy is apparently aware of this because she asserts that "the Landfill's current design capacity is not far below the capacity that would trigger emission

control requirements under the Guidelines." Almy Decl. ¶ 13. In reality, the design capacity is below the level at which the landfill would even need to *report*, let alone *control*, the rate of its emissions of non-methane organic compounds. It is speculative to assume that this landfill will ever seek to increase its design capacity, and neither Ms. Almy nor Petitioners suggest that it will do so. To assume that this landfill will additionally have to *install* emission controls, even if it were to exceed the design capacity threshold, extends the reasoning even farther into guesswork. Ms. Almy offers nothing to suggest that emissions from this facility exceed the 34 Mg/year threshold for implementing emission controls.

Because the Lebanon Landfill and Recycling Center is below the design capacity threshold, the 2016 regulations do not require the landfill to report its rate of emissions of non-methane organic compounds, much less install controls for those emissions. Ms. Almy's injuries, therefore, cannot be traced to the stay of the 2016 regulations.

3. Ms. Nekola's injury is not traceable to the Stay Decision because the landfill near her home has already installed gas capture and control system under the 1996 regulations.

Petitioners only mention Ms. Nekola in the context of injuries related to climate change, but Ms. Nekola also describes a more direct injury from the odor from a landfill less than five miles from her home. Decl. of Kathryn A. Nekola (July 12, 2017) ¶ 20 (Pet. Add. 67). The landfill in question is the Dane County Landfill in Madison, Wisconsin. *Id.* Ms. Nekola drives past this landfill almost daily, and is

"aware of the odor that emanates from it." *Id.* Ms. Nekola also recreates even closer to this landfill, but does not describe any recreation-related injuries arising from the landfill's emissions, such as spending less time outside due to the smell. *Id.* ¶ 21.

As with Mr. Gooding and Ms. Almy, Ms. Nekola's injury is not traceable to the 2016 regulations, or to the Stay Decision, because the Dane County Landfill has already installed and is already operating a gas collection and control system. *See* Air Pollution Control Operation Permit Renewal, Dane County Landfill Site #2, Rodefeld, June 17, 2014 at 5 (attached as Ex. 4 to Declaration of Robin Dunkins, U.S. EPA) (Resp. Add. 131); July 24, 2017, Letter from John Welch, P.E., Solid Waste Manager, to Barbara Pavliscak, P.E., Section Chief, Wisconsin Department of Natural Resources, Division of Environmental Management, Air Management Program, at 2 (attached as Ex. 5 to Declaration of Robin Dunkins, U.S. EPA) (Resp. Add. 175).

Because the Dane County Landfill is already controlling its emissions of non-methane organic compounds pursuant to the 1996 regulations, Subpart WWW, the 2016 regulations have no effect on the landfill. Ms. Nekola's injuries, therefore, cannot be traced to the stay of the 2016 regulations.[5]

[5] Subpart Cf (the 2016 regulations for existing landfills) will apply to this landfill once a state plan to implement Subpart Cf is approved, but Subpart Cf does not impose any different emission controls beyond what is required by Subpart WWW (the 1996 regulations for existing landfills).

4. Petitioners' remaining allegations are too generalized to demonstrate an injury traceable to the Stay Decision.

For the three members who do not claim to live or recreate near an identifiable landfill (Mr. Minott, Ms. Molyneaux, and Mr. Foy), their assertions of injury are even more tenuous. Granted, each declaration ends with the following generic statement that mentions "the landfill in my community":

> I understand that EPA recently issued a three-month delay of the Guidelines, and that [Clean Air Council (for member Minott) and CLF (for members Foy and Molyneaux] has initiated a lawsuit to challenge that delay. I support this lawsuit, because EPA's regulations will reduce air pollution from the landfill in my community and from the landfills in many other communities around the country.

Minott Decl. ¶ 24 (Pet. Add. 57); Molyneaux Decl. ¶ 24; Foy Decl. ¶ 22. But none of these declarations identifies which landfill the member is referring to, or how close it is to where the member lives, works, and recreates. Without this information, Petitioners fail to meet their burden of production to establish standing. *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

These declarants' reference to all landfills "around the country" fares no better, and is similar to Petitioners' attempt to rely on EPA's Regulatory Impact Analysis to support standing. These generic allegations are far from the type of injury that Article III requires. Petitioners note that landfills subject to the 2016 regulations emit various hazardous air pollutants, and assert that "Petitioners' members who live near affected landfills currently suffer concrete and particularized injury from exposure" to hazardous air pollutants. Pet. Br. at 13, citing Regulatory Impact Analysis at 4-31 to

4-40 (JAxxxx-xxxx); *see also* Pet. Br. at 14 (the 2016 regulations will require 105 additional landfills to install controls). Although EPA did describe the health effects associated with the main hazardous air pollutants of concern from municipal solid waste landfills, EPA's analysis did not describe any concrete and particularized injuries to individual members of the Petitioner organizations, nor did EPA identify whether any of Petitioners' members live, work, or recreate near specific landfills that would be affected by the 2016 regulations. Furthermore, the Regulatory Impact Analysis is based on estimated emissions from all relevant landfills across the United States in the year 2025. *See* Regulatory Impact Analysis Table 3-1 on page 3-13 and Table 7-1 on page 7-5 (landfills affected) (JAxxxx, xxxx); Table 3-2 on page 3-14 and Table 7-2 on page 7-6 (emission reductions) (JAxxxx, xxxx). It does not demonstrate particularized injury to any of Petitioners' members arising from any particular landfill's emissions.

An Article III injury must be actual or imminent, "not remote, speculative, conjectural, or hypothetical." *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1293-94 (D.C. Cir. 2007). Furthermore, an injury to one of Petitioners' members must be connected to the *stay*, not simply to the 2016 landfill regulations. Even assuming Petitioners' interpretation of the impact of the stay were correct, which as discussed in Argument II it is not, a member's particularized, concrete, and imminent injury must be tied specifically to emissions from a landfill that would otherwise have been controlled at most 90 days sooner than it otherwise would have been were it not for the Stay Decision. *Compare Sierra Club v. EPA*, 755 F.3d 968, 973-74 (D.C. Cir. 2014)

(declarations pointed to "four individuals who live or work in close proximity to three specific refineries," where "each of those refineries already had a gasification unit in place, ready and able to process the very hazardous materials that are the subject of the challenged regulation"). Here, that connection between a specific landfill and a tangible, personal injury is missing.

Without establishing some connection between their asserted injuries and a landfill whose emissions are covered by the 2016 regulations, Petitioners have failed to explain how the decision to temporarily stay those regulations causes them an injury-in-fact that is traceable to the Stay Decision. *See Public Citizen,* 489 F.3d at 1293 (although "several hundred Americans, including some Public Citizen members, will annually be injured in car crashes who would not be injured" if the challenged rule complied with the law, "no one can say who those several hundred individuals are" or "when such accidents might occur").

B. No asserted injuries due to climate change are particularized, imminent, or traceable to the Stay Decision.

Petitioners' six declarants also assert an injury related to climate change, but these assertions are insufficient to establish an injury-in-fact, and fail to establish that any injury is traceable to the Stay Decision.

1. Petitioners' asserted injuries related to climate change do not constitute an injury-in-fact.

An Article III injury must be "personal, individual, distinct and differentiated—not generalized or undifferentiated." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d

905, 914 (D.C. Cir. 2015) (citations and quotations omitted). Climate change, however, "is a harm that is shared by humanity at large." *Center for Biological Diversity v. United States Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009).

As with the petitioners in *Center for Biological Diversity*, Petitioners here seek redress which "is not focused any more on these petitioners than it is on the remainder of the world's population." *Id.* Mr. Minott seeks to address "climate change and its effect on rising waters, increasing bad ozone, allergens, and our children's future planet." Minott Decl. ¶ 23 (Pet. Add. 57); *see also* Molyneaux Decl. ¶ 23 (same) (Pet. Add. 75), Foy Decl. ¶ 21 (same) (Pet. Add. 93). Similarly, Ms. Nekola seeks to address "climate change and its effect on Wisconsin's air quality, lakes, rivers, ground water, farms, businesses, public health, culture and heritage." Nekola Decl. ¶ 23 (Pet. Add. 67); *see also* Almy Decl. ¶ 14 (same for New Hampshire) (Pet. Add. 86).

These are the very same types of concerns that this Court has held are "too generalized to establish standing." *Center for Biological Diversity*, 563 F.3d at 478 (petitioners sought "to prevent an increase in global temperature"). Because "[s]tanding analysis does not examine whether the environment in general has suffered an injury," these generalized allegations are insufficient to support standing. *Id.* Unless a petitioner asserts "an injury that is peculiar to himself or a distinct group of which he is part, rather than one 'shared in substantially equal measure by all or a large class of citizens,'" the petitioner lacks standing. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 101 (1979) (quoting *Warth v. Seldin*, 422 US 490, 499 (1975).

Furthermore, Petitioners' professed fears about increased risk and vulnerability to sea level rise do not demonstrate that the Stay Decision itself has created an imminent and substantial increase in the risk of an injury to Petitioners' members. *See Food & Water Watch*, 808 F.3d at 915 (concluding that plaintiffs "have not plausibly alleged that the [agency decision] substantially increases the risk of foodborne illness compared to the existing inspection systems"). Petitioners' members do no more than point to the increased risks of harm that are associated with the broader, more gradual effects of climate change that stretch out into the future. *See, e.g.*, Gooding Decl. ¶ 10 (roads around Charleston "will be at *risk* in the future due to sea level rise") (emphasis added) (Pet. Add. 79); Molyneaux Decl. ¶ 18 (stating that her property, located on the waterfront of Cape Cod, is "vulnerable to damage" from increased flooding attributable to increased global temperatures) (Pet. Add. 74); Minott Decl. ¶ 17 (same) (Pet. Add. 55); Foy Decl. ¶ 19 (same) (Pet. Add. 92). Similarly, the declarants express concerns about the risks that global warming poses in the future, including risks to future generations. *See, e.g.*, Foy Decl. ¶ 20 (stating in reference to children and grandchildren that "I worry about how the changing climate will impact their health and their futures") (Pet. Add. 92). Such sweeping assertions fail to demonstrate an injury-in-fact, as required by Article III. *Food & Water Watch*, 808 F.3d at 914.

2. Petitioners' asserted injuries related to climate change are not traceable to the Stay Decision.

Even if Petitioners had sufficiently pled an injury-in-fact related to climate change, they fail to demonstrate causation, *i.e.*, traceability to the Stay Decision. Traceability means that "it is substantially probable . . . that the challenged acts of the defendant . . . will cause the particularized injury of the plaintiff." *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (*en banc*) (citations omitted). Neither in the declarations nor elsewhere have Petitioners articulated an evidentiary link between their purported climate change-related injuries and the Stay Decision.

Petitioners assert that landfill emissions contribute to global climate change, Pet. Br. at 15, but as described above, the 2016 regulations do not require emission controls on all municipal solid waste landfills, and even those controls that are required would not conceivably result in any reduction in greenhouse gas emissions for several years. *See* 40 C.F.R. §§ 60.32f, 60.762(b)(1)(ii) (installation and operation of gas collection and control systems are due 30 months from when a landfill reports non-methane organic compound emissions of 34 Mg/year or more). But Petitioners are not challenging the 2016 regulations; they are challenging EPA's decision to stay those regulations for 90 days. Thus, Petitioners must demonstrate that their injuries related to climate change are traceable to a hypothetical delay of, at most, 90 days in

the commencement of emission controls at a subset of landfills, at least three years in the future.[6]

None of the declarants have even come close to doing so. As discussed above, the three declarants who assert an injury that can be tied to a specific landfill (Mr. Gooding, Ms. Almy, and Ms. Nekola) would not see any reduction in those emissions arising from a vacatur of the Stay Decision, because the landfills near them are not even affected by the 2016 regulations, much less by the Stay Decision. And even if the Court were to accept Petitioners' broad characterization of their injury as the effects of climate change from emissions from all municipal solid waste landfills regulated by the 2016 regulations, Petitioners still fail to demonstrate redressability because their arguments do not focus on the effects of the Stay Decision itself. The relevant inquiry is not the potential risks posed by climate change, or whether landfill emissions contribute generally to such risks. The relevant inquiry is whether the 90-day stay contributes to such risks. None of Petitioners' members have made such a showing.

Petitioners' only argument is that the Stay Decision delays compliance with the 2016 regulations, which in turn delays emission reductions and prolongs the harm from climate change. Pet. Br. at 16. But, as explained in Argument II.B.2, *see infra* at 41, the Stay Decision only affects deadlines in the 2016 regulations that would have

[6] This delay is hypothetical because, as explained in Argument II, EPA is not aware of a single landfill that was affected by the Stay Decision.

otherwise expired during the 90 days in which the stay was in effect. And the potential universe of such deadlines is exceedingly small: only landfills that commenced construction between March 2, 2017, and June 1, 2017, have any deadlines that hypothetically could have been affected by the Stay Decision. Petitioners do not identify, and EPA is not aware of, any landfills that actually fit that description.

Indeed, as set forth above, *see supra* page 21 n.4, Petitioners' sole specific example of purported delayed emission reduction is flawed. Petitioners assert that without the Stay Decision, South Carolina would have been required to submit a state plan by May 30, 2017. Pet. Br. at 16. But the Stay Decision did not take effect until May 31, and thus could not have affected South Carolina's (or any other state's) deadline.[7]

Thus, none of the declarants demonstrates how their injuries are traceable to EPA's decision to stay for 90 days two rules that affect one source category of emissions alleged to be contributing to global climate change. *Communities for a Better Env't v. EPA*, 748 F.3d 333, 337–38 (D.C. Cir. 2014) (Petitioners' theory of causation "is simply a bridge too far given the current record," where "Petitioners have not presented a sufficient showing that carbon monoxide at the level permitted by EPA

[7] Whether the Stay Decision has any continuing effect is discussed in more detail in Argument II.

would worsen global warming as compared to what would happen if EPA set the secondary standard in accordance with the law as petitioners see it.").

C. Petitioners have not demonstrated redressability.

Petitioners have also failed to show a substantial likelihood that the Court can redress their alleged injuries by vacating the Stay Decision. *See Nat'l Chicken Council v. EPA*, 687 F.3d 393, 396 (D.C. Cir. 2012) (petitioners failed to show a substantial probability that vacating EPA's interpretation would undo the claimed injury).

Petitioners simply assert that the Stay Decision "pushed back a series of deadlines," Pet. Br. at 17, and that vacating the Stay Decision will put those deadlines "back on track." *Id.* As described in Argument II, Petitioners misconstrue the effect the Stay Decision had on the deadlines in the 2016 regulations, and whether vacating the Stay Decision will have any impact on those deadlines. But in the standing context, Petitioners' analysis largely misses the point. Petitioners' alleged injuries are not redressable for the same reasons that Petitioners' alleged injuries from landfill emissions are not traceable to the Stay Decision. For example, just as Mr. Gooding's injuries from the Charleston County Landfill are not caused by the Stay Decision, because the 2016 regulations do not require emission controls at that landfill, his injuries are not redressable because vacating the Stay Decision will not lead to emission controls at that landfill. The same is true for Ms. Almy's injuries, and Ms. Nekola's. Nor are Petitioners' more generalized injuries redressable, whether they are

from emissions from unspecified landfills or, like their alleged injuries related to climate change, from all landfills.

D. Injuries due to lost procedural rights are not cognizable.

Petitioners also assert that they are injured by the lack of notice of, and an opportunity to comment on, the Stay Decision. Pet. Br. at 16-17. Although the redressability and imminence requirements are relaxed for parties asserting a procedural injury, a procedural injury nonetheless "must be tethered to some concrete interest adversely affected by the procedural deprivation." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013). As the Supreme Court explained, "a procedural right *in vacuo* – is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. at 496. Furthermore, Petitioners must still demonstrate causation, and in particular a substantial probability that the lack of notice "will cause the essential injury to [Petitioners'] own interest." *Jewell,* 738 F.3d at 306 (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d at 664-65).

Petitioners fail both tests because they cannot demonstrate an injury-in-fact, and because they do not even attempt to explain how it is substantially probable that the lack of notice of a 90-day stay will cause any injury.

II. Petitioners' Challenge to the Stay Decision Is Moot.

Unlike standing, which is evaluated as of the time a challenge is filed, a challenge is moot if events have transpired after the time of filing so that a decision will neither presently affect the parties' rights nor have a more than speculative chance

of affecting them in the future. *See, e.g., Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011). Here, even if Petitioners could hypothetically demonstrate standing, their challenge is moot because the 90-day stay period has expired and a decision at this point will neither presently affect them nor have more than a speculative chance of affecting them in the future.

In contesting mootness, Petitioners incorrectly assert that the Stay Decision extended all timeframes in the 2016 regulations for 90 days. Pet. Br. at 19. Thus, under Petitioners' view, every deadline in the 2016 regulations is moved back 90 days. But, as discussed below, Petitioners misconstrue how the Stay Decision and the 2016 regulations operate and interrelate.

A. The Stay Decision has no effect on existing landfills.

The Stay Decision has no effect whatsoever on existing landfills regulated under subpart Cf. As the parties agree, state plans were due by May 30, 2017. *See* 40 C.F.R. § 60.30f(b). Petitioners assert that the Stay Decision extended this deadline, and because all subsequent deadlines are "keyed to the May 30th submission date," all subsequent deadlines have been pushed back by 90 days. Pet. Br. at 10, 18-19. Petitioners' assertion is incorrect, and has three flaws.

First, the Stay Decision by its express terms began on *May 31*, not May 30, and therefore did not alter the May 30 due date for state plans. 82 Fed. Reg. at 24,879/2-3 (JAxxxx). Notwithstanding the subsequent stay, state plans were still due on May 30 and EPA did not purport to retroactively extend that date.

Second, the Stay Decision did not affect any subsequent deadlines for existing landfills. Petitioners note that under 40 C.F.R. § 60.27, if a state submits a plan, EPA must approve or disapprove it within four months from the submission deadline, and if a state fails to submit a plan, EPA must promulgate a federal plan within six months from the submission deadline. Pet. Br. at 10; *see also* 40 C.F.R. §§ 60.27(c), (d). What Petitioners fail to note is that the Stay Decision by its terms did not include or encompass the application of section 60.27. That provision is contained in Subpart B, EPA's general regulations governing state plans under Clean Air Act section 111(d). 40 C.F.R. §§ 60.20 – 60.29. Regardless of whether EPA could have stayed the effectiveness of Subpart B as applied to landfills, EPA did not do so here. The Stay Decision only stayed Subparts Cf and XXX, the 2016 regulations for existing and new landfills, respectively. 82 Fed. Reg. at 24,879/2-3 (JAxxxx). Thus, notwithstanding the stay, EPA had four months, until September 31, 2017, to approve or disapprove any state plans that were timely submitted by May 30, and six months, until November 30, 2017, to promulgate a federal plan for the other states that did not timely submit state plans. Contrary to Petitioners' assertion, Pet. Br. at 18-19, these deadlines were not pushed back. They have come and gone, and the Stay Decision had no effect on them.

Third, the deadlines in Subpart Cf, for landfills to submit a design capacity report and a non-methane organic compounds emission rate report, flow from EPA's approval of a state plan (or promulgation of a federal plan), not from the May 30th

state submission deadline. Petitioners assert that "[e]ach subsequent deadline [for existing landfills] is keyed to the May 30th submission date," Pet. Br. at 10, but that is not correct. Existing landfills must submit a design capacity report no later than 90 days after EPA's approval of a state plan, and existing landfills that meet or exceed the design capacity threshold must also submit an emission rate report within 90 days after EPA's approval of a state plan. 40 C.F.R. §§ 60.38f(a), 60.38f(c).

Although EPA has neither approved nor disapproved the state plans that were timely submitted, nor has EPA promulgated any federal plans, any remedy for EPA's failure to act in this regard would lie in district court. *See* 42 U.S.C. § 7604(a)(2) (providing district courts with exclusive jurisdiction to review claims that EPA has failed to timely perform nondiscretionary duties). In any event, the Stay Decision had no effect on EPA's deadlines to take those actions.

B. EPA is not aware of any new landfills affected by the Stay Decision and Petitioners have not pointed to any.

The Stay Decision's impact on new landfills requires a slightly different (and slightly more complicated) analysis because, while some new landfills have a clearly defined, fixed deadline to submit a design capacity report under the 2016 regulations, for other new landfills there is no single fixed starting point.

1. New landfills that commenced construction after July 14, 2014, but before August 29, 2016, are not affected by the Stay Decision because no deadlines fell within the period of the stay.

For new landfills that commenced construction after July 17, 2014 and before August 29, 2016, design capacity reports and initial emission rate reports were due November 28, 2016. That deadline had long passed by the time of the Stay Decision and is not affected by it.

If a landfill's design capacity meets or exceeds the design capacity threshold, and if its emission rate report shows emissions at or above 34 Mg/year (but less than 50 Mg/year, because those landfills would be covered by the 1996 new landfill regulations, Subpart WWW, which were not stayed), then a gas collection and control system design plan for that landfill is due within a year, *i.e.*, by November 28, 2017, and landfills must install and operate a gas collection and control system within 30 months, *i.e.*, by May 28, 2019. Under Petitioners' view, the clocks for the design plan and for the emission control system for this subset of new landfills stopped running for 90 days, and the respective deadlines are now February 26, 2018, and August 28, 2019. Thus, in Petitioners' view, the Stay Decision gave some new landfills – *i.e.*, landfills that commenced construction after July 17, 2014, and before August 29, 2016, that meet or exceed the design capacity threshold, and that have an annual emission rate for non-methane organic compounds of 34 Mg/year (but less than 50

Mg/year) – an extra 90 days in which to submit a design plan and to install and operate emission controls.

EPA disagrees. In announcing the Stay Decision EPA did not purport to revise the regulations to permanently change deadlines falling outside of the 90-day stay period. This contrasts with actions in which EPA has stated its intent to change a specific date of certain requirements. *See, e.g.,* "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date," 82 Fed. Reg. 27,133 (June 14, 2017) (rule establishing new effective date for certain provisions beyond initial 90-day stay period) (JAxxxx); "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements," 82 Fed. Reg. 51,788, 51,792/1 (Nov. 8, 2017) (notice requesting comment on whether to amend certain phase-in periods in the rule instead of staying the requirements, noting that a stay "would mean that sources do not have to comply while the stay is in place" but would not "change any dates" in the rule) (JAxxxx); "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date," 82 Fed. Reg. 13,968 (Mar. 16, 2017) (Section 7607(d)(7)(B) stay changing effective date of rule) (JAxxxx). Instead, the Stay Decision here only addresses an affected entity's obligation to comply with deadlines that actually fell within the 90-day period. For example, if a deadline fell on July 1, 2017 (during the stay period), affected entities did not have to comply with that deadline during the pendency of the stay, but if a

deadline fell on September 30, 2017 (outside the period), the deadline remains September 30, 2017 – it is not automatically extended 90 days, to December 30, 2017.

In other words, in the case of landfills that commenced construction after July 14, 2014, but before August 29, 2016, no deadlines fell during the stay period, the clock kept running during the stay and the Stay Decision has no effect. The deadlines for this subset of new landfills remain November 28, 2017, to submit a gas collection and control system design plan, and May 28, 2019, to install and operate the system (again, assuming the landfill's design capacity meets or exceeds the design capacity threshold, and the landfill's emission rate report shows emissions at or above 34 Mg/year but less than 50 Mg/year).

Nothing in the Stay Decision indicates anything to the contrary. The Stay Decision states that subparts Cf and XXX (the 2016 regulations for existing and new landfills) are stayed from May 31 until August 29, and in the preamble, EPA stated that it is appropriate to stay those subparts for 90 days while the agency addresses the issues on which the Administrator granted reconsideration. 82 Fed. Reg. at 24,879/2 (JAxxxx). Nowhere did EPA purport to stop the clock for all deadlines, as opposed to staying the effectiveness of deadlines that applied during the 90-day period of the stay. To the extent that the effect of the Stay Decision requires interpretation, EPA's interpretation of its own regulations is reasonable and should be upheld.

2. Petitioners have not identified any new landfills that commenced construction after August 29, 2016, nor is EPA aware of any.

For new landfills that commenced construction after August 29, 2016, the design capacity report and the emission rate report (if required) are due within 90 days of commencement of construction. If emissions are at or above 34 Mg/year, a gas collection and control system design plan is due within a year of the emissions report, with installation and operation due within 30 months from that same emissions report. Petitioners say that for all landfills in this category, any deadline that did not expire by May 31, 2017, is pushed back 90 days. For example, if a landfill commenced construction on September 1, 2016, its initial reports were due November 30, 2016, and if its emissions are over 34 Mg/year (and its design capacity over 2.5 metric tons), a design plan would have been due November 30, 2017. According to Petitioners, that design plan is now due February 28, 2018, with a similar extension for installation and operation of emission controls.

In fact, as explained above, the clocks for this subset of new landfills kept running during the stay period, and only the deadlines that otherwise would have applied during the stay are affected. If, for example, a landfill commenced construction on August 20, 2016, its initial emission rate report was due November 20, 2016, its design plan was due November 20, 2017, and installation and operation of emission controls is due May 28, 2019. None of these dates fell within the stay period, so none are affected by the Stay Decision.

The only landfills potentially affected by the Stay Decision are those which commenced construction between March 2, 2017, and June 1, 2017. A landfill that commenced construction after June 1, 2017, would have its first deadline fall on August 30, 2017, which is outside the stay period. And Petitioners presumably agree that a new landfill that commenced construction after the Stay Decision expired would be unaffected by the stay. But for new landfills that commenced construction between March 2 and June 1, initial reports would have been due during the stay period, and those landfills, if any exist, would not have been required to submit their initial reports during the pendency of the stay.

The question, then, is whether there are any landfills that commenced construction between March 2 and June 1, 2017. If not, then the Stay Decision has no effect on any landfills, and Petitioners' challenge is moot. EPA is not aware of any such landfills, and Petitioners have not identified any. Because the party invoking federal jurisdiction bears the burden of establishing it, *Lujan*, 504 U.S. at 561, the Court should not assume that such landfills exist, and should instead dismiss the petition as moot.

III. The Stay Decision Should Be Upheld.

If the Court were to reach the merits, it should uphold the Stay Decision because EPA reasonably found that it was impracticable to raise an objection to the required use of wind barriers in certain circumstances in Tier 4 monitoring during the comment period, and reasonably found that industry's objection to the use of wind

barriers is of central relevance to the outcome of the 2016 rulemaking. *See* 42 U.S.C. § 7607(d)(7)(B); *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (holding that a stay under Section 7607(d)(7)(B) can only be granted where reconsideration is mandatory).

To be sure, EPA solicited public comment on possible wind speed restrictions for Tier 4 monitoring generally. *See, e.g.*, 79 Fed. Reg. at 41,789 (JAxxxx). But EPA never hinted during the rulemaking process that it was considering requiring wind barriers during Tier 4 monitoring, and no commenter suggested using wind barriers as an optional or required component of the monitoring methodology. Because the wind barrier requirement appeared without notice for the first time in the final 2016 regulations, the impracticability prong of *Clean Air Council* is satisfied. EPA also reasonably concluded that industry's objection to the wind barrier requirement is of central relevance. As EPA explained, the Tier 4 monitoring option provides landfills with a new, more flexible method for demonstrating that they have not triggered the lower 34 Mg/year threshold for emission controls in the 2016 regulations, and that the final restrictions on the use of Tier 4, including the required use of a wind barrier in certain circumstances, will limit the ability of landfill owners and operators to use that more flexible monitoring methodology. 82 Fed. Reg. at 24,879 (JAxxxx). EPA's reasonable conclusion was that the terms on which landfill owners could avail themselves of a major new compliance option are of central relevance. If EPA had the benefit of public comment with regard to this aspect of the rule, it might have

structured the 2016 regulations differently and "in such a way as to minimize any potential impacts on flexibility." *Id.*

CONCLUSION

The Court should dismiss the petition for review for lack of jurisdiction, or in the alternative should deny the petition on the merits.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

Of Counsel:
ELLIOTT ZENICK
KAREN PALMER
DIANE MCCONKEY
Office of the General Counsel
U.S. Environmental Protection Agency
Washington, DC

s/*Daniel R. Dertke*
DANIEL R. DERTKE
Senior Attorney
Environmental Defense Section
Environment and Natural Res. Div.
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-0994
daniel.dertke@usdoj.gov

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **10,965 words**, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

s/ *Daniel R. Dertke*
DANIEL R. DERTKE

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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DANIEL R. DERTKE