

# Chemical Disaster Rule: U.S. Court of Appeals for the D.C. Circuit Addresses EPA Authority to Conduct Reconsideration Proceedings



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The United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) addressed in an August 17th opinion whether the United States Environmental Protection Agency (“EPA”) had the authority to delay the effective date of a federal regulation titled:

Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act (“Chemical Disaster Rule”)

See 82 Fed. Reg. 4594 (Jan. 13, 2017). See *Air Alliance Houston v. Environmental Protection Agency*, No. 17-1155, 2018 WL 4000490 (D.C. Cir. Aug. 17, 2018)

The Court considered whether EPA had the authority to delay the Clean Air Act Chemical Disaster Rule for 20 months for purposes of reconsideration even if such authority was properly exercised.

The promulgation of the Chemical Disaster Rule revised dozens of requirements under 42 U.S.C. § 7412(r)(7), and was specific to three major areas of regulation:

1. Accident prevention, including expanded post-accident investigations, more rigorous safety audits, safety training, and safer technology requirements;
2. Emergency response, including more frequent coordination with local first responders and emergency response committees, and more intensive incident-response exercises; and
3. Public information disclosure, including public disclosure of safety information and public-meeting requirements

Following the 2016 presidential election and subsequent change of Administration, EPA delayed the effective date of the final Chemical Disaster Rule three times. These delays amounted to a 20-month period of non-implementation to facilitate what the federal agency termed a “reconsideration proceeding.”

EPA justified the delay on its consideration of the complex issues involved and “based on EPA rulemaking experience.” In an attempt to validate the reconsideration proceeding, the EPA promulgated the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act;

Further Delay of Effective Date (“Delay Rule”), 82 Fed. Reg. 27,133-01 (June 14, 2017), which served to delay the effective date of the Chemical Disaster Rule until February 19, 2019.

As authority for promulgating the Delay Rule, the EPA cited Section 7607(d)(7)(B) (providing authorization to stay the effectiveness of a final rule during reconsideration for a period not to exceed three months) and Section 7412(r) (providing that a rule’s effective date “as determined by the Administrator” must “assure compliance as expeditiously as practicable”).

Two groups petitioned for review of the Delay Rule. They included over a dozen community and environmental groups, including Air Alliance Houston (“Community Petitioners”), and a number of states (“State Petitioners”). After confirming the petitioners’ Article III standing, the D.C. Circuit proceeded to the merits.

The D.C. Circuit set out to analyze the statutory authority of the EPA to delay the implementation of a final rule. The Delay Rule was deemed to arise from reconsideration petitions under Section 7607(d)(7)(B). EPA’s reliance on this authority to delay a rule for reconsideration under that provision was found to trigger application of the Clean Air Act’s three month limitation on delay. Further, the D.C. Circuit found that the specific tailoring of regulatory authority under Section 7607(d)(7)(B) effectively trumped the general statutory authority under Section 7412(r). As a result, EPA could not stay the effectiveness of the Chemical Disaster Rule beyond three months. On the strength of this reasoning, the D.C. Circuit held that the Delay rule must be vacated.

The D.C. Circuit cautioned that its holding narrowly applied so as to affirm the EPA’s statutory authority to substantively amend a final rule under Section 7412(r)(7). Nevertheless, the D.C. Circuit found that the EPA made no efforts to do so, and, in effect, “employ[ed] delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits.”

Finally, even if the promulgation of the Delay Rule could be seen as a substantive amendment of the programmatic requirements of the Chemical Disaster Rule under a Section 7412(r)(7) analysis, the D.C. Circuit noted that the EPA’s revision of effective and compliance dates was subject to arbitrary and capricious review. The D.C. Circuit offered several reasons for its contention that the EPA failed to engage in reasoned decision making, and, therefore, acted in an arbitrary and capricious manner:

1. EPA failed to explain how the effectiveness of the Chemical Disaster Rule would impede its ability to reconsider the rule;
2. The Delay Rule offered no explanation for the EPA’s departure from its stated reasoning in setting the original effective date and compliance dates; and
3. EPA’s reliance on a Bureau of Alcohol, Tobacco, and Firearms finding that a fertilizer plant explosion was caused by arson rather than by accident was not enough to countervail the initial impetus for the rule

Accordingly, the Court granted the petitions for review and vacated the Delay Rule.

A [copy of the opinion](#) can be found here.