

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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March 20, 2017

The Honorable John Michael Mulvaney
Director of Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Director Mulvaney:

We write to bring an urgent and serious matter to your attention. In recent days, it appears that Administrator Pruitt of the Environmental Protection Agency (EPA), Secretary of Energy Rick Perry, and potentially additional agency heads, have consistently ignored and flouted the requirements of the Administrative Procedure Act (APA).¹ With limited exceptions, the APA requires agency regulations be published at least 30 days before their effective date² after public notice and comment.³ Despite these clear requirements, Administrator Pruitt issued two “final rules” this week with no notice, no comment, and less than 30 days between publication and the effective date. And according to press reports, Secretary Perry will publish five similar “final rules” tomorrow.

We request that you withdraw these regulations immediately. These “final rules” are not valid and stand to create dangerous confusion among regulated entities if they are not withdrawn. Even more importantly, failure to withdraw these new “final rules” will put workers and communities nationwide in danger by delaying needed safeguards.

These are the “final rules” that should be immediately withdrawn:

¹ 5 U.S.C §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521.

² 5 U.S.C. § 553(d).

³ 5 U.S.C. § 553(c).

1. The administrative stay signed on March 13, 2017 (“March 13 final rule”)⁴ to delay the effective date of the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act (“RMP Amendments”).⁵
2. The administrative stay⁶ of five rules dated March 14th and published on March 20th, affecting:
 - a. The January 9, 2017 rule adding subsurface intrusion to the Hazard Ranking System under Superfund;
 - b. The formaldehyde emissions standards for composite wood products published December 12, 2016;
 - c. The Revisions to the Guideline on Air Quality Models: Enhancements to the AERMOD Dispersion Modeling System and Incorporation of Approaches to Address Ozone and Fine Particulate Matter, published on January 17, 2017;
 - d. The rule certifying pesticide applicators published on January 4, 2017.
 - e. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/ Termination or Suspension of Permits; Procedures for Decisionmaking, published on January 9, 2017.
3. The five administrative stays dated March 15th and expected to be published on March 21st,⁷ affecting:

⁴ Environmental Protection Agency, *Further Delay of Effective Date for the Final Rule Entitled “Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act”* (Mar. 2017) (final rule).

⁵ Environmental Protection Agency, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 82 Fed. Reg. 4594 (Jan. 13, 2017) (final rule).

⁶ Environmental Protection Agency, *Further Delay of Effective Dates of Five Final Regulations Published by the Environmental Protection Agency Between December 12, 2016 and January 17* (Mar. 20, 2017) (final rule).

⁷ Environmental Protection Agency, *Energy Conservation Program: Energy Conservation Standards for Ceiling Fans* (scheduled to be published Mar. 21, 2017) (final rule; further delay of effective date) (s3.amazonaws.com/public-inspection.federalregister.gov/2017-05479.pdf); Environmental Protection Agency, *Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings' Baseline Standards Update* (scheduled to be published Mar. 21, 2017) (final rule; further delay of effective date) (s3.amazonaws.com/public-inspection.federalregister.gov/2017-05479.pdf); Environmental Protection Agency, *Energy Conservation Program: Test Procedures for Compressors* (scheduled to be published Mar. 21, 2017) (final rule; further delay of effective date) (s3.amazonaws.com/public-inspection.federalregister.gov/2017-05479.pdf); Environmental Protection Agency, *Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps* (scheduled to be published Mar. 21, 2017) (final rule; further delay of effective date) (s3.amazonaws.com/public-inspection.federalregister.gov/2017-05481.pdf); Environmental Protection Agency, *Energy Conservation Program: Test Procedure for Walk-in Coolers and Walk-in Freezers* (scheduled to be published Mar. 21, 2017) (final rule;

- a. The ceiling fan efficiency standards published on January 19, 2017;⁸
- b. Energy efficiency standards for new federal low-rise residential buildings published on January 10, 2017;⁹
- c. Test procedures for compressors published on January 4, 2017;¹⁰
- d. Test procedures for central air conditioners and heat pumps published on January 5, 2017;¹¹
- e. Test procedures for walk-in coolers and freezers published on December 28, 2016.¹²

Judicial precedent makes clear that changing the effective date of a rule is a substantive amendment of that rule, and is therefore subject to all of the requirements for rulemaking – including publication thirty days before the effective date and notice and comment.¹³ In the second “final rule,” Administrator Pruitt appears to recognize this, and offers three arguments for why these “final rules” qualify for exceptions to the requirements, none of which are valid. Secretary Perry offers an additional unfounded claim that the DOE rules are exempt from notice and comment requirements as “procedural” rules.

First, Administrator Pruitt asserts notice and comment is impractical due to “the imminence of the effective date,” and claims the good cause exception in 5 U.S.C. 553(b)(B).¹⁴ However, precedent is clear on this point. In *NRDC v. Abraham* (355 F.3d 179), the Department of Energy claimed that an administrative delay to stay the effective date of a final rule did not require notice and comment because the effective date was imminent. The court there found that

further delay of effective date) (s3.amazonaws.com/public-inspection.federalregister.gov/2017-05483.pdf).

⁸ Environmental Protection Agency, *Energy Conservation Program: Energy Conservation Standards for Ceiling Fans*, 82 Fed. Reg. 6826 (Jan. 19, 2017) (final rule).

⁹ Environmental Protection Agency, *Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings' Baseline Standards Update*, 82 Fed. Reg. 2857 (Jan. 1, 2017).

¹⁰ Environmental Protection Agency, *Energy Conservation Program: Test Procedures for Compressors*, 82 Fed. Reg. 1052 (Jan. 4, 2017) (final rule).

¹¹ Environmental Protection Agency, *Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps*, 82 Fed. Reg. 1426 (Jan. 5, 2017) (final rule).

¹² Environmental Protection Agency, *Energy Conservation Program: Test Procedure for Walk-in Coolers and Walk-in Freezers*, 81 Fed. Reg. 95758 (Dec. 28, 2016) (final rule).

¹³ See *NRDC v. Abraham*, 355 F.3d 179, 203-206 (2nd Cir. 2004). Note that *Sierra Club v. Jackson*, 833 F. Supp. 2d 11 (D.C. Cir. 2012), concerned an administrative stay pending judicial review and is not applicable to the March 13th Final Rule.

¹⁴ Environmental Protection Agency, *Further Delay of Effective Dates of Five Final Regulations Published by the Environmental Protection Agency Between December 12, 2016 and January 17* (Mar. 20, 2017) (final rule).

the imminent effective date did not constitute an “emergency” or “good cause” for purposes of waiving APA requirements on a rule.¹⁵

Next, Administrator Pruitt claims that following APA requirements for these “final rules” would be “contrary to the public interest in the orderly promulgation and implementation of regulations.”¹⁶ This claim is patently absurd. The public interest in the orderly promulgation and implementation of regulations is undermined, not served, by this last minute change in effective date, promulgated without required process. The underlying final rules were promulgated in full accordance with the requirements of the APA and reflect broad stakeholder input.

Third, Administrator Pruitt attempts to claim that whatever urgency exists is due to “circumstances beyond [the Agency’s] control,” because of the lack of Senate-confirmed staff at the Agency.¹⁷ This claim is clearly intended to avoid the finding made by the court in *NRDC v. Abraham* that an emergency of an agency’s “own making” does not constitute good cause.¹⁸ As noted above, that court found that an imminent deadline did not constitute an emergency, so the question of who created the short time-frame is not relevant. However, we are compelled to point out that the EPA currently employs thousands of staff, including scientists, technologists, engineers, researchers, and policy experts who are fully capable of performing regulatory work. Further, the Senate cannot be blamed for the lack of confirmed appointees when none have been nominated.

Secretary Perry reiterates the claims above and then in addition and in the alternative claims that the rules that would be stayed by the DOE actions qualify for an exception as “procedural” rules. However, the exception in the APA is for “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.”¹⁹ The test procedures outlined in these rules are not agency procedures. Rather, they are procedures to be followed by industry to establish whether or not products meet efficiency standards.²⁰ They are clearly outside the scope of the procedural rule exception.

Even more importantly, these “final rules” do not meet the overarching test established by courts to determine whether the APA’s notice and comment requirements should be waived. Several different courts have established that the requirements should only be waived if

¹⁵ *NRDC v. Abraham*, 355 F.3d 179, 205-206 (2d Cir. 2004).

¹⁶ Environmental Protection Agency, *Further Delay of Effective Dates of Five Final Regulations Published by the Environmental Protection Agency Between December 12, 2016 and January 17* (Mar. 20, 2017) (final rule).

¹⁷ *Id.*

¹⁸ *NRDC v. Abraham*, 355 F.3d 179, 205-206 (2d Cir. 2004).

¹⁹ 5 U.S.C. § 553(b)(3)(A).

²⁰ 42 U.S.C. § 6314.

providing the time for notice and comment would “do real harm.”²¹ In this case, that would require a demonstration of harm should these new “final rules” be delayed to allow for comment. EPA and DOE do not claim any harm; they merely claim a need to delay these regulations to allow them to evaluate whether changes are needed. However, the agencies will have full discretion to evaluate the rules after they have taken effect. Any potential changes to the rules will have to be carried out through full notice and comment rulemaking – whether the effective date is delayed or not. So no harm is avoided by rushing these “final rules” into effect.

Rushing the rules, on the other hand, will cause clear and serious harm by delaying needed safeguards. You remember, we are sure, the West Fertilizer explosion that claimed the lives of fifteen people and led to the development of the RMP amendments, which would be delayed by the March 13th stay.²² Similarly, you must recall the dangerous exposures to formaldehyde from trailers supplied by FEMA after Hurricane Katrina, which led to the development of the formaldehyde emissions standards.²³ And, perhaps you read the 2010 report by the Government Accountability Office finding that the Superfund National Priorities List could not accurately or adequately address human health risks without taking subsurface intrusion into account.²⁴ These are the types of harms the underlying rules will address.

The Committee on Energy and Commerce has a longstanding interest in ensuring that all government agencies operate in compliance with the law and in an honest and transparent manner. These EPA rulemaking actions appear to subvert the APA and raise concerns that other executive branch agencies may be in violation of the law. Further, these rulemaking actions will undermine programs and statutes within the Committee’s jurisdiction, namely Superfund, the Toxic Substances Control Act, the Risk Management Plan program, and other Clean Air Act programs.

In addition to immediate withdrawal of the March 13th Final Rule and the March 20th Final Rule, we request responses to the following questions:

²¹ See, e.g., *Hawaii Helicopter Operators Ass’n v. Federal Aviation Administration*, 51 F.3d 212, 214 (9th Cir. 1995); *United States Steel Corp. v. EPA*, 595 F.2d 207, 213-14 & n. 15 (5th Cir. 1979). *NRDC v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003); *SEIU, Local 102 v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1995).

²² U.S. Chemical Safety and Hazard Investigation Board, *Investigation Report: West Fertilizer Company Fire and Explosion* (Apr. 2013) (REPORT 2013-02-I-TX).

²³ U.S. Centers for Disease Control and Prevention, *What You Should Know About Formaldehyde in Mobile Homes*, (www.cdc.gov/nceh/ehhe/trailerstudy/pdfs/08_118152_new-resident-flyer-final-032508.pdf) (accessed Mar. 20, 2017).


²⁴ Government Accountability Office, *Superfund: EPA’s Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels and More Sites Are Expected to be Added to the National Priorities List*, (May 2010) (GAO-10-380).

1. Did EPA follow the agency's Action Development Process in developing the March 13 final rule and March 20 final rule? Please provide copies of all records relating to the Action Development Process for this rulemaking including records of any agency work groups (including names of employees and offices represented in the work group), work group meeting dates (including teleconferences), as well as all emails and materials detailing the internal agency process used to draft this rulemaking. Please provide a list of dates on which this rulemaking was subject to early guidance and final action review as part of the Action Development Process completed for this rulemaking.
2. Please provide a copy of all emails and other communications between Mr. Pruitt and all other current EPA political appointees with representatives and employees 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. Please include all emails and communications sent to or from the public and personal email accounts of Mr. Pruitt and all other current EPA political appointees to representatives of these organizations.

Please respond to this inquiry as soon as possible, but no later than March 31, 2017. Should you have any questions, please contact Jacqueline Cohen or Jon Monger with the Committee Staff at (202) 225-3641.

Sincerely,


Frank Pallone, Jr.
Ranking Member


Bobby L. Rush
Ranking Member
Subcommittee on Energy


Doris O. Matsui
Member of Congress


Paul D. Tonko
Ranking Member
Subcommittee on Environment