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

CLEAN AIR COUNCIL, EARTHWORKS, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL INTEGRITY PROJECT, NATURAL RESOURCES DEFENSE COUNCIL, and SIERRA CLUB, *Petitioners*, v. SCOTT PRUITT, Administrator, ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondents.*	No. 17-1145

PETITIONERS' OPPOSITION TO EPA'S MOTION TO RECALL THE MANDATE

Petitioners respectfully oppose EPA's motion to recall the mandate ("Mot."). On July 3, 2017, this Court granted Petitioners' motion for summary vacatur, determining that Administrator Pruitt's grounds for suspending the leak detection and repair program and other key provisions of EPA's 2016 Rule were "inaccurate and thus unreasonable," and that the suspension was therefore "unauthorized,"

"unreasonable," and "arbitrary, capricious, [and] in excess of statutory … authority." Opinion 11, 15, ECF 1682465 (July 3, 2017) ("Slip Op."). The Court directed the Clerk to issue the mandate forthwith. Order 2, ECF 1682468 (July 3, 2017).

The Court's immediate issuance of the mandate was entirely proper in the circumstances of this case. The Federal Rules of Appellate Procedure recognize courts' broad discretion to exercise their remedial powers, explicitly permitting the courts to "shorten or extend the time" for issuing the mandate. Fed. R. App. P. 41(b). Consistent with this discretion, this Court (like other courts of appeals) regularly issues the mandate immediately where the relief requested is time-sensitive. *See, e.g.*, *Teva Pharm. USA, Inc. v. Food & Drug Admin.*, 441 F.3d 1, 5 (D.C. Cir. 2006) (issuing mandate "forthwith" in case regarding imminent start of 180-day exclusive marketing period); *McKee v. U.S. Parole Comm'n*, 214 F. App'x 1, 2 (D.C. Cir. 2006) (issuing mandate "forthwith" "in light of [prisoner's] approaching release date"); *Sandlowski v. United Steelworkers of Am.*, 645 F.2d 1114, 1125 (D.C. Cir. 1981) ("Because of the nearness of the upcoming election the clerk of court is hereby ordered to issue the mandate forthwith."), *rev'd on other grounds*, 457 U.S. 102 (1982).[1] So too here, the Court properly recognized

[1] *See also Lex Claims, LLC v. Fin. Oversight & Mgmt. Bd.*, 853 F.3d 548, 553 (1st Cir. 2017) (following expedited consideration, mandate issued immediately upon reversal of district court's ruling that automatic stay provisions of Puerto Rico

that immediate issuance of the mandate was warranted upon Petitioners' emergency motion challenging the Administrator's 90-day stay because Petitioners' relief would be significantly compromised by any additional delay.

Nonetheless, having failed in his argument that the stay was lawful, the Administrator now seeks to accomplish substantially what he sought to achieve through his unlawful stay by delaying the mandate for 52 days or longer, Mot. 2. This maneuver would allow him to delay important climate and public health protections for months, and throughout the summer ozone season, while he readies a much longer, two-year stay.

Although appellate courts have inherent authority to recall a mandate, they should exercise that authority only "in extraordinary circumstances." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) ("The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies."). This Court has identified certain limited circumstances that may warrant recall of a mandate. *See Greater Boston Television Corp. v. FCC,* 463

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bankruptcy relief statute did not apply to claims in dispute, and hence did not limit Puerto Rico's ability to spend its funds); *Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132, 135 (2d Cir. 2013) (reversing class certification as premature and remanding complex civil cases for further proceedings, issuing mandate immediately); *Lakeview Tech., Inc. v. Robinson*, 446 F.3d 655, 658 (7th Cir. 2006) (reversing and issuing mandate forthwith, to enforce "with dispatch" covenant not to compete or share sensitive business information that could be imminently breached).

F.2d 268, 278-79 (D.C. Cir. 1971) (identifying clerical errors, misconduct affecting the integrity of the judicial process, and other extraordinary circumstances that potentially support a recall of the mandate). Apart from the desire to maintain his unlawful stay, the Administrator identifies no compelling reason, let alone extraordinary circumstances, supporting his extraordinary request.

The Administrator expresses concern that the "regulated community" "would ordinarily be afforded a reasonable amount of time to make the necessary adjustments to ensure compliance." Mot. 4. But this argument ignores that the agency already provided—at industry's request, Pet'rs' Attach. 240–41 (American Petroleum Institute request for "an initial compliance period of 1 year" and Western Energy Alliance suggestion of "9 to 12 months as a reasonable implementation timeframe")—a full year to comply with the leak detection and repair requirements of the 2016 Rule, a generous amount of lead time. Industry has been aware of these requirements for a long time. The Rule was proposed on September 18, 2015, 80 Fed. Reg. 56,593 (Sept. 18, 2015), duly promulgated and published in the Federal Register on June 3, 2016, and has been in effect since August 2, 2016. 81 Fed. Reg. 35,824, 35,895 (June 3, 2016). And while industry parties filed petitions for review of the Rule in August 2016, none of the challengers sought a judicial stay of the Rule, or even to establish a briefing

schedule. The Court's decision and mandate simply restore the status quo that existed five weeks ago, prior to the Administrator's unlawful stay.

Likewise, the Administrator distorts the matter in complaining repeatedly that this Court "required immediate compliance" with its decision. Mot. 2, 3, 5. Far from imposing some elaborate judicial decree on EPA, the Court simply required the agency to adhere to its own rule, which it has not lawfully altered or suspended.

To the extent that any oil and gas companies are "abruptly at risk of noncompliance with the 2016 Rule," *id.* at 4, it is due to the Administrator's own dilatory and irregular approach to suspending these protections, as well as some companies' failure to take advantage of the extensive lead time provided in the 2016 Rule. Indeed, after apprising industry of the stay of the leak detection and repair provisions on April 18, the Administrator waited to promulgate it until June 5—two days *after* the compliance deadline for those provisions had passed, 82 Fed. Reg. 25,730 (June 5, 2017)—making it impossible for Petitioners to obtain judicial review in advance of the compliance deadline.[2]

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[2] Notably, while readying three different suspensions of the Rule, the Administrator has not taken readily available steps suggested by industry to alleviate the alleged burdens of the Rule, such as issuing guidance to clarify that a company or trade association may apply for approval of alternative means of compliance for multiple sites. Indeed, his proposal to extend the stay explicitly does not seek comments on any "substantive issues," including the issues he raised

The Administrator also seeks to justify his extraordinary motion on the grounds that EPA is "exercising its prerogative to re-examine policy in light of the results of the democratic process." Mot. 3. Yet those considerations are wholly unrelated to the lawfulness of the stay struck down by this Court. Nothing in this Court's decision or issuance of the mandate interferes with EPA's ability to re-examine the policy of the 2016 Rule in conformity with the substantive and procedural requirements of the Clean Air Act.

The Court properly recognized the basic rule of law principle that an agency may not change its regulations until it demonstrates that its "new policy is permissible under the statute [and] there are good reasons for it." Slip Op. 23 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). In requiring such a showing, the law protects both the public that benefits from important health and environmental regulatory safeguards and the companies subject to those safeguards from abrupt and capricious shifts in policy like the sudden stay that this Court found unlawful here.

Administrator Pruitt further contends that he should be permitted additional time to consider his options for further review because his decision involved first-impression issues of EPA's authority to stay a rule under 42 U.S.C. § 7607(d)(7)(B) where EPA has granted "discretionary reconsideration." Mot. 3.

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for reconsideration months ago. Pet'rs' Reply Attach. 2, ECF 1680425 (June 20, 2017).

But the argument that EPA has authority to issue a stay where it has granted "discretionary reconsideration" is a post hoc creation of EPA's lawyers nowhere articulated in the stay notice, Slip Op. 13, and *no* member of the panel agreed with that counter-textual reading of the statute, *see* Slip Op. 1 (Brown, J., dissenting).

Finally, by suggesting that the Court needed to conclude that Petitioners would be irreparably harmed by the stay in order to immediately issue the mandate, Mot. 5, Administrator Pruitt misapprehends the implications of the Court's decision to grant summary vacatur. Based on a straightforward reading of section 307(d)(7)(B) and a careful review of the record, the Court concluded that each of the Administrator's reasons for staying the 2016 Rule were clearly "inaccurate, and thus unreasonable." Slip Op. 15. Because the stay was clearly unauthorized, the Court had no need to assess the harm to Petitioners and appropriately granted summary vacatur. And because the usual interval for issuance of a mandate would prejudice Petitioners by allowing the Administrator to continue his unlawful stay and would substantially deprive the Court's order of its effectiveness, it was entirely appropriate for the Court to issue the mandate immediately in the circumstances of this case.

In any event, even if a balancing of harms were relevant to the timing of the issuance of the mandate, Petitioners demonstrated that Administrator Pruitt's last-minute stay of critical health and welfare protections at the start of the ozone

season has already irreparably harmed Petitioners' members and similarly situated Americans by failing to control significant volumes of climate-destabilizing methane, smog-forming volatile organic compounds, and toxic air pollution. Pet'rs' Emergency Mot. for a Stay 25–31, ECF 1678141 (June 5, 2017); Pet'rs' Reply 11–15, ECF 1680425 (June 20, 2017); *see* Colo. Mot. to Intervene, 12 ¶ 19, ECF 1682343 (June 30, 2017) ("Colorado's peak ozone period is the summer generally, making the immediate health threats to Coloradans and its visitors even more pronounced due to the Administrative Stay."); Mot. of Comm. of Mass., *et al.* to Intervene, 9–13, ECF 1680516 (June 20, 2017).

CONCLUSION

For the reasons stated herein, the Court should deny EPA's motion to recall the mandate.

DATED: July 11, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petitioners' Opposition to EPA's Motion to Recall the Mandate was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 1,649 words.

CERTIFICATE OF SERVICE

I certify that on this 11th day of July, 2017, I have served the foregoing Petitioners' Opposition to EPA's Motion to Recall the Mandate through the Court's electronic filing (ECF) system.

DATED: July 11, 2017

/s/ *Susannah L. Weaver*
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