ORAL ARGUMENT NOT SCHEDULED

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.	)	No. 17-1145
SCOTT PRUITT, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondents.	)	

On Petition for Review of Final Action of the
United States Environmental Protection Agency

STATE PETITIONER-INTERVENORS' OPPOSITION TO EPA'S MOTION TO RECALL THE MANDATE

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The Commonwealths of Massachusetts and Pennsylvania, the States of Connecticut, Delaware, Illinois, Iowa, Maryland, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the District of Columbia, and the City of Chicago (collectively, "State Petitioner-Intervenors") hereby oppose EPA's Motion to Recall the Mandate ("Mot.") filed on July 7, 2017.

On July 3, 2017, in response to Petitioners' Emergency Motion for a Stay, or In the Alternative, Summary Vacatur ("Emergency Motion"), this Court vacated Administrator Pruitt's stay ("Administrative Stay") of key provisions of EPA's 2016 New Source Performance Standards controlling methane and other pollutant emissions from new oil and gas sector sources ("2016 Rule"). *See* Opinion, ECF Doc. No. 1682465 (July 3, 2017) ("Slip Op."). The 2016 Rule had been in effect for nearly a year—since August 2, 2016, 81 Fed. Reg. 35,824 (June 3, 2016)—when Administrator Pruitt published a "[n]otice of reconsideration and partial stay" of the 2016 Rule for 90 days. 82 Fed. Reg. 25,730, 25,731 (June 5, 2017) (setting stay expiration date of August 31, 2017). This Court concluded that, because EPA's decision to grant reconsideration was arbitrary and capricious, EPA "lacked authority under the Clean Air Act to stay the rule." Slip Op. at 2. At the time of the decision, the Administrative Stay had already been in effect for a month; accordingly, the Court instructed the Clerk to issue the mandate forthwith. *See* Order, ECF Doc. No. 1682468 (July 3, 2017).

The Court was well within its discretion to direct issuance of the mandate concurrently with its decision vacating the Administrative Stay. Indeed, the Federal Rules of Appellate Procedure plainly permitted the Court to issue its mandate immediately. Rule 41(b) expressly provides that "*[t]he court may shorten or extend the time*" in which to issue its mandate. Fed. R. App. P. 41(b) (emphasis added); *see also* Fed R. App. P. 40(a) (time for filing rehearing petition may be shortened or extended by order).

Here, the circumstances warranted the immediate issuance of the mandate. One-third of the 90-day Stay period had already elapsed as of July 3. Directing the simultaneous issuance of the mandate—rather than allowing the unlawful Stay to remain in effect even longer—was therefore necessary to avoid frustrating the Court's decision to vacate the Administrative Stay.

The Court's immediate issuance of its mandate is therefore not a "departure from . . . norms" that "deprived EPA and the Intervenor-Respondents of the standard relief from immediate compliance" with the mandate—let alone "an extraordinary circumstance" justifying recall of the mandate. Pet. at 2; *see Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (stating that recall of mandate "can be exercised only in extraordinary circumstances") (citing 16 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3938 (2d ed. 1996)). The Court's ordinary application of the Rules of Appellate Procedure, tailored to the

circumstances of this particular case, is not a "grave, unforeseen contingenc[y]," overriding "'the profound interests in repose' attaching to the mandate of a court of appeals." *Calderon*, 523 U.S. at 549-550.

Under the law of this Circuit, the Court may recall its mandate "for good cause shown," in order "to avoid injustice." *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1971). The Court has identified circumstances constituting such grounds, including mistakes or inconsistencies between the judgment and mandate; mandates "procured by effecting fraud on the court," such that "enforcement of the mandate is 'manifestly unconscionable'"; inconsistencies between cases pending at the same time; and instructions of the appellate court "that would operate, unless changed, to require the district court to issue an unjust order." *Id.* at 277-79. None of these circumstances is present here.

In stark contrast, the Court's decision here to issue the mandate immediately was a common-sense approach to remedy the immediate harms occurring as a result of the Administrative Stay. Recall of the Court's mandate in this case would indeed work a further injustice, by rewarding EPA for "its decision to impose a stay [which] was 'arbitrary, capricious, [and] . . . in excess of [its] . . . statutory . . . authority.'" Slip Op. at 23 (citing 42 U.S.C. § 7607(d)(9)(A), (C)). As set forth in Petitioners' Emergency Motion, at 25-29, and State Petitioner-Intervenors' Motion to Intervene, at ¶¶ 12-17, excess emissions of methane, volatile organic

compounds, and hazardous air pollutants occurred as a result of the unlawful Administrative Stay and would have continued had the Stay remained in place. Issuance of the mandate—following a decision on a motion for emergency relief—therefore had to occur immediately to meaningfully remedy EPA's unauthorized action.

To withhold the mandate, as EPA suggests, for fifty-two days "or longer," Mot. at 2, would effectively nullify the Court's decision by allowing EPA to run out the clock, maintaining the unauthorized Administrative Stay in place until at least August 24, one week before it currently is set to expire.

And, as the Court observed, its decision in no way deprives EPA of the ability to "re-examine policy." Mot. at 3. Rather, the decision concludes unremarkably that, should EPA elect to do so, it must conform its decision-making processes to the well-established requirements of administrative law. Slip Op. at 11-12, 23. Nor does the Court's decision unreasonably alter the expectations of the "regulated community." For example, June 3, 2017, was the *deadline* by which regulated entities were to have completed fugitive emissions monitoring, 40 C.F.R. § 60.5397a(f), (h)—the first step in the 2016 Rule's leak detection and repair program that was frozen by the Administrative Stay. Regulated entities therefore had nearly a year—since August 2, 2016—to comply with that obligation before the Administrative Stay went into effect. The Court's decision merely reinstates

the 2016 Rule, and returns to the *status quo*, prior to the issuance of EPA's unauthorized Administrative Stay.

For the foregoing reasons, State Petitioner-Intervenors respectfully request that the Court deny EPA's Motion.

Respectfully submitted,

Dated: July 11, 2017

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the foregoing was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word, it contains 984 words, in accordance with Federal Rule of Appellate Procedure 27(d)(1) and (2).

Dated: July 11, 2017

/s/ Peter C. Mulcahy
Peter C. Mulcahy

CERTIFICATE OF SERVICE

I certify pursuant to Federal Rule of Appellate Procedure 25(d) that a copy of the foregoing Opposition to EPA's Motion to Recall the Mandate was filed on July 11, 2017, using this Court's ECF system, which serves copies on all registered counsel, and that paper copies were delivered to the Court by hand, pursuant to the Court's July 10, 2017, Order.

Dated: July 11, 2017

/s/ Peter C. Mulcahy
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