ORAL ARGUMENT NOT YET SCHEDULED

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.	)	

INTERVENOR-RESPONDENTS' RESPONSE IN SUPPORT OF EPA'S MOTION TO RECALL THE MANDATE

Pursuant to Federal Rule of Appellate Procedure 27 and D.C. Circuit Rule 27, the Industry Intervenor-Respondents respectfully submit this response in support of EPA's Motion to Recall the Mandate (ECF No. 1683079). The Industry Intervenor-Respondents are the American Petroleum Institute ("API"), GPA Midstream Association ("GPA"), the Interstate Natural Gas Association of America ("INGAA"), the Independent Petroleum Association of America

("IPAA") and other independent producers,[1] Texas Oil & Gas Association ("TXOGA"), and Western Energy Alliance ("WEA").

BACKGROUND

This case stems from actions by the United States Environmental Protection Agency ("EPA" or "Agency") under the Clean Air Act ("CAA") regarding new source performance standards ("NSPS") for the oil and natural gas sector. The most recent is "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," 81 Fed. Reg. 35,824 (June 3, 2016) ("Quad Oa Rule" or "2016 NSPS Rule").[2] On April 18, 2017, Administrator Pruitt granted administrative reconsideration of certain issues in the 2016 NSPS Rule and stated an intent to stay the effectiveness of provisions in the 2016 NSPS related to those issues. *See* Letter from E. Scott Pruitt, Adm'r, EPA, to Howard J. Feldman, API, *et al.*, re: "Convening a Proceeding for Reconsideration of Final Rule, 'Oil and Natural Gas Sector: Emission Standards for New, Reconstructed

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[1] The full list of intervenor independent producers are in IPAA *et al.'s* Unopposed Motion for Leave to Intervene in Support of Respondents (ECF No. 1679651) and the signature block to this filing.

[2] The Intervenor-Respondents here are Petitioners in the related cases addressing 2016 NSPS Rule and related NSPS rules, consolidated in *American Petroleum Institute v. EPA*, No. 13-1108 (D.C. Cir.). These cases are currently being held in abeyance.

and Modified Sources,' published June 3, 2016, 81 Fed. Reg. 35824" (Apr. 18, 2017), Docket No. EPA-HQ-OAR-2010-0505-7730 ("Pruitt Letter").

On June 5, 2017, EPA issued the action at issue here: "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay," 82 Fed. Reg. 25,730 (June 5, 2017) ("EPA's Stay Decision"). EPA's Stay Decision granted reconsideration of the issues identified in the Pruitt Letter and of two additional issues. EPA also granted a three-month stay, pursuant to CAA § 307(d)(7)(B), of the following parts of the 2016 NSPS Rule: (1) the fugitive emissions requirements (also referred to as leak detection and repair ("LDAR")), (2) the standards for pneumatic pumps at well sites, and (3) the requirements for certification by a professional engineer.

That same day, the Petitioners filed both a petition to review EPA's Stay Decision and an Emergency Motion for a Stay or, in the Alternative, Summary Vacatur (ECF No. 1678141) (hereinafter "Emergency Stay Motion"). EPA and the Industry Intervenor-Respondents opposed the Emergency Stay Motion.

On July 3, 2017, the Court issued a per curiam opinion that granted the Petitioners' motion to vacate the stay. The Court did not reach the merits of the Petitioners' request for an emergency stay, ruling it was moot. Pursuant to the Court's order directing contemporaneous issuance of the mandate, the Clerk of the Court issued the mandate on July 3, 2017.

ARGUMENT

The Industry Intervenor-Respondents support EPA's Motion to Recall the Mandate. Typically, this Court does not issue a mandate until the period for seeking rehearing or the rehearing process concludes. Here, the only plausible reason for deviating from that well-established practice and issuing the mandate immediately would be to accomplish unspecified incremental emissions reductions during the remainder of the 90-day stay period. Yet, the reductions that might be achieved—and corresponding benefits to the public, if any—remain completely speculative because this Court declined to adjudicate the Movants' claims of harm, which were controverted by both EPA and the Industry Intervenor-Respondents. The speculative benefits from unknown incremental emissions reductions alleged by Movants do not justify a departure from the Court's normal procedures and schedule for issuing a mandate.

In addition, EPA has issued two proposed rules that would extend the compliance deadline in the 2016 NSPS Rule for two years beyond the 90-day stay at issue in this proceeding. EPA proposed the extension to allow the Agency time to complete its evaluation of the 2016 Rule. EPA is taking comment on these proposals now and will be in a position to take final action within just a few short weeks. It is unreasonable to require immediate compliance with the 2016 Rule when the requirements may again be stayed shortly after being implemented. This

whipsaw could accomplish little in the way of environmental protection during the remaining days of the 90-day stay period, but would impose very significant costs and implementation burdens on affected facilities. By granting summary disposition, the Court has not considered these important factors. They weigh heavily here against an immediate mandate.

As such, the Industry Intervenor-Respondents respectfully request that this Court withdraw the mandate and only issue it after the time and process allowed for petitions for panel rehearing or rehearing *en banc* have concluded.

I. Immediately Issuing the Mandate and Deviating From the Usual Practice of Allowing the Parties Time to Seek Rehearing is Not Warranted Here.

Under normal operation of this Court's rules, the mandate would not have issued until 45-52 days after July 3, 2017, when the Court issued its per curiam opinion. This Court's practice is to wait to issue the mandate until after the deadline for a petition for rehearing or a petition for rehearing e*n banc*, which here is 45 days. D.C. Cir. Rule 41(a) (establishing that this Court will "ordinarily" instruct the clerk to withhold the mandate until the deadline for a petition for rehearing or petition for rehearing *en banc*); Fed. R. App. P. 40(a) (setting 45 days as the time period for petition for panel rehearing by "a United States agency" like EPA); D.C. Cir. Rule 35(a) (applying same time period for a petition for rehearing

en banc). Under normal circumstances, the Court could wait an additional 7 days after that time period. Fed. R. App. P. 41(b).

This Court presumably immediately issued the mandate out of concern that the 90-day stay would expire by the time the mandate was issued, if the Court adhered to its normal procedures. With an immediate mandate, the stayed provisions of the rule became immediately effective, creating the possibility that emissions reductions might be achieved during the brief period when any further proceedings (such as consideration of rehearing petitions) took place. In other words, presumably the Court issued the mandate immediately in an effort to alleviate some of the alleged harm that Movants had claimed in their stay motion.

Yet, the Court expressly decided not to assess the weight or validity of the Movants' claims of harm. Because this Court specifically declined to decide whether to grant an emergency stay, which would have required it to apply the four-factor test, there are no judicial findings regarding what harm would occur if the stay is vacated. The lack of judicial findings is significant given that both EPA and the Industry Intervenor-Respondents contested the Movants' claims of harm. *See* EPA's Opposition to Petitioners' Emergency Motion for a Stay Or, in the Alternative, Summary Vacatur, at 26-29 (ECF No. 1679831) (explaining how the Petitioners failed to argue imminent harm from EPA's stay of the standards for pneumatic pumps or professional engineer certification and failed to prove

substantial irreparable harm from stay of the LDAR requirements); Movant Intervenor-Respondents' Response in Opposition to Petitioners' Emergency Motion for a Stay Or, in the Alternative, Summary Vacatur, at 10-13 (ECF No. 1679836) (discussing insufficiency of evidence presented by the Petitioners to prove irreparable harm). And both EPA and the Industry Intervenor-Respondents provided information on the prejudice to other parties or to the general public that would be caused by vacating the stay. *See* EPA's Opposition to Petitioners' Emergency Motion for a Stay Or, in the Alternative, Summary Vacatur, at 29-31 (ECF No. 1679831) (explaining the compliance burdens and harm to important public interests caused by an emergency stay); Emergency Motion for a Stay Or, in the Alternative, Summary Vacatur, at 13-14 (ECF No. 1679836) (discussing harm of vacating stay to regulated entities).

Instead of ruling on the stay motion, the Court relied on purely legal analyses of the Agency's authority to issue the stay and rationale for granting administrative reconsideration. In this context, there is no basis for issuing the mandate immediately because the incremental emissions reductions that might be achieved and the potential harm to human health or the environment that might be alleviated were not established. Having declined the opportunity to issue an emergency stay, the Court should likewise decline to institute the mandate in such a way as to grant the emergency stay motion without making the required findings.

II. Immediate Issuance of the Mandate Will Be Costly and Counter-Productive.

The costs to regulated entities during EPA's on-going evaluation of the stayed provisions also supports withdrawing the mandate. It does not serve the public interest to issue the mandate immediately upon issuance of the decision here, especially since EPA is currently evaluating whether to reconsider and possibly revise the 2016 NSPS Rule. EPA has also proposed to extend the compliance deadlines for these provisions in the 2016 NSPS Rule for two years to allow for this reconsideration process to occur without unnecessary disruption. The Court should withdraw the mandate and reissue it only after allowing the parties to complete the rehearing process, in accordance with this Court's typical practice.

On June 12, 2017, Administrator Pruitt signed a pre-publication notice titled, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements," which proposes to stay the parts of the Quad Oa Rule at issue here for an additional two years. EPA published this proposed rule in the Federal Register on June 16, 2017. 82 Fed. Reg. 27,645 (June 16, 2017). On the same day, EPA also published a proposed rule to stay these same requirements for the three month period during which the two-year stay, if finalized, would be delayed taking effect under the Congressional Review Act. 82

Fed. Reg. 27,641 (June 16, 2017). The comment periods for both proposals close on August 9, 2017.

The costs to affected facilities and EPA's strong interest in reconsidering and possibly revising the 2016 NSPS Rule both support withdrawing the mandate here. As this Court recognized, administrative agencies possess inherent authority to reconsider or revise their decisions. Op. at 11; *see also Landis v. N. Am. Co.,* 299 U.S. 248, 254 (1936); *Dietz v. Bouldin,* 136 S. Ct. 1885 (2016). The Court's July 3, 2017 opinion does not limit EPA's ability to reconsider the 2016 NSPS Rule. The future for the stayed provisions is highly uncertain and counsels against issuing the mandate immediately, especially when the benefits of immediate compliance are highly speculative. It would be a significant waste of limited resources and extremely disruptive for regulated entities to spend time immediately complying with the 2016 NSPS Rule, when EPA has already indicated that it is poised to change the requirements of this rule.

EPA's proposed stays also counsel for withdrawing the mandate. EPA possesses other authority to change compliance deadlines. EPA's three-month stay would have expired on August 31, 2017, almost a month after the comment period for the proposed two-year stay ends. In light of these two proposals, EPA is in a position to defer the compliance deadlines beginning immediately after August 31, 2017. Immediate compliance with the 2016 NSPS Rule is unreasonable, as these

provisions will likely be stayed a short time after being implemented. Not only would this accomplish little, if any, environmental benefit, but also it would saddle affected facilities with significant implementation burdens and costs for a short time period. Because this Court granted summary disposition based solely on legal issues, there has been no opportunity to discuss these costs to regulated entities. These factors strongly support EPA's Motion to Withdraw the Mandate.

CONCLUSION

The Intervenor-Respondents respectfully request this Court grant EPA's motion and withdraw the mandate until no sooner than seven days after the deadline for EPA to file a petition for panel or *en banc* rehearing.

Respectfully submitted,

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Dated: July 11, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) and 27(d)(2)(A) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing Intervenor-Respondents' Response in Support of EPA's Motion to Recall the Mandate contains 2,028 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit of 5,200 words set by the Federal Rules of Appellate Procedure 27(d)(2)(A). I also certify that this document complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word™ 2010 with 14-point Times New Roman font.

/s/ William L. Wehrum
William L. Wehrum

DATED: July 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of July 2017, a copy of the foregoing Intervenor-Respondents' Response in Support of EPA's Motion to Recall the Mandate was electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system.

/s/ William L. Wehrum
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