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

No. 17-1145

CLEAN AIR COUNCIL, EARTHWORKS, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL INTEGRITY PROJECT, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB,

Petitioners

v.

SCOTT PRUITT, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents

EMERGENCY MOTION FOR A STAY OR, IN THE ALTERNATIVE, SUMMARY VACATUR

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CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners hereby certify as follows:

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to this Case

Petitioners: Clean Air Council, Earthworks, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club.

Respondents: The United States Environmental Protection Agency ("EPA") and Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency.

Intervenors: No parties have moved for leave to intervene at present.

(iii) *Amici* in this Case

None at present.

(iv) Circuit Rule 26.1 Disclosures

See disclosure form below.

(B) Rulings Under Review

Petitioners seek review of the final action taken by EPA at 82 Fed. Reg. 25,730 (June 5, 2017), entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay."

(C) Related Cases

Petitioners are aware of the following cases related to this matter, which may involve the same or similar issues: *American Petroleum Institute v. EPA*, D.C. Cir. No. 13-1108; consolidated with D.C. Cir. Nos. 13-1289, 13-1290, 13-1292, 13-1293, 13-1294, 15-1040, 15-1041, 15-1042, 15-1043, 15-1044, 16-1242, 16-1257, 16-1262, 16-1263, 16-1264, 16-1266, 16-1267, 16-1269, and 16-1270.

These cases (which are presently held in abeyance) challenge a regulation, 81 Fed. Reg. 35,824 (June 3, 2016). That regulation is subject to partial reconsideration and partially stayed by the EPA's June 5, 2017 action, which is challenged in this case.

DATED: June 5, 2017

/s/ Susannah L. Weaver
Susannah L. Weaver

RULE 26.1 DISCLOSURE STATEMENT OF PETITIONERS

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Petitioners Clean Air Council, Earthworks, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club make the following disclosures:

Clean Air Council

Non-Governmental Corporate Party to this Action: Clean Air Council ("CAC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CAC is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. CAC is a not-for-profit organization focused on protection of public health and the environment.

Earthworks

Non-Governmental Corporate Party to this Action: Earthworks.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Earthworks, a corporation organized and existing under the laws of the District of Columbia, is a national nonprofit organization dedicated to protecting communities and the environment from the impacts of oil, gas, and mineral development while seeking sustainable solutions to

the problems such development can cause.

Environmental Defense Fund

Non-Governmental Corporate Party to this Action: Environmental Defense Fund ("EDF").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: EDF, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization that links science, economics, and law to create innovative, equitable, and cost-effective solutions to society's most urgent environmental problems.

Environmental Integrity Project

Non-Governmental Corporate Party to this Action: Environmental Integrity Project ("EIP").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: EIP, a corporation organized and existing under the laws of the District of Columbia, is a national nonprofit organization that advocates for more effective enforcement of environmental laws.

Natural Resources Defense Council

Non-Governmental Corporate Party to this Action: Natural Resources Defense

Council ("NRDC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: NRDC, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

DATED: June 5, 2017

/s/ Susannah L. Weaver
Susannah L. Weaver

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GLOSSARY OF ABBREVIATIONS

API	American Petroleum Institute
EPA	Environmental Protection Agency
IPAA	Independent Petroleum Association of America
LDAR	Leak detection and repair
TXOGA	Texas Oil & Gas Association
VOCs	Volatile organic compounds

Petitioners respectfully move, pursuant to Federal Rules of Appellate Procedure 18 and 27 and D.C. Circuit Rules 18 and 27, for a judicial stay of the Environmental Protection Agency's ("EPA") administrative stay of provisions of its New Source Performance Standards for emissions of methane—a powerful climate-changing pollutant—and other harmful air pollutants from the oil and gas industry. 82 Fed. Reg. 25,730, 25,731 (June 5, 2017) (Attach. 1). In the alternative, because the stay is clearly unlawful, Petitioners request summary disposition and vacatur.

INTRODUCTION AND SUMMARY OF ARGUMENT

On June 3, 2016, EPA promulgated a rule—developed over many years with extensive stakeholder input—to curb emissions of methane and other air pollutants from new and modified production, gathering, processing, transmission and storage equipment in the oil and gas industry. 81 Fed. Reg. 35,824 (June 3, 2016) ("2016 Rule") (Attach. 2). The cornerstone of the Rule is its requirements for leak detection and repair, which direct oil and gas companies to monitor their well sites and compressor stations at regular intervals to detect leaks (also called fugitive emissions) of air pollutants, repair those leaks within specified periods, and report periodically on those actions. *See* 40 C.F.R. § 60.5397a.

Equipment leaks from malfunctioning or improperly installed components are among the largest sources of methane and other harmful pollutants from oil and

gas facilities.[1] EPA found that leak detection and repair will deliver up to 45 percent of the 2016 Rule's total projected reductions in smog- and soot-forming volatile organic compounds ("VOC"), more than half of its methane reductions, and approximately 90 percent of its reductions in hazardous air pollutants such as cancer-causing benzene and formaldehyde. EPA, *Regulatory Impact Analysis* 3-13, Table 3-4 (May 2016) (Attach. 3). The 2016 Rule directs owners and operators to complete their first round of monitoring by no later than June 3, 2017, and to fix leaks found within 30 days of being detected. 40 C.F.R. § 60.5397a(f), (h). More than 18,000 new and modified wells and associated equipment, located in 22 states, along with new and modified compressor stations, are subject to these requirements. Compliance will substantially reduce air pollution exposures for thousands of Petitioners' members and similarly situated people living in close proximity to sources subject to the 2016 Rule.

But on June 5, 2017, EPA Administrator Scott Pruitt snatched away those benefits just as they were about to be realized by publishing in the Federal Register the notice challenged in this case. Appearing two days after the June 3 compliance deadline, the Notice purports to retroactively stay the entire leak detection and

[1] *See* ICF International, Economic Analysis of Methane Emission Reduction Opportunities in the U.S. Onshore Oil and Natural Industries 3-6 (Mar. 2014), *available at* https://www.edf.org/sites/default/files/methane_cost_curve_report.pdf.

repair program, as well as other requirements, for a period beginning on June 2, 2017, and ending on August 31, 2017. 82 Fed. Reg. at 25,732-33.[2] A second notice, proposing to extend the stay for an indeterminate period thereafter, is pending at the Office of Management and Budget. Attach. 4. These are Administrator Pruitt's first steps towards suspending, revising, or rescinding the entire Rule. *See* Exec. Order No. 13783, § 7(a), 82 Fed. Reg. 16,093, 16,096 (Mar. 28, 2017).

Every day that the administrative stay is in place irreparably harms Petitioners and their members, as well as all Americans similarly situated. Many of Petitioners' members (plus tens of thousands of others) live in close proximity to the more than 18,000 new and modified wells subject to the 2016 Rule—more than 11,000 of which are producing wells located in states that do not impose their own comparable leak detection and repair programs. Decl. of David Lyon ¶¶ 9, 12 (Attach. 5). Because of the administrative stay, these individuals will now continue to experience high levels of dangerous air pollution due to unmonitored and unfixed leaks. If the administrative stay remains in place, these individuals will be at heightened risk for adverse health effects, including more asthma attacks and other respiratory diseases. These impacts are particularly acute because almost

[2] Administrator Pruitt identified no authority to impose a retroactive stay. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

2,000 of the subject wells are located in areas that exceed the 2008 national ambient air quality standards for ozone, and we are now entering the summer season of high ozone levels. Decl. of Elena Craft ¶¶ 7, 14-15 (Attach. 6).

Petitioners' members across the country will also be irreparably harmed by the additional emissions of methane, a powerful heat-trapping greenhouse gas with more than 80 times the global warming potential of carbon dioxide within the first twenty years after it is emitted. Decl. of Ilissa Ocko ¶ 4 (Attach. 7). Once in the atmosphere, these emissions contribute to climate harms that cannot be undone or reversed. Methane, through the creation of tropospheric ozone, also contributes to ground-level ozone and its associated harmful health effects. *Id.* ¶ 5.

The Administrator has no authority to issue the stay and cause this irreparable harm. Promulgated rules remain in effect unless and until they are validly changed through the Clean Air Act's enhanced rulemaking procedures. *See* 42 U.S.C. § 7607(d)(1)–(6). Those procedures do not allow EPA to stay or suspend an existing rule during a rulemaking to modify or repeal it. *See Natural Res. Def. Council v. Reilly*, 976 F.2d 36, 40 (D.C. Cir. 1992) ("[B]oth the language and the purpose" of the Clean Air Act "preclude the authority claimed by the EPA to stay the effectiveness of the standards").

The Act provides only one exception to this rule, under section 307(d)(7)(B), which allows EPA to issue a three-month stay during a "reconsideration"

proceeding. 42 U.S.C. § 7607(d)(7)(B). Crucially, reconsideration is a specific procedure available only at the tail end of a prior rulemaking under "carefully defined circumstances." *Reilly*, 976 F.2d at 40. A person seeking reconsideration must have identified an objection (1) that it could not have raised in the comment period and (2) that is of central relevance to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B). Here, the bases that EPA has cited for granting "reconsideration"—and then issuing the stay—do not come close to meeting these two threshold requirements. In fact, all of the issues Administrator Pruitt identified could have been, *and actually were*, raised (and extensively deliberated) during the comment period. Further, these objections are not centrally relevant, as they go at most to discrete, severable elements of those requirements and provide no justification for reconsidering and staying the entire leak detection and repair program. While nothing prevents the Administrator from opening a new rulemaking under section 307(d)(1)-(6) while the Rule remains in effect, he lacks the necessary legal predicate for reconsideration and a stay under section 307(d)(7)(B).

The challenged stay perverts the express and limited purpose for which Congress created the reconsideration provision: to require petitioners to bring late-arising concerns to the agency before bringing them to a court. *See infra* pp. 10- 12. "Reconsideration" is not the statutory vehicle for "look[ing] broadly at the

entire 2016 Rule," as Administrator Pruitt says he intends to do here, 82 Fed. Reg. at 25,732, or for responding to Executive Order 13783, *see* Attach. 8 (EPA Press Release), and it plainly does not provide a legal basis for staying the Rule while the Administrator mulls its future.

Even if the issues on which the Administrator based the reconsideration met the standard for opening a section 307(d)(7)(B) proceeding, the challenged administrative stay would be arbitrary and capricious because it is overbroad. Staying the *entire* leak detection and repair program is far broader than necessary to address the issues he cites. Moreover, the Administrator made no effort to weigh the equities by demonstrating that adhering to the Rule's compliance dates would irreparably harm industry or by assessing the damage to public health and welfare from the stay. The administrative stay would fail any such analysis, as the leak detection and repair requirements impose only modest costs and reap significant public health benefits.

These same considerations weigh strongly in favor of this Court's staying the Administrator's action. The action was patently unlawful, the irreparable harm to the public is serious, and the burden on industry is minimal.

PROCEDURAL HISTORY

The Rule to curb emissions of methane and other dangerous pollutants was promulgated on June 3, 2016. 81 Fed. Reg. at 35,824. Many of the Rule's

requirements took effect on August 2, 2016. The Rule further required that owners and operators complete their initial round of leak detection no later than June 3, 2017,[3] repair any leaks by no later than 30 days after detection, resurvey within 30 days after repair to verify the repair, and report on those activities as soon as October 31, 2017. 40 C.F.R. §§ 60.5397a(f), (h), 60.5410a, 60.5420a(b).

On August 2, 2016, the American Petroleum Institute ("API") filed a petition with EPA identifying some issues for administrative reconsideration under section 307(d)(7)(B) and "a number of additional issues where we believe changes to the rule are needed, *but where we are not asking for administrative reconsideration*." Attach. 9, Cover Letter at 1 (emphasis added). Three other oil and gas industry groups filed similar petitions. GPA Midstream Ass'n (Attach. 10); Indep. Petroleum Ass'n of Am. et al. ("IPAA") (Attach. 11); Tex. Oil & Gas Ass'n ("TXOGA") (Attach. 12).[4] The API petition explicitly categorized its requested changes to the leak detection and repair rules *as not qualifying* for reconsideration under section 307(d)(7)(B). *See infra* pp. 13-17.

[3] New wells or equipment that commenced operations or undertook a modification less than 60 days before June 3, 2017, or any time after that date, have 60 days to conduct their initial monitoring.

[4] These same industry groups, along with several States, also petitioned for review of the Rule. That litigation is currently being held in abeyance. Order, *API v. EPA*, No. 13-1108 (May 18, 2017), ECF No. 1675813.

Notwithstanding API's concession, on April 18, 2017, Administrator Pruitt sent the industry groups a letter *granting reconsideration* on these very same leak detection and repair issues. Attach. 13.[5] The letter further assured them that "[a]s a result of this reconsideration, the EPA intends to exercise its authority under CAA section 307 to issue a 90-day stay of the compliance date for [the leak detection and repair] … requirements." *Id.*

On May 25, 2017, more than 60 public health and environmental organizations, including Petitioners, wrote Administrator Pruitt urging him not to stay the leak detection and repair requirements, and explaining that tens of thousands of people are exposed to dangerous air pollution as a result of oil and gas industry leaks and that these cost-effective and common-sense techniques substantially reduce this pollution and the associated health risks. Attach. 14. Petitioners wrote the Administrator again on June 1, one day after the stay notice became public on the agency's website, demanding that he withdraw the stay because it is unlawful. Attach. 15. Petitioners have received no response.

The Administrator nevertheless published the stay challenged here in the June 5, 2017 Federal Register. The published notice purports to stay the leak

[5] Specifically, Administrator Pruitt granted reconsideration on "provisions for requesting and receiving an alternative means of emissions limitations and the inclusion of low-production wells." Attach. 13.

detection and repair requirements in their entirety, starting retroactively from June 2, 2017, until August 31, 2017. 82 Fed. Reg. at 25,731-32. Furthermore, the June 5 notice stays additional requirements of the 2016 Rule: the standard for pneumatic pumps, and requirements that a professional engineer certify the proper installation of closed vent systems used to comply with certain standards in the 2016 Rule. *Id.* at 25,732.

Moreover, the June 5 notice states that EPA "intends to look broadly at the entire 2016 Rule" in the reconsideration proceeding. *Id.* Accordingly, EPA has sent another notice to the Office of Management and Budget proposing to extend the stay. Attach. 4.

ARGUMENT

EPA Administrator Pruitt lacked authority to invoke reconsideration under section 307(d)(7)(B) of the Clean Air Act—the sole claimed authority for the 90-day stay. Even assuming such authority, the stay as issued is overbroad and arbitrary and capricious. These failings more than demonstrate a likelihood of success on the merits supporting a judicial stay, and, alternatively, provide a compelling basis for summary vacatur.[6]

[6] The Clean Air Act authorizes this Court to reverse EPA actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" 42 U.S.C. § 7607(d)(9).

Further, the administrative stay is causing irreparable harm to Petitioners' members and similarly situated people, and the compliance burden on regulated entities is modest. The balance of equities and the public interest therefore strongly favor a judicial stay.

I. EPA's Administrative Stay is Unlawful and Must Be Vacated.

A. EPA may not issue an administrative stay absent a valid reconsideration proceeding.

Under the Clean Air Act, EPA has authority to revisit existing regulations by initiating a new rulemaking. *See, e.g.*, 42 U.S.C. §§ 7601(a), 7411(b)(1)(B). Such a rulemaking must comply with the specific procedures set forth in the Act. *Id.* § 7607(d)(1)-(6). Neither those provisions nor any other law permits EPA to summarily stay an existing regulation while mulling a change to it in a new rulemaking.

Staying a rule is permitted only in proceedings for "reconsideration" under section 307(d)(7)(B), a provision Congress adopted in 1977 for "carefully defined" circumstances. *Reilly,* 976 F.2d at 40. The "reconsideration" provision was intended to create an exhaustion requirement for a narrow class of issues arising at

the tail end of a rulemaking, to ensure that the EPA addressed those issues before they were presented to a reviewing court.[7] Section 307(d)(7)(B) states:

> Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment … may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that *it was impracticable to raise such objection within such time* or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and *if such objection is of central relevance to the outcome of the rule*, the Administrator shall convene a proceeding for reconsideration of the rule ….

42 U.S.C. § 7607(d)(7)(B) (emphasis added). Reconsideration is available "only if" the two statutory conditions italicized above are met. *Chevron U.S.A., Inc. v. EPA*, 658 F.2d 271, 274 (5th Cir. 1981).

With respect to the status of a rule during reconsideration, the Act stipulates that "[s]uch reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months." 42 U.S.C. § 7607(d)(7)(B). If, and only if, there is a valid reconsideration proceeding, EPA may stay the effectiveness of a rule "for a single period not to exceed three months." *Reilly*, 976 F.2d at 40.

[7] *See* H.R. Rep. No. 95-294, at 323 (1977) (provision targets "the circumstances in which a reviewing court may consider data and arguments that were not presented to the agency during the rulemaking").

This Court has strictly enforced the "threshold" eligibility requirements for reconsideration. *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1172-74 (D.C. Cir. 1980). Reconsideration is not available when a party could have raised an issue during the comment period, but failed to do so. Likewise, reconsideration is not available when a party actually did raise the issue in comments. Reconsideration is also unavailable if the agency's final action is a "logical outgrowth" of issues that EPA had timely noticed, and of public comments made on those issues. *North Carolina v. EPA*, 531 F.3d 896, 928-29, *modified on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008) (where final rule was a "logical outgrowth," party did "not demonstrate[] that it was impracticable to raise such objection within the comment period," and "therefore . . . fail[ed] to demonstrate a statutory ground that would require reconsideration"); *see Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) ("An agency satisfies the notice requirement, and need not conduct a further round of public comment, as long as its final rule is a 'logical outgrowth' of the rule it originally proposed.").

As explained further below, the objections on which EPA purported to grant "reconsideration" in this case do not meet these eligibility criteria, and consequently the Administrator was not authorized to issue the challenged stay. This does not mean that administrative petitioners—industry trade associations in this instance—lack a pathway to ask for changes in the 2016 Rule. They can do so

by asking for the initiation of a new rulemaking to amend the 2016 Rule, as they have done. *See* Attach. 9, Cover Letter at 1. But such proceedings are not "reconsideration," and in such proceedings the agency lacks authority to delay compliance with requirements of a rule (whether for 90 days or any other period) without notice, opportunity for comment, and a reasoned decision grounded in the statute and supported by a record, in conformity with section 307(d)(1)-(6).[8]

Indeed, both EPA and the oil and gas industry associations acknowledge this critical distinction. EPA apparently recognizes that any further delay in the compliance obligations of the Rule will require a notice and comment rulemaking, submitting to the Office of Management and Budget a proposed rule to that very effect. Attach. 4. As for industry, API's August 2, 2016 petition separately listed "issues for which we believe that administrative reconsideration is warranted," and "a number of additional issues where we believe changes to the rule are needed, but where we are not asking for administrative reconsideration." Attach. 9, Cover Letter at 1. API placed its objections to the leak detection and repair provisions in

[8] *See, e.g.*, *Pub. Citizen v. Steed*, 733 F.2d 93, 96, 98, 105 (D.C. Cir. 1984) (declaring arbitrary and capricious agency action, following notice and comment, to indefinitely suspend regulatory requirements while the agency revised the regulation and holding that agency needed to justify the suspension in the same manner as a revocation); *Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981) ("deferring [a] requirement" is a substantive rule subject to the Administrative Procedure Act).

the second category—issues for which reconsideration under section 307(d)(7)(B) is *not available*. *Id*. at 11-19. Yet these ineligible issues are the very ones on which EPA purported to grant reconsideration.

B. The objections on which the Administrator granted reconsideration do not meet the statute's threshold eligibility requirements.

Each of the objections cited by the Administrator as the basis for reconsideration could have been (and in fact, *was*) raised during the public comment period. And each complained-about provision of the final Rule was a logical outgrowth of the proposed rule and responsive to the comments actually made. There was no last-minute surprise or course change that commenters could not have anticipated. Consequently, there was no proper basis for reconsideration, nor for a stay.[9]

Low-Production Wells. First, the Administrator purported to grant reconsideration on "the applicability of the fugitive emissions requirements to low-

[9] In contrast to scientific or technical determinations on which courts give agencies broad deference, whether an objection could have been, or actually was, raised during the comment period is an issue on which the agency has no greater expertise than the Court. The same is true in evaluating whether the final rule is a logical outgrowth of the proposal and comments received. Consequently, the agency deserves little or no deference regarding whether the objections cited to trigger reconsideration (and thus the stay) were eligible under section 307(d)(7)(B).

production well sites." 82 Fed. Reg. at 25,731. But, as API recognized, this is not an eligible basis for reconsideration. Attach. 9 at 12.

The Administrator claims that EPA's rationale for including low-producing well sites in the leak detection and repair program in the 2016 final Rule—that emissions "'are not correlated with the level of production, but rather based on the number of pieces of equipment and components'"—was "not presented for public comment during the proposal stage," making it "impracticable [for commenters] to object to this new rationale." 82 Fed. Reg. at 25,731 (quoting 81 Fed. Reg. at 35,856). This is patently untrue.

In its 2015 proposal, EPA specifically sought comment on whether to include or exclude low-producing well sites from the Rule's leak detection and repair requirements:

> We are proposing to exclude low production well sites … from the standards for fugitives [sic] emissions from well sites. … Further, we solicit comment on whether EPA should include low production well sites for fugitive emissions ….

80 Fed. Reg. 56,593, 56,639 (Sept. 18, 2015) (Attach. 16). The 2015 proposal expressly asked for comment on the specific rationale that the agency now erroneously claims had not been aired:

> To more fully evaluate the exclusion, we solicit comment on the air emissions associated with low production wells, and the relationship between production and fugitive emissions.

80 Fed. Reg. at 56,639. Commenters, including API and others, then provided detailed comments on this very question. For instance, API's comment stated:

> Fugitive emissions do not correlate to production. A production rate gives no indication of the type or number of equipment that are located at the site. … API believes it more appropriate and would prefer that the rule be based on the process equipment located at the site rather than a low production rate since fugitive emissions are based simply on the number of components associated with the process equipment.

API Comments 104 (Attach. 17). *See also* TXOGA Comments 40-41 (Attach. 18) (discussing proposed exemption for low producing wells); IPAA Comments 29 (Attach. 19) (same). Despite EPA's request, no industry commenter provided information to show that low-production wells leak less pollution than higher-producing wells. 81 Fed. Reg. at 35,856. Environmental commenters also responded, providing extensive data and analysis demonstrating that low-producing well sites do *not* exhibit lower fugitive emissions than higher-producing wells. *See* Clean Air Task Force Comments 35-42 (Attach. 20).

In the final 2016 Rule, after considering the various arguments and data received from commenters, EPA concluded that "well site fugitive emissions are not correlated with levels of production, but rather [are] based on the number of pieces of equipment and components." 81 Fed. Reg. at 35,856. On that basis, EPA decided to include low-production wells in the final Rule's leak detection and repair program. *Id*.

The inclusion of low-production well sites in the final program stemmed from comments expressly requested and received by EPA and plainly was a logical outgrowth of the proposal and comments received. *See City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007); *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) ("[A]ny reasonable party should have understood that EPA might reach the opposite conclusion after considering public comments."). The agency provided far more than the required "fair notice of the subjects and issues involved." *Husqvarna AB v. EPA*, 254 F.3d 195, 203 (D.C. Cir. 2001); *see Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (agency need only be "reasonabl[y] specific[]" about the "range of alternatives being considered"). Consequently, EPA may neither open a reconsideration proceeding on that subject nor issue a stay.

Alternative Compliance. Second, the Administrator purported to grant reconsideration on "the process and criteria for requesting and receiving approval for the use of alternative means of emission limitations." 82 Fed. Reg. at 25,731. But this is an issue on which no party sought reconsideration. Once again, API explicitly categorized this as an "other issue" for which it was not seeking reconsideration. Attach. 9 at 9, 15-16. IPAA took the same position, Attach. 11 at 8-9, and TXOGA "adopt[ed] the API petition as its own," Attach. 12 at 2-3. GPA Midstream Association did not raise this issue at all. Attach. 10. The

Administrator now seeks to grant reconsideration—and a stay—on an issue raised by no administrative petitioner, something EPA has no authority to do under section 307(d)(7)(B).

Even if EPA *could* reconsider an issue *sua sponte*, the section 307(d)(7)(B) factors are not met by this issue. EPA sought and received comment on alternative compliance, and the final 2016 Rule was plainly a logical outgrowth of the proposal.

The proposed rule specifically solicited comment on the criteria for evaluating whether voluntary corporate fugitive emission programs could be deemed equivalent to the proposed leak detection and repair requirements, asking whether EPA could "define those regimes as constituting alternative methods of compliance." 80 Fed. Reg. at 56,638. The proposal also solicited comment on "how to determine whether existing state requirements … would demonstrate compliance with the federal rule." *Id*. at 56,595.

EPA received detailed comments on the issue. API asked EPA to "exempt sites subject to state, local or other federally enforceable leak detection programs" and provided EPA with a table comparing various state programs to the proposed federal program. Attach. 17 at 102-03, Attach. F. In addition, API requested that EPA permit use of alternative technologies for the leak detection and repair

program, and offered a set of criteria and procedures for approving such technologies. *Id.* at 135-40.

In response to these and other comments, the final Rule included an application process by which source operators could receive approval to meet their leak detection and repair obligations through "alternative means of emissions limitations." 81 Fed. Reg. at 35,871; *see also* 40 C.F.R. § 60.5398a. EPA identified this provision as a mechanism for recognizing both equivalent state level standards and emerging technologies. 81 Fed. Reg. at 35,860-61, 35,871.

The Administrator's current grant of reconsideration is premised on the claim that industry lacked an opportunity to comment on the final Rule's alternative compliance *application process*—despite the fact that it was added to the Rule in direct response to the industry comments. 82 Fed. Reg. at 25,731. This approval process for alternative compliance is the very model of a logical outgrowth—an "agency modification of a proposed rule, in response to the comments it solicited and received on alternative possibilities." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998). As explained above, a proposed rule need only be "reasonabl[y] specific[]," *Small Refiner*, 705 F.2d at 549, "to fairly apprise interested parties of the issues involved, but it need not specify every precise proposal which the agency may ultimately adopt as a rule," *Nuvio Corp. v. Fed. Commc'ns Comm'n*, 473 F.3d 302, 310 (D.C. Cir. 2006)

(quotations and alterations omitted); *see also Daniel Int'l Corp. v. Occupational Safety & Health Review Comm'n*, 656 F.2d 925, 932 (4th Cir. 1981) (finding that this same principle "is particularly true when proposals are adopted in response to comments from participants in the rulemaking proceeding").

Furthermore, the alternative compliance approval issue does not qualify as an objection of central relevance to the 2016 Rule's outcome. None of the administrative petitioners' (or the agency's) expressed concerns meets EPA's long-established test for central relevance, because none "provides substantial support for the argument that the regulation should be revised." *See, e.g.*, 75 Fed. Reg. 49,556, 49,561 (Aug. 13, 2010) (citing EPA standard for determining what issues are of central relevance); 45 Fed. Reg. 41,211, 41,213 (June 18, 1980) (similar). API and other administrative petitioners merely ask for clarification about details of the approval procedure EPA provided in the final Rule (such as whether a trade association may submit an application on behalf of multiple firms)—details that API suggested could easily be clarified through guidance without revising the rule. *See, e.g.,* Attach. 9 at 15-16.

Accordingly, the alternative compliance issue could not be a basis for reconsideration even if administrative petitioners had asked for it, which they did not.

Professional Engineer Certification & Technical Infeasibility Exemption.

The two issues that the Administrator added to the reconsideration proceeding in his June 5 notice—the professional engineer certification requirement and technical infeasibility exemption—likewise do not meet the threshold requirements of section 307(d)(7)(B). *See* 82 Fed. Reg. at 25,732. In the preamble to the proposed rule, EPA specifically asked "whether [it] should specify criteria by which the PE [professional engineer] verifies that the closed vent system is designed to accommodate all streams routed to the facility's control system, or whether [EPA] might cite to current engineering codes that produce the same outcome." 80 Fed. Reg. at 56,649. Industry petitioners then commented on this issue. *See, e.g.*, Attach. 17 at 48-49. Having had the opportunity to raise all their concerns about professional engineer requirements in the comment period, industry's objection (now accepted by the Administrator for granting reconsideration) that the agency supposedly did not expressly consider the cost of requiring professional engineer verification does not provide a basis for further reconsideration. Rather, it may be raised with this Court in a challenge to the 2016 Rule. Moreover, it is a wholly unsupported claim in light of the thoroughness of the agency's assessment of the 2016 Rule's overall costs, and would not provide a reasonable basis for revising the Rule.

Likewise, for the same reasons that they cannot complain about alternative compliance, *supra* p. 17-20, industry petitioners have no basis to complain about the 2016 Rule's addition of an exemption from standards for pneumatic pumps that they explicitly requested. 81 Fed. Reg. at 35,850. The proposed rule required owners or operators to "connect the pneumatic pump affected facility through a closed vent system." 80 Fed. Reg. at 56,666. The 2016 Rule exempts pneumatic pumps at certain sites from emissions reductions when it is technically infeasible to control emissions, and requires such infeasibility to be certified by professional engineers. 40 C.F.R. § 60.5393a(b)(5). Administrative petitioners commented on both professional engineer certification and the parameters for the pneumatic pump exemption. *See* Attach. 17 at ES-3, 78; EPA, Response to Comments at 5-10 to 5-11 (Attach. 21). The final requirement is plainly a logical outgrowth of the proposal and comments, and thus ineligible for reconsideration.

The Administrator has identified no proper basis for reconsideration under section 307(d)(7)(B). For that reason, EPA has no authority to issue the 90-day stay.

C. The administrative stay is also arbitrary and capricious.

Even if the Administrator had a basis to invoke reconsideration under section 307(d)(7)(B), the stay the agency has imposed is arbitrary and capricious

both because it is overbroad and because the Administrator did not consider the relevant factors or adequately explain his decision.

Given the narrowness of the purported bases for reconsideration, it was arbitrary and capricious to issue an expansive stay covering the entire leak detection and repair program. Consistent with the general requirement that stays be "narrowly tailored," *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 842 (D.C. Cir. 1985), EPA's past practice is to limit agency stays to the specific issues under reconsideration. For example, in March 2005, EPA granted reconsideration of a final rule regarding interstate transport of nitrogen oxides, but stayed that rule only as it applied to administrative petitioner Georgia. 70 Fed. Reg. 9897, 9897 (Mar. 1, 2005). Likewise, in December 2010, EPA granted reconsideration of a rule setting section 112 standards for chemical manufacturing area sources, but only stayed provisions related to Title V permit applications. 75 Fed. Reg. 77,760, 77,761 (Dec. 14, 2010).

The Administrator's departure from that practice here is arbitrary and capricious. That the agency may be reconsidering an exemption for low-production wells provides no reason to stay the standards for higher production wells or compressor stations. And it was also patently arbitrary and capricious to stay the entire leak detection and repair requirements because of alleged flaws in the procedure for approving alternative means of compliance for a subset of

sources. As discussed *supra* p. 20, even API conceded that the clarifications sought in the application procedure could have been addressed through guidance and did *not* require rulemaking. A need to clarify those *application* details would hardly justify staying the entire program.

The Administrator's cursory explanation for the stay also does not meet even the minimum requirements of reasoned agency decision-making, according to which an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted).

Here, the Administrator made no effort to demonstrate that industry would suffer any substantial, let alone irreparable, harm if the Rule's requirements took effect on June 3, 2017, as long anticipated. Nor did he assess the damage done to public health and welfare during a 90-day administrative stay occurring right in the midst of the summer peak ozone season. There was also no balancing of equities or determination whether the stay is in the public interest. Given the statute's strong default rule that promulgated rules should come into effect (and that reconsideration does not automatically delay compliance dates), EPA's complete failure to consider the relevant factors renders the stay arbitrary and capricious.

Finally, given the Administrator's open acknowledgement of his "inten[t]" to "broadly" review the "entire 2016 Rule," 82 Fed. Reg. at 25,732, his flimsy rationale for granting reconsideration was plainly a pretext for issuing an immediate stay of overbroad scope without notice and comment. It is thus as unmoored from the purposes of the reconsideration provision as the stay struck down in *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33 (D.D.C. 2012) (finding EPA's stay arbitrary and capricious because EPA failed to "ground" its action in the purposes of the authorizing provision, there 5 U.S.C. § 705).

II. Petitioners Meet the Other Factors for a Judicial Stay.

To obtain a judicial stay, Petitioners must demonstrate: (a) a likelihood of success on the merits; (b) that they are likely to suffer irreparable harm in the absence of injunctive relief; (c) that the balance of equities favors an injunction; and (d) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Section I, *supra*, establishes that Petitioners are likely to succeed on the merits. Petitioners also meet the other factors.

A. Petitioners and their members are being irreparably harmed.

Every day that the stay is in effect many of Petitioners' members and similarly situated people are being exposed to excessive amounts of air pollution that would otherwise have been avoided if these requirements to find and fix leaks remained in force. The number of wells at issue is large. According to declarant

Dr. David Lyon, more than 18,000 oil and gas wells throughout the country have been drilled, fractured, or re-fractured since the Rule was proposed on September 18, 2015.[10] Lyon Decl. ¶ 9. More than 14,000 such wells are currently producing oil or natural gas based on the latest available data, and thus are subject to the leak detection and repair requirements. *Id.* ¶ 10. Absent the stay, the owners or operators of such wells were required to have *completed* a first round of monitoring for leaks by no later than June 3, 2017, and to fix leaks within 30 days of that initial inspection. 40 C.F.R. § 60.5397a(f), (h). Moreover, more than 11,000 covered wells are both currently producing *and* located in states that do not have their own programs. Lyon Decl. ¶ 12. Thus, these wells would avoid responsibility to conduct *any* inspections and repairs under the administrative stay.

If these wells do not comply with the federal requirements, Dr. Lyon estimates they could emit up to approximately 17,000 additional tons of methane, 4,700 additional tons of smog-forming VOCs, and 181 additional tons of hazardous air pollutants, such as benzene and formaldehyde during the 90-day stay period. *Id.* ¶ 21 & tbl 3. Based on EPA's own analysis, Dr. Lyon has estimated that 105 new or modified compressor stations were constructed since September 2015. *Id.* ¶¶ 16, 25 & tbl 4. These sources, for which leak detection and repair

[10] This is the date that defines wells subject to the 2016 Rule. 42 U.S.C. § 7411(a)(2).

requirements are now likewise stayed, could add approximately 1,000 tons of methane, 240 tons of VOCs, and 11 tons of hazardous air pollutants. *Id.*

These emissions have irreparable consequences on Petitioners' members' health. Dr. Lyon estimates that more than 1,800 wells subject to the federal program and not covered by state programs are located in counties where ozone levels exceed EPA's 2008 ozone ambient air quality standards. *Id*. ¶ 21 & tbl 3. He projects that such wells will, as a result of the stay, emit up to an additional 832 tons of VOC in these communities struggling with ozone pollution. *Id.* During the 2016 ozone season, counties with wells that would be subject to the NSPS but for the administrative stay experienced 7,832 moderate days (yellow flag warning), 549 days deemed unhealthy for sensitive groups (orange flag warning), 94 unhealthy days (red flag warning), and 6 very unhealthy and hazardous days (purple flag warning). Craft Decl. ¶ 15. Though the 2017 ozone season has just begun, counties with covered wells have already been subject to warnings in each of these categories. *Id.*

Moreover, these additional emissions will occur during the hot summer months when ozone levels are highest, when large numbers of Petitioners' members and similarly situated people are outdoors, and when the health effects of ozone exposure are aggravated by heat. *Id.* ¶ 17. Ozone exposure impairs lung functioning and leads to missed school and work days, hospital and emergency

room visits, and serious cardiovascular and pulmonary problems such as shortness of breath, bronchitis, asthma attacks, stroke, heart attacks, and death. 81 Fed. Reg. at 35,837. Children, the elderly, low-income communities, and people with pre-existing heart or lung conditions are particularly vulnerable to ozone. *Id.*; Craft Decl. ¶ 17. Likewise, exposure to hazardous air pollutants such as benzene and formaldehyde can cause serious illnesses, including cancer and neurological damage. 81 Fed. Reg. at 35,837, 35,889; Craft Decl. ¶ 19.

These adverse health effects are especially dangerous to people who live within close proximity to well sites or compressor stations with leaking components located in the vast majority of states that do not have strong state-level leak detection and repair programs. For example, Sierra Club and Earthworks member Lois Bower-Bjornson, who resides in Pennsylvania, a state without mandatory leak detection and repair requirements at well sites, lives within approximately one and a half miles of 15 active new wells, including four that are closer than 2,000 feet from her family's home. Decl. of Lois Bower-Bjornson ¶¶ 3-4, 7 (Attach. 22). 18,793 other Sierra Club members live in ozone-constrained counties with one or more new oil and gas wells that lack mandatory state-level leak detection and repair requirements for those wells. Decl. of Huda Fashho ¶ 9 (Attach. 23). Likewise, nearly 10,000 of Petitioner Environmental Defense Fund's members live within 10 miles of an active new well subject to the

2016 Rule's program but not covered by state programs. Decl. of John Stith ¶ 12 (Attach. 24). Tens of thousands of other Americans are similarly situated and exposed.

Methane emissions will likewise be much greater as a result of the delay in monitoring and fixing leaks. During the time these emissions remain in the atmosphere, they will have the same 20-year climate impact as over 300,000 passenger vehicles driving for one year or over 1.5 billion pounds of coal burned. Ocko Decl. ¶ 10. This methane ultimately decays into carbon dioxide, which then remains in the atmosphere for decades or even centuries, all the while trapping heat and disrupting our climate. Once in the atmosphere, there is no available mechanism to remove this climate pollution or reverse its disruptive effects. *Id.*[11]

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

Increased air pollution from fossil fuel extraction or combustion constitutes irreparable harm, as once the pollution is in the air the damage is done and cannot

[11] For similar reasons, Petitioners have standing to seek this relief. *See* Petitioners' organizational and member declarations. (Attachs. 22-33).

be reversed. *See, e.g., Sierra Club v. U.S. Dep't of Agric., Rural Utils. Serv.*, 841 F. Supp. 2d 349, 358 (D.D.C. 2012) (finding that coal plant expansion would "emit substantial quantities of air pollutants that endanger human health and the environment and thereby cause irreparable harm") (quotation omitted); *Diné Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209, 2015 WL 4997207, at *48 (D.N.M. Aug. 14, 2015), *aff'd*, 839 F.3d 1276 (10th Cir. 2016) (finding irreparable injury where "even properly functioning directionally drilled and fracked wells produce environmental harm . . . includ[ing] air pollution"); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 256 (D.D.C. 1972) (similar).

Even if the delay in implementing the requirements ends once the 90-day period expires (which seems unlikely given EPA's apparent intent to further suspend them), the damage from the stay will have been done and will be irreversible. *See, e.g., Beame v. Friends of the Earth*, 434 U.S. 1310, 1313-14, (1977) (Marshall, J., in chambers) (recognizing "the irreparable injury that air pollution may cause during [a two-month] period, particularly for those with respiratory ailments"); *Southeast Penn. Transp. Auth. v. Int'l Ass'n of Machinists & Aerospace Workers*, 708 F. Supp. 659, 663-64 (E.D. Pa.) (preliminarily enjoining subway workers from striking for even one day in part because "[t]he absence of commuter rail service will greatly increase the numbers of persons

utilizing automobiles . . . and cause high levels of air pollution"), *aff'd* 882 F.2d 778 (3d Cir. 1989).

As explained above, the harm to Petitioners' members will be exacerbated because the removal of regulatory protections occurs during the summer, when ozone formation is greatest. *See Or. State Pub. Interest Research Grp. v. Pac. Coast Seafoods Co.*, 374 F. Supp. 2d 902, 904, 907 (D. Or. 2005) (enjoining defendant from discharging pollutants and noting that the harm would be "enhanced by the impending summer processing season," during which time the negative environmental impacts of discharges "[are] paramount").

EPA's delay of the leak detection and repair requirements will irreparably injure Petitioners' members.

B. The public interest and balance of equities support this Court's issuance of a judicial stay.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences" when issuing an injunction. *Winter*, 555 U.S. at 24. Here, the public benefits of the leak detection and repair requirements far outweigh any harm that may occur to oil and gas companies from keeping the requirements in effect.

As explained above, the requirements of the 2016 Rule will significantly reduce emissions of methane, VOCs, and hazardous air pollutants from new oil and gas sources subject to the 2016 Rule. Particularly for Americans who live in

close proximity to wells and other facilities, the health benefits of controlling those emissions are substantial. Implementing the 2016 Rule without delay will also significantly reduce methane emissions, a highly potent greenhouse gas, providing relief to an atmosphere already overburdened with heat-trapping pollutants. EPA concluded these climate benefits alone outweighed costs by $170 million for the entire Rule in 2025. 81 Fed. Reg. at 35,828.

By contrast, the oil and gas companies charged with monitoring and fixing their leaks face only modest compliance expenditures and any harm they would face from the relief requested would be small. In comments on EPA's proposed rule, a leak detection and repair company indicated that it provides leak monitoring surveys for $250 per well, and other sources have documented similarly modest costs. Decl. of Jonathan R. Camuzeaux and Dr. Kristina Mohlin ¶¶ 22-23 (Attach. 34). These expenditures represent less than a fraction of a percent of the revenues these wells produce, which, on average, have produced more than $3 million in revenue per well, *id.* ¶¶ 11, 12, and a small percentage of the millions of dollars companies invest to drill and complete new wells, *id.* ¶ 14. EPA's own analysis of the final Rule indicates that the standards as a whole would have negligible impacts on drilling activity, oil and natural gas production, and energy prices. Attach. 3 at 6-7 to 6-9 & tbls 6-2 & 6-3. Moreover, compliance with the leak detection and repair provisions will ensure that natural gas that would otherwise be

leaked to the atmosphere is instead captured and either sold, generating revenue, or put to beneficial use. Camuzeaux Decl. ¶¶ 8-10. Companies in places like Colorado, Wyoming, and Ohio are already complying with similar state requirements.

Companies have had a year to plan for compliance with these initial survey requirements. Indeed, EPA provided for this long lead time in response to requests from API and others for a one-year or more compliance deadline. *E.g.*, Attach. 17 at 121; *see* Attach. 21 at 4-482. EPA's decision now to further suspend these requirements is particularly inequitable.

Retaining the leak detection and repair requirements as planned greatly benefits the health of Americans and the stability of the earth's climate. These benefits far outweigh any modest costs of complying with those requirements on schedule. Therefore, the balance of equities of the parties and the public interest as a whole, overwhelmingly favor a judicial stay of EPA's action.

CONCLUSION

The Court should grant the motion for a judicial stay of EPA's unlawful June 5, 2017, stay of provisions of the 2016 Rule. In the alternative, the Court should grant the motion for summary disposition on the merits, and vacate EPA's unlawful administrative stay.

DATED: June 5, 2017

Respectfully submitted,

/s/ *Susannah L. Weaver*

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 7626 words.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2017, I have served the foregoing Emergency Motion for a Stay or, in the Alternative, Summary Vacatur, on all parties through the Court's electronic filing (ECF) system and by email.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 18(a)(1)

I hereby certify that this Emergency Motion for a Stay, or in the Alternative, Summary Vacatur complies with D.C. Circuit Rule 18(a).

Relief was previously requested from the agency, Respondent U.S. Environmental Protection Agency ("EPA"). As stated in the Emergency Motion, Petitioners sent two letters to the Administrator objecting to the challenged action and requesting that he not issue or withdraw the stay or otherwise respond. Petitioners have therefore complied with D.C. Circuit Rule 18(a)(1).

DATED: June 5, 2017

/s/ *Susannah L. Weaver*
Susannah L. Weaver