

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

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CLEAN AIR COUNCIL, EARTHWORKS,))
ENVIRONMENTAL DEFENSE FUND,))
ENVIRONMENTAL INTEGRITY))
PROJECT, NATURAL RESOURCES))
DEFENSE COUNCIL, and SIERRA))
CLUB,))
))
<i>Petitioners,</i>)	No. 17-1145
)	
v.)	
)	
SCOTT PRUITT, Administrator,)	
ENVIRONMENTAL PROTECTION)	
AGENCY, and UNITED STATES)	
ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
<i>Respondents.</i>)	
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PETITIONERS’ MOTION TO ISSUE THE MANDATE

Petitioners respectfully request that the Court issue the mandate in this case forthwith pursuant to Federal Rule of Appellate Procedure 41(b) and Circuit Rule 41(a)(1) (Court “retain[s] discretion to direct immediate issuance of its mandate....”). As the Court recognized, any further withholding of the mandate would “hand the agency, in all practical effect, the very delay in implementation this [Court] determined to be ‘arbitrary, capricious, [and] ... in excess of [EPA’s]

statutory ... authority.” Order, ECF 1683944 (July 13, 2017) (“July 13 Order”). Each day of delay injures Petitioners’ members and similarly situated Americans. While the Court afforded EPA a 14-day delay to consider its options for further appeals, the agency filed no petition for rehearing. The Industry and State petitions for rehearing en banc are transparent attempts to seek further delay, and do not warrant any further withholding of the mandate.

A. Further withholding of the mandate would result in the very delay in implementation that this Court found unlawful.

The leak detection and repair provisions of the 2016 Rule were set to commence—and begin delivering significant benefits to Petitioners’ members and other Americans—on June 3, 2017. But on June 5, 2017, Administrator Pruitt unlawfully stayed these and other requirements of the Rule *retroactively* from June 2 until August 31, 2017. Because the stay would irreparably harm their members by delaying these critical safeguards during ozone season, Petitioners filed an emergency motion at the earliest possible moment. On July 3, this Court ruled that the Administrator’s “90-day stay was unauthorized by section 307(d)(7)(B) and was thus unreasonable,” and “vacate[d] the stay as ‘arbitrary, capricious, [and] in excess of statutory ... authority.’” Opinion 11, ECF 1682465 (July 3, 2017) (“Slip Op.”) (quoting 42 U.S.C. § 7607(d)(9)(A), (C)).

Yet it is now 58 days after the June 3 deadline, and Administrator Pruitt and his industry and state allies continue to benefit from the unlawful stay. Delay has

been their goal from the start. Administrator Pruitt made public his intention to issue the stay in April, but did not publish the stay in the Federal Register until *after* the compliance deadlines had passed, thereby blocking any earlier court challenge. After the Court decided the merits and issued the mandate, the Administrator sought to delay the mandate for more than seven weeks. EPA Mot. to Recall Mandate 1-3, 6, ECF 1683079 (July 7, 2017) (“Recall Mot.”) (stressing the “interest in affording *the Government* an adequate opportunity to review the Court’s decision and seek meaningful review”) (emphasis added). The Administrator in fact filed no petition for rehearing within the 14-day reprieve granted by the Court. Instead, Industry and State Respondent-Intervenors picked up the quest for delay, with one petitioning for rehearing en banc only at the eleventh hour of the last day, and the other waiting until past that period to file a “me too” petition. They ask for further delay in issuing the mandate “until after disposition of [their] petition[s].” Industry Pet’n for Rehearing En Banc 1, ECF 1686243 (July 27, 2017) (“Industry Pet’n”).

The Industry and State Respondent-Intervenors do not even claim the existence of extraordinary circumstances or a question of exceptional importance to warrant en banc rehearing. *See* Fed. R. Civ. P. 35(a). They assert that review is necessary to secure and maintain uniformity of the court’s decisions. Indus. Pet’n 1. But they cite no serious conflicting authority to support their primary argument

that the stay is not a reviewable final action because the grant of reconsideration would be unreviewable standing alone. They cite only an Eastern District of Pennsylvania decision regarding class certification and an attorney's argument in an 1866 Supreme Court decision regarding bills of attainder and ex post facto laws. *Id.* at 10 (citing *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 283 (E.D. Pa. 2003) & *Cummings v. Missouri*, 71 U.S. 277, 288 (1866)).

The filing of such flimsy petitions cannot be permitted to accomplish the very delay this Court found unlawful, to the detriment of Petitioners' members and other Americans who are suffering continued exposure to dangerous—and easily preventable—air pollution.

B. Each additional day of delay injures Petitioners' members.

The administrative stay that this Court found arbitrary, capricious, and contrary to law is now nearly two months old. Every day that the stay remains in place, Petitioners' members and similarly situated Americans are exposed to excessive amounts of air pollution from more than 11,000 oil and gas wells—pollution that compliance with the Rule would reduce or avoid. Pet'rs' Emergency Mot. for a Stay 25-26, ECF 1678141 (June 5, 2017).

The stay is causing substantial additional methane, ozone-forming VOCs, and hazardous air pollutants such as benzene and formaldehyde to be released into the air of communities near these wells. *Id.* at 26. Many of these communities are

already struggling with ozone pollution, leading to a variety of irreparable harms including missed school and work days, hospital and emergency room visits, and serious cardiovascular and pulmonary problems such as shortness of breath, bronchitis, asthma attacks, strokes, heart attacks, and deaths. *Id.* at 27-28 (citing 81 Fed. Reg. 35,824, 35,837 (June 3, 2016)). Excess methane emissions remain in the atmosphere for decades or more and there is no available mechanism to remove this climate pollution or reverse its disruptive effects. *Id.* at 29.

Against the substantial factual showing of injury made by Petitioners, Administrator Pruitt and his allies have not offered any support for the proposition that compliance with the duly promulgated provisions of the 2016 Rule would cause significant hardship to regulated entities that had a year's lead time to prepare. Instead, they argue that the Administrator's proposal to *extend* the illegal stay justifies their continued non-compliance. Recall Mot. 5; Industry Resp. ISO Recall Mot. 4-5, 8-10, ECF 1683427 (July 11, 2017).

EPA has not revised the 2016 Rule, and unless and until it does so, the agency is bound to enforce it and industry is bound to comply with it. *See Nat'l Family Planning & Repro. Health Ass'n*, 979 F.2d 227, 234 (D.C. Cir. 1992) (“[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.” (citing *U.S. v. Nixon*, 418 U.S. 683, 695-96 (1974))). Moreover, Administrator Pruitt's proposals to further extend the stay are

themselves of dubious legality. His proposals do not even cite any statutory authority for the proposition that the agency may stay or postpone the compliance dates of the duly-promulgated 2016 Rule while the Administrator mulls revisions to it. The possibility that EPA may someday lawfully stay or revise the 2016 Rule is no reason to allow industry to avoid compliance with the Rule now.

C. In the alternative, this Court should grant Petitioners' emergency motion for a stay.

Given its July 3 decision on the merits and the immediate issuance of the mandate, the Court dismissed Petitioners' motion for a judicial stay as moot. Order 2, ECF 1682468 (July 3, 2017). But the basis for finding that motion moot no longer obtains if the mandate continues to be withheld while the rehearing petitions are considered. For this reason, if the mandate is further delayed, Petitioners respectfully request that the Court reconsider their fully-briefed emergency motion, determine that the equities favor staying the Administrator's illegal action, and stay the unlawful administrative stay.

CONCLUSION

For the reasons stated herein, the Court should issue the mandate forthwith. In the alternative, the Court should grant Petitioners' emergency motion for a stay.

DATED: July 31, 2017

Respectfully submitted,

/s/ Susannah L. Weaver

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Motion to Issue 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 1,238 words.

CERTIFICATE OF SERVICE

I certify that on this 31st day of July, 2017, I have served the foregoing Motion to Issue the Mandate through the Court's electronic filing (ECF) system.

DATED: July 31, 2017

/s/ Susannah L. Weaver
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