

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

**MOTION OF 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, TO ISSUE MANDATE**

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Massachusetts*

Additional counsel on signature pages

The Commonwealths of Massachusetts and Pennsylvania, the States of Connecticut, Delaware, Illinois, Iowa, Maryland, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, the District of Columbia, and the City of Chicago (collectively, “State Petitioner-Intervenors”), hereby move pursuant to Federal Rule of Appellate Procedure 41(d) and Circuit Rule 41(a)(1) for issuance of the mandate consistent with this Court’s July 13, 2017, Order for the following reasons:

1. On July 3, 2017, in response to Petitioners’ Emergency Motion for a Stay, or, in the Alternative, Summary Vacatur (“Emergency Motion”), this Court issued an order (“July 3 Order”) vacating Administrator Pruitt’s administrative stay (“Administrative Stay”) of key provisions of EPA’s 2016 New Source Performance Standards governing 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.”).

2. Published in the Federal Register on June 3, 2016, the 2016 Rule had been in effect for nearly a year, since August 2, 2016, 81 Fed. Reg. 35,824 (June 3, 2016), when, on June 5, 2017, Administrator Pruitt published a “[n]otice of reconsideration and partial stay,” of the 2016 Rule. 82 Fed. Reg. 25,730. As this Court concluded in its July 3 Order, EPA “lacked authority under the Clean Air Act to stay the rule” Slip Op. at 2. The Court instructed the Clerk to issue the

mandate forthwith, and the mandate issued that same day. Order, ECF Doc. No. 1682468 (July 3, 2017).

3. On July 7, Respondent EPA moved to recall the mandate, ECF Doc. No. 1683079; Petitioners and State Petitioner-Intervenors filed oppositions to EPA's motion on July 11. ECF Doc. Nos. 1683449 and 1683433. On July 13, the Court issued an order ("July 13 Order") recalling the mandate for a limited fourteen-day period. ECF Doc. No. 1683944. The July 13 Order provided that the mandate would be recalled to provide Respondent EPA with time to determine whether to seek rehearing or other relief, and it made clear why issuance of the mandate would not be further stayed: "To stay issuance of the mandate for longer would hand the agency, in all practical effect, the very delay in implementation this panel determined to be 'arbitrary, capricious, [and] . . . in excess of [EPA's] statutory . . . authority.' 42 U.S.C. § 7607(d)(9)(A), (C)."

4. Respondent EPA neither petitioned the Court for rehearing nor moved for any further relief within the fourteen-day mandate recall period. On July 27, the last day of that fourteen-day period, at 10:24 p.m., Industry Respondent-Intervenors filed a petition for rehearing *en banc*, ECF Doc. No. 1686243, and on the following morning, July 28, State Respondent-Intervenors also filed a petition for rehearing *en banc*. ECF Doc. No. 1686271. In their petition, Industry

Respondent-Intervenors request that the Court further stay the mandate. *Id.* at 16-17.

5. Federal Rule of Appellate Procedure 41(d) provides that, “[t]he timely filing of a . . . petition for rehearing *en banc* . . . stays the mandate until disposition of the petition . . . *unless the court orders otherwise.*” Fed. R. App. P. 41(d)(1) (emphasis supplied).

6. The Court’s July 13 Order recalled the mandate for fourteen days, until July 27, for the purpose of allowing EPA additional time to file a petition for rehearing (or seek other relief) during that period. Further staying the mandate in light of Respondent-Intervenors’ petitions would be inconsistent with that July 13 Order, which “otherwise” ordered a time for issuance of the mandate, Fed. R. App. P. 41(d), and it would effectively “hand the agency” the ability to implement its unlawful Administrative Stay of the 2016 Rule, an outcome this Court declared to be unacceptable. Despite the language in the Court’s July 13 Order, as of the time of this filing, the mandate has not yet been issued. Therefore, State-Petitioner Intervenors file this motion for its issuance forthwith.

7. The 90-day stay, which expires on August 31, 82 Fed. Reg. at 25,731, had already been in place for nearly a month when the Court’s July 3 Order issued; now, nearly two months have passed. 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 like benzene and formaldehyde have occurred and will continue to occur with each passing day that the unlawful Administrative Stay is effective.

8. These excess emissions will harm State Petitioner-Intervenors' residents. *See* State Petitioner-Intervenors' Motion to Intervene at ¶¶ 8-17. As EPA noted in its promulgation of the 2016 Rule, hazardous air pollutants like formaldehyde and benzene are known to cause cancer and other adverse health effects, including respiratory and neurological illness. 81 Fed. Reg. at 35,837. VOC emissions contribute to the formation of ground-level ozone, which, EPA has found, contributes to significant negative health effects, including coughing, throat irritation, lung tissue damage, the aggravation of existing conditions, such as asthma, bronchitis, heart disease, and emphysema, and is linked to premature death. *See* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292, 65,302-11 (Oct. 26, 2015); *see also* 81 Fed. Reg. at 35,837. Finally, as EPA stated in its promulgation of the 2016 Rule, "methane is a potent [greenhouse gas] with a 100-year [global-warming potential] that is 28-36 times greater than that of carbon dioxide." 81 Fed. Reg. at 35,830. Excess emissions of methane, caused by the suspension of the protections of the 2016 Rule, will contribute to climate change and its myriad potential harms to State Petitioner-Intervenors' residents. *See* State Petitioner-Intervenors' Motion to Intervene at ¶¶ 8, 16-17. By

contrast, neither of the rehearing petitions submitted by the Respondent-Intervenors demonstrate any harm that will occur either to the Respondent or the Respondent-Intervenors if the mandate issues now.

9. For these reasons, State Petitioner-Intervenors respectfully request that the Court issue the mandate forthwith, with no further delay.

10. Counsel for the Commonwealth of Massachusetts represents, pursuant to Circuit Rule 32(a)(2), that the other parties listed in the signature blocks below consent to the filing of this motion.

Respectfully submitted,

Dated: July 31, 2017

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MASSACHUSETTS

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the foregoing Motion to Issue Mandate was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word, it contains 1,015 words, in accordance with Federal Rule of Appellate Procedure 27(d)(1) and (2).

/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 Motion to Issue Mandate was filed on July 31, 2017, using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Peter C. Mulcahy

Peter C. Mulcahy