ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1145

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

CLEAN AIR COUNCIL, *et al.*,
Petitioners,

v.

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

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency 82 Fed. Reg. 25,730 (June 5, 2017)

PETITION OF INTERVENOR-RESPONDENTS FOR REHEARING EN BANC

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2016 NSPS Rule	"Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," 81 Fed. Reg. 35,824 (June 3, 2016)

INTRODUCTION AND RULE 35(B)(1) STATEMENT

The Industry Intervenor-Respondents[1] respectfully request *en banc* rehearing of the panel's *per curium* decision in *Clean Air Council v. EPA*, No. 17-1145. The panel's merits review of non-final agency action violates Supreme Court and D.C. Circuit precedent. *See* Fed. R. App. P. 35(b)(1)(A) (permitting *en banc* review when "the panel decision conflicts with a decision of the United States Supreme Court" or the reviewing court and "consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions"). Publishing this decision will compound the error. Rehearing *en banc* is necessary to correct this error and maintain uniformity regarding this Court's jurisdiction under the Clean Air Act ("CAA" or the "Act") and, more broadly, the definition of reviewable final agency action. As this petition for *en banc* rehearing has been timely filed, this Court should withhold the mandate until after the disposition of this petition. Fed. R. App. P. 41(d)(1); D.C. Cir. R. 41(a)(1).

BACKGROUND

The relevant facts are straightforward. In 2016, the United States Environmental Protection Agency ("EPA" or "Agency") issued a rule under the

[1] Industry Intervenor-Respondents are the American Petroleum Institute, GPA Midstream Association, the Interstate Natural Gas Association of America, Texas Oil & Gas Association, Western Energy Alliance, and the Independent Petroleum Association of America (and associations representing primarily other independent producers listed in the signature block to this filing).

Act. "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," 81 Fed. Reg. 35,824 (June 3, 2016) ("2016 NSPS Rule"). In April and June of 2017, EPA Administrator Pruitt granted administrative reconsideration of certain issues in the 2016 NSPS Rule. On June 5, 2017, EPA issued a three-month stay, pursuant to CAA § 307(d)(7)(B), of three segments of the 2016 NSPS Rule. "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").

On June 5, 2017, the Petitioners filed (1) a petition to review EPA's Stay Decision, and (2) an Emergency Motion for a Stay or, in the Alternative, Summary Vacatur (ECF No. 1678141). Under an expedited motions briefing schedule, EPA and the Industry Intervenor-Respondents opposed Petitioners' Emergency Stay Motion on the basis that this Court lacks jurisdiction to review non-final agency action.

On the basis of the motions briefing, the Court issued a *per curium* decision on July 3, 2017, with a dissenting opinion, vacating EPA's three-month stay. Op., *Clean Air Council v. Pruitt*, No. 17-1145, ECF No. 1682465 (D.C. Cir. July 3, 2017). The Court declined to reach the merits of the Petitioners' request for an emergency stay because it was "moot." Order at 2, *Clean Air Council v. Pruitt*,

No. 17-1145, ECF No. 1682468 (D.C. Cir. July 3, 2017) (ordering dismissal of the stay motion "as moot"); Op. at 11 (declining to evaluate whether to grant a stay pending judicial review).

Instead of evaluating whether to grant a stay pending judicial review, the panel decided the merits of EPA's decision to grant reconsideration. Initially, the panel correctly stated that "an agency's decision to grant a petition to reconsider a regulation is not reviewable final agency action." Op. at 6 (citing *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011)). The panel next determined that the three-month stay was reviewable final agency action. Op. at 6-10. The panel concluded that the issuance of the stay allowed the Court to review EPA's decision to grant reconsideration. Op. at 10 ("[A]lthough absent a stay we would have no authority to review the agency's decision to grant reconsideration, because EPA chose to impose a stay suspending the rule's compliance deadlines, we must review its reconsideration decision to determine whether the stay was authorized under section 307(d)(7)(B)."). The panel reached this conclusion by deciding that "CAA section 307(d)(7)(B) expressly links EPA's power to stay a rule to the two requirements for mandatory reconsideration." *Id*.

Having determined that it could review the merits of EPA's grant of reconsideration, the panel then evaluated whether EPA was required to grant reconsideration under CAA § 307(d)(7)(B). The panel assessed whether EPA gave

adequate notice of the issues under reconsideration and whether they were of central relevance to the rule. Op. at 13-23. The panel determined the reconsideration issues did not meet this test and thus ruled that EPA had no authority to issue the three-month stay under CAA § 307(d)(7)(B). The panel issued an order vacating EPA's three-month stay. Order at 1.

ARGUMENT

The panel's decision violates Supreme Court and D.C. Circuit caselaw because it entailed review of non-final agency actions: EPA's decision to grant administrative reconsideration and EPA's three-month stay. Publication of this decision furthers the conflict with existing Supreme Court and D.C. Circuit cases regarding this Court's ability to review non-final agency action. *See* D.C. Cir. R. 36(e) (noting that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in the disposition").

The panel arrived at this erroneous decision by constructing an artificial "rock and a hard place" conundrum using three steps. First, the panel correctly stated that EPA's decision to grant reconsideration is not "reviewable final agency action." Op. at 6. Second, the panel concluded that the three-month stay is final agency action because it is "tantamount to amending or revoking a rule." *Id.* Finally, the panel decided that it must review the merits of EPA's grant of reconsideration because the statute "expressly links EPA's power to stay a final

rule to the two requirements for mandatory reconsideration" in Section 307(d)(7)(B). Op. at 10. This chain of logic created a problem: to review the stay (which the panel concluded it must do because it decided the stay was final agency action), the panel necessarily had to assess the merits of EPA's grant of reconsideration (a non-final agency action).

The panel resolved its "rock and a hard place" conundrum by declaring an unreviewable non-final agency action (i.e., the grant of reconsideration) to be reviewable for purposes of assessing the validity of the stay. In other words, the panel cornered itself by deciding that the three-month stay compelled review of an unreviewable decision.

This "transformation" of a non-final agency action into a final agency action is ungrounded in the law and inconsistent with well-established Supreme Court and D.C. Circuit precedent. The law is clear–the panel lacked jurisdiction to review EPA's decision to grant administrative reconsideration.

Further, transforming non-final agency action to final agency action was unnecessary. The panel could have avoided this outcome in three different ways and should have done so to avoid outstepping its jurisdiction. The panel should have determined that the stay is committed to agency discretion by law. Alternatively, the panel should have found that the stay is not final agency action, as Judge Brown explained in her dissent. Lastly, the panel should have deferred to

EPA's statutory interpretation and found that reviewing the stay does not require reviewing the merits of EPA's grant of reconsideration.

Rehearing *en banc* is needed to correct these errors.

I. EPA'S DECISION TO GRANT ADMINISTRATIVE RECONSIDERATION IS NOT FINAL AGENCY ACTION AND CANNOT BE REVIEWED BY THIS COURT.

Supreme Court and the D.C. Circuit cases confirm what is clear on the face of Section 307(b) of the Act–the Clean Air Act only grants this Court jurisdiction to review final agency actions. 42 U.S.C. § 7607(b)(1) (stating that a petition for review of "any other nationally applicable regulations promulgated, or final action taken" by EPA under the Act "may be filed only in the United States Court of Appeals for the District of Columbia"). As the panel correctly recognized, a grant of reconsideration is not "final" under the Supreme Court's test for final agency action. The panel's decision is thus incorrect, as the panel cannot review what Congress and the Supreme Court have said it may not. A three-month stay does not and cannot transform EPA's grant of reconsideration into a final agency action.

The Supreme Court and the D.C. Circuit have explicitly recognized that the Circuit Courts' CAA jurisdiction is limited to final agency actions. *E.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980) ("Congress … vested the courts of appeals with jurisdiction under § 307(b)(1) to review 'any other final action.'"); *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 643 n.37 (D.C. Cir. 2016), *cert. denied*

sub nom. Am. Mun. Power v. EPA, No. 16-1168, 2017 WL 1134103 (June 26, 2017) (stating that the D.C. Circuit's jurisdiction "under the CAA is limited to 'final' actions"); *Dalton Trucking Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015) ("[W]e reiterate what the Supreme Court made clear thirty-five years ago: Section 307(b)(1) is a 'conferral of jurisdiction upon the courts of appeals.'") (quoting *Harrison*, 446 U.S. at 593); *Portland Cement*, 665 F.3d at 193 (holding that the Court lacked jurisdiction to hear a challenge to non-final agency action because the Act "gives us jurisdiction to review only 'final' agency actions").

The panel correctly stated that a grant of reconsideration is not final agency action under CAA § 307(b)(1). Op. at 6. To be final, agency action must meet two criteria. First, it "must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted). Second, the agency action "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id*. at 178 (internal quotation marks omitted).

Granting reconsideration meets neither of the criteria required for final agency action. EPA has begun a reconsideration proceeding, but has not yet made any definitive conclusion in that proceeding as to the 2016 NSPS Rule. *See Harrison*, 446 U.S. at 586 (1980) (evaluating Circuit Court's jurisdiction to review

an EPA action under CAA § 307 and noting that the parties agreed "that the Administrator's decision was 'final action' as that term is understood in the context of the Administrative Procedure Act and other provisions of federal law" because "the Administrator's ruling represented EPA's final determination concerning the applicability of the 'new source' standards to PPG's power facility"). EPA has not yet even issued a proposed rule stating whether EPA proposes to revise or retain the 2016 NSPS Rule. Granting a reconsideration petition, like granting a rulemaking petition, merely starts a process that will not culminate in final agency action until EPA completes the reconsideration proceeding. *Cf. Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984) (noting that "an agency decision not to amend long-standing rules *after a notice and comment period* is reviewable agency action") (emphasis added).

EPA's decision to grant reconsideration also has not determined any legal rights or consequences. "'The most important factor' in determining whether an agency action is one 'from which legal consequences will flow' 'concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities.'" *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016) *petition for cert. filed*, (U.S. Dec 05, 2016) (No. 16-739) (quoting *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014)). EPA's decision to grant reconsideration has no legal effect on regulated entities. It simply begins

an administrative process in which EPA may consider revising the 2016 NSPS Rule. Only time will tell whether EPA ultimately decides to make changes to the rule.

Because a grant of reconsideration is not final agency action, this Court lacks jurisdiction to review it. No other provision of the CAA provides authority for challenging EPA's decision to open a reconsideration proceeding.[2] And for good reason: it is inappropriate for this Court to evaluate the merits of an on-going administrative proceeding. The purpose of Section 307(d)'s exhaustion requirement "is to ensure that the agency is given the first opportunity to bring its expertise to bear on the resolution of a challenge to a rule." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) (per curiam); *see also Med. Waste Inst. & Energy Recovery Council v. EPA,* 645 F.3d 420, 428 (D.C. Cir. 2011). The panel's evaluation of whether the reconsideration issues were adequately noticed and of central relevance to the rule contradicts § 307(d)'s purpose by robbing EPA of the opportunity to evaluate these issues first through notice and comment

[2] CAA § 307(d)(7)(B) expressly provides for judicial review only when EPA denies a reconsideration petition (which is final agency action). 42 U.S.C. § 7607(d)(7)(B) ("If the Administrator refuses to convene [a proceeding for reconsideration], such person may seek review of such refusal in the United States court of appeals for the appropriate circuit as provided in [section 307(b)]."). Absent from § 307(d)(7)(B) is any suggestion that EPA's decision to grant reconsideration and undertake a rulemaking proceeding creates a right to immediately challenge said grant.

rulemaking. *Cf. TeleSTAR, Inc. v. F.C.C.*, 888 F.2d 132, 134 (D.C. Cir. 1989) ("If a party determines to seek reconsideration of an agency ruling, it is a pointless waste of judicial energy for the court to process any petition for review before the agency has acted on the request for reconsideration.").

In sum, the panel incorrectly determined that the issuance of the stay somehow transformed non-final action into reviewable final agency action. *See* Op. at 10. But the panel's desire to review EPA's stay cannot expand its limited jurisdiction. To the contrary, the Act plainly states that nothing in the Clean Air Act "shall be construed to authorize judicial review" of EPA orders "except as provided" in Section 307. 42 U.S.C. § 7607(e). Section 307(b)(1), in turn, limits this Court's original jurisdiction to final agency actions. Even the panel admits that EPA's grant of reconsideration is not a final agency action. Thus, the panel's decision to expand the jurisdictional bounds Congress set out in the Act was in error. *See O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 283 (E.D. Pa. 2003) ("In an attempt to secure our subject matter jurisdiction, litigants cannot do indirectly what they may not do directly."); *Cummings v. Missouri*, 71 U.S. 277, 288 (1866) ("The legal result must be the same, if there is any force in the maxim, that what cannot be done directly cannot be done indirectly").

II. THE PANEL COULD HAVE, AND SHOULD HAVE, AVOIDED REVIEW OF EPA'S GRANT OF RECONSIDERATION

A. This Court Lacks Jurisdiction to Review EPA's Stay Decision Because It Is Not a Final Agency Action.

The panel's determination that the stay was final agency action presents a second conflict with Supreme Court and D.C. Circuit caselaw. As detailed above, this Court only has jurisdiction to review final agency action. Finality requires that the action be the end of the agency's decisionmaking process and one that determines rights or obligations. 42 U.S.C. § 7607(b)(1). *Bennett*, 520 U.S. at 177-78 (internal quotation marks and citation omitted). As Judge Brown explained in her dissent, the stay meets neither of these criteria. First, the stay is not the end of EPA's decision making process. As Judge Brown states: "[H]itting the pause button is the antitheses of ending the matter. … The stay is 'essentially' nothing but a stay, and it does not qualify as 'final agency action' under the two-part inquiry set forth by the Supreme Court." Op. at 25, (Brown, J. dissenting). If this limited, three-month stay to preserve the status quo is "final agency action," then "every interlocutory action that leaves compliance to the discretion of the regulated party would justify judicial review." *Id*. This cannot be the case. In fact, because the stay is a procedural determination that is just one part of a broader rulemaking, § 307(d)(8) prohibits review of the stay now. 42 U.S.C. § 7607(d)(8).

The stay here is extremely limited: it affects only three portions of the rule and can last no more than three months. *See also id.* at 26-27 (distinguishing cases cited by the majority with EPA's action here, which is a "neutral, time-limited stay"). The stay is not an unbounded, potentially multi-year stay, such as under APA § 705. It is logical that Congress gave EPA wide discretion in issuing a stay because the remedy itself is so limited. The stay functions solely to allow EPA time to undergo reconsideration. It does not impact the ultimate decision that EPA makes in reconsideration. As Judge Brown stated, "If an intermediate stay is the *consummation* of an agency's decision-making, we have conflated the agency *preserving the status quo, i.e.,* forestalling the rule's requirements in order to reconsider them, with the agency *completing* a course of action, *i.e.*, ordering compliance." *Id.* at 29 (emphasis in original).

Second, the stay does not determine rights and obligations. The stay merely preserves the status quo that existed beforehand. The mere fact that an action has some consequences is insufficient to meet this criterion. As Judge Brown explained, "Agency actions of various kinds, 'final' or not, come with consequences. The relevant question is whether the consequences have a 'legal force or practical effect' *beyond* 'the disruptions that accompany' the agency making a decision to 'initiate proceedings.'" *Id.* (quoting *Fed Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 241, 243 (1980)) (emphasis in original).

The stay here is time limited and meant to facilitate EPA's reconsideration process. *Id.* at 30. Briefly preserving the *status quo* is not a "legal consequence" that causes EPA's decision to grant a stay to constitute reviewable final agency action.

Thus, the stay is not a final agency action over which the court has jurisdiction.

B. This Court Lacks Jurisdiction to Review EPA's Stay Decision Because It Is Committed to Agency Discretion by Law.

EPA's decision to issue a stay is not reviewable agency action. Courts lack jurisdiction when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). An action is committed to agency discretion if there is no law to apply–that is, if the reviewing court has no manageable standard by which to review the agency's action. *Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985).

Section 307(d)(7)(B) does not provide law that this Court can apply. The relevant provision reads:

> 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 … 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 …. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such 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).

Congress granted EPA wide discretion to issue a three-month stay to briefly preserve the *status quo* after a decision to grant reconsideration. The only statutory requirements governing an EPA decision to grant a stay are that: (1) EPA must have granted reconsideration; and (2) the stay may last "a period not to exceed three months." The statutory language does not provide any meaningful bounds on EPA's discretion. *See Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (action committed to agency discretion if statute has "no meaningful standard against which to judge the agency's exercise of discretion"). As such, CAA § 307(b)(7)(B) makes it impossible for a reviewing court to determine if EPA acted arbitrarily or capriciously. *See Heckler*, 470 U.S. at 830 (finding that a law committed to agency discretion "avoids conflict with the 'abuse of discretion' standard of review in § 706–if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion'").

As this case demonstrates, there is no way for this Court to evaluate the merits of an EPA decision to grant a stay without interrogating the merits of reconsideration–which this Court lacks jurisdiction to do. On the face of the statute, the Court's jurisdiction over a Section 307 stay is limited to whether the stay is limited to a three-month period and whether a reconsideration proceeding

was underway when the stay was granted. A decision to grant reconsideration entails the kind of "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," that is committed to agency discretion by law, "such as 'the procedures it adopts for implementing [a] statute.'" *Skalka v. Kelly*, No. CV 16-107, 2017 WL 1214400, at *4 (D.D.C. Mar. 31, 2017) (quoting *Heckler*, 470 U.S. at 831-32). In these circumstances, there is no meaningful standard of review. *See ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (review of a denial of reconsideration based on allegation of material error precluded because law committed to agency discretion).

C. EPA's Authority to Issue a Stay Under CAA § 307(d) Is Not Bound by the Mandatory Reconsideration Criteria.

The panel also erred in determining that the stay is only available during mandatory reconsideration. In EPA's view, the Act reasonably can be interpreted to authorize a Section 307 stay even when reconsideration is not required. EPA's interpretation of the statute here warranted deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

CAA Section 307(d)(7)(B) specifies that EPA must grant administrative reconsideration when: (1) "the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection" during the comment period or "the grounds for such objection arose after the period for public comment (but within the time specified for judicial review)"; and (2) the objection

"is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). By all accounts, EPA is authorized to grant a Section 307 stay when reconsideration is "mandatory" under these criteria.

Contrary to the panel's opinion, however, the statute does not "expressly link" authority to issue a Section 307 stay to these "mandatory" reconsideration criteria. In EPA's view, the text of the statute reasonably extends to permissive reconsideration proceedings: the words "such reconsideration" can reasonably be interpreted to refer to "a proceeding for reconsideration of the rule," regardless of whether it is mandatory or not. EPA Br. Opp'n at 11-13. This is consistent with the breadth of CAA § 307(d) generally, which applies to any rule that sets or revises standards under CAA § 111, such as the 2016 NSPS Rule.

The panel should have deferred to EPA's reasonable interpretation of an ambiguous provision. Doing so would have avoided the perceived need to reach unreviewable non-final agency action.

CONCLUSION

Rehearing *en banc* is needed because the panel's review of non-final agency action conflicts with Supreme Court and D.C. Circuit caselaw. The mandate should be withheld until the final disposition of this timely petition. Fed. R. App. P. 41(d)(1); D.C. Cir. R. 41(a)(1). If this Court is inclined to consider a different

schedule for issuing the mandate, the Intervenor-Respondents respectfully request this Court allow for briefing on the issue before the mandate is issued.

Dated: July 27, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)and 35(b) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing Petition of Intervenor-Respondents for Rehearing En Banc contains 3,896 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 3,900 words set by Federal Rule of Appellate Procedure 35(b)(2) and Circuit Rule 35(b). 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.

Dated: July 27, 2017

/s/ William L. Wehrum
William L. Wehrum

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of July 2017, a copy of the foregoing Petition of Intervenor-Respondents for Rehearing En Banc was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ William L. Wehrum
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ADDENDUM PURSUANT TO CIRCUIT RULE 35(c)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided July 3, 2017

No. 17-1145

CLEAN AIR COUNCIL, ET AL.,
PETITIONERS

v.

E. SCOTT PRUITT, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY AND ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

AMERICAN PETROLEUM INSTITUTE, ET AL.,
INTERVENORS

On Emergency Motion For A Stay Or,
In the Alternative, Summary Vacatur

Susannah L. Weaver, *Sean H. Donahue*, *David Doniger*, *Meleah Geertsma*, *Tim Ballo*, *Joel Minor*, *Adam Kron*, *Peter Zalzal*, *Alice Henderson*, *Vickie Patton*, *Tomás Carbonell*, *Andres Restrepo*, *Joanne Marie Spalding*, *Ann Brewster Weeks*, and *Darin Schroeder* were on the emergency motion for a stay or, in the alternative, summary vacatur and reply to responses in opposition to emergency motion for a stay or, in the alternative, summary vacatur.

Jeffrey H. Wood, Acting Assistant Attorney General, U.S. Department of Justice, and *Benjamin Carlisle*, Attorney, were on EPA's opposition to petitioners' emergency motion for a stay or, in the alternative, summary vacatur.

William L. Wehrum, *Felicia H. Barnes*, *Stacy R. Linden*, *John Wagner*, *Samuel B. Boxerman*, *Joel F. Visser*, *Sandra Y. Snyder*, *James D. Elliott*, *Shannon S. Broome*, *Charles H. Knauss*, and *John R. Jacus* were on the industry intervenor-respondents' response in opposition to petitioners' emergency motion for a stay or, in the alternative, summary vacatur.

Before: TATEL, BROWN, and WILKINS, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

Dissenting Opinion filed by *Circuit Judge* BROWN.

PER CURIAM: Petitioners, a group of environmental organizations, challenge the Environmental Protection Agency's decision to stay implementation of portions of a final rule concerning methane and other greenhouse gas emissions. For the reasons set forth in this opinion, we conclude that EPA lacked authority under the Clean Air Act to stay the rule, and we therefore grant petitioners' motion to vacate the stay.

I.

In June 2016, EPA Administrator Gina McCarthy issued a final rule establishing "new source performance standards" for fugitive emissions of methane and other pollutants by the oil and natural gas industries. 81 Fed. Reg. 35,824 (June 3, 2016).

The methane rule took effect on August 2, 2016, *id.*, and required regulated entities to conduct an "initial monitoring survey" to identify leaks by June 3, 2017, 40 C.F.R. § 60.5397a(f).

After EPA published the rule, several industry groups—including the American Petroleum Institute (API), the Texas Oil and Gas Association (TXOGA), and the Independent Petroleum Association of America (IPAA)—filed administrative petitions seeking reconsideration under section 307(d)(7)(B) of the Clean Air Act (CAA). 42 U.S.C. § 7607(d)(7)(B); *see also* 82 Fed. Reg. 25,731 (June 5, 2017). That provision sets forth the circumstances under which EPA *must* reconsider a rule. It provides that "[i]f the person raising an objection can demonstrate to the Administrator that [1] it was impracticable to raise such objection within [the notice and comment period] . . . and [2] 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). The statute also provides that 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." *Id.* The industry associations argued that CAA section 307(d)(7)(B) required EPA to reconsider the final rule because several of its provisions "were not included in the proposed rule and . . . [they were therefore unable] to raise an objection during the public comment period." *See, e.g.*, API, Request for Administrative Reconsideration of EPA's Final Rule "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," at 1 (Aug. 2, 2016) ("API Reconsideration

Request"). They also sought a stay "pending reconsideration." *Id.*

By letter dated April 18, 2017, the Administrator, now Scott Pruitt, stated that EPA "[found] that the petitions have raised at least one objection to the fugitive emissions monitoring requirements" that warrants reconsideration "under 307(d)(7)(B) of the CAA." Letter from E. Scott Pruitt to Howard J. Feldman, Shannon S. Broome, James D. Elliott, & Matt Hite, Convening a Proceeding for Reconsideration, at 2 (Apr. 18, 2017). Accordingly, the Administrator announced, "EPA is convening a proceeding for reconsideration" of two specific provisions of the methane rule. *Id.* The letter also stated that "EPA intend[ed] to exercise its authority under CAA section 307 to issue a 90-day stay of the compliance date" for the fugitive emissions requirements. *Id.*

On June 5—just two days after the deadline for regulated parties to conduct their first emissions surveys and begin repairing leaks, *see* 40 C.F.R. § 60.5397a(f)—EPA published a "[n]otice of reconsideration and partial stay" in the Federal Register, 82 Fed. Reg. at 25,730. Relying on CAA section 307(d)(7)(B), EPA granted reconsideration on four aspects of the methane rule: (1) the decision to regulate low-production wells, (2) the process for proving compliance by "alternative means," (3) the requirement that a professional engineer certify proper design of vent systems, and (4) the decision to exempt pneumatic pumps from regulation only if a professional engineer certified that it was "technically infeasible" to route such pumps "to a control device or a process." 82 Fed. Reg. at 25,731–32. In addition, the notice "stay[ed] the effectiveness of the fugitive emissions requirements, the standards for

pneumatic pumps at well sites, and the certification by a professional engineer requirements" for 90 days "pending reconsideration." 82 Fed. Reg. at 25,732. The notice explained that the stay had gone into effect on June 2, 2017—that is, three days before the notice was published in the Federal Register. 82 Fed. Reg. at 25,731.

On June 16, EPA published a notice of proposed rulemaking (NPRM) announcing its intention to extend the stay "for two years" and to "look broadly at the entire 2016 Rule" during "the reconsideration proceeding." 82 Fed. Reg. 27,645 (June 16, 2017). Comments on that NPRM are due July 17, or if any party requests a hearing, by August 9. *Id.*

After EPA suspended implementation of the methane rule, six environmental groups—Environmental Defense Fund, Natural Resources Defense Council, Environmental Integrity Project, Earthworks, Clean Air Council, and Sierra Club—filed in this court an "emergency motion for a stay or, in the alternative, summary vacatur." According to Environmental Petitioners, EPA's stay violates CAA section 307(d)(7)(B) because "all of the issues Administrator Pruitt identified could have been, *and actually were*, raised (and extensively deliberated) during the comment period." Environmental Petitioners' Mot. 5 (emphasis in original). EPA opposes the motion, as do intervenors, a group of oil and gas associations including API, IPAA, and TXOGA. Together, they argue that we lack jurisdiction to review the stay, and that even if it were justiciable, the stay is lawful. We consider these arguments in turn.

II.

We begin with jurisdiction. Both EPA and Industry Intervenors argue that an agency's decision to grant reconsideration of a rule is unreviewable because it does not constitute "final action" under 42 U.S.C. § 7607(b)(1). EPA Opp. 8; Intervenors' Opp. 6. Industry Intervenors argue that for the same reason we lack jurisdiction to review the stay. Intervenors' Opp. 8.

It is true that an agency's decision to grant a petition to reconsider a regulation is not reviewable final agency action. *See Portland Cement Association v. EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011) (noting that review is available "if reconsideration is *denied*" (emphasis added)). To be "final," agency action must "mark the consummation of the agency's decisionmaking process" and "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations and internal quotation marks omitted). By itself, EPA's decision to grant reconsideration, which merely begins a process that could culminate in no change to the rule, fails this test.

The imposition of the stay, however, is an entirely different matter. By staying the methane rule, EPA has not only concluded that section 307(d)(7)(B) requires reconsideration, but it has also suspended the rule's compliance deadlines. EPA's stay, in other words, is essentially an order delaying the rule's effective date, and this court has held that such orders are tantamount to amending or revoking a rule. As we explained in a very similar situation, where an agency granted an application

for interim relief from a safety standard while it reconsidered that standard: "In effect, the Administrator has granted a modification of the mandatory safety standard for the entire period of time that the petition is pending. There is no indication that the Secretary intends to reconsider this decision or to vacate the grant of interim relief. Thus, the Secretary's decision represents the final agency position on this issue, has the status of law, and has an immediate and direct effect on the parties. Therefore, we have no difficulty concluding that the Secretary has issued a final decision . . . ." *International Union, United Mine Workers of America v. Mine Safety & Health Administration*, 823 F.2d 608, 614–15 & n.5 (D.C. Cir. 1987) (citation omitted); *see also Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983) ("[S]uspension of the permit process . . . amounts to a suspension of the effective date of regulation . . . and may be reviewed in the court of appeals as the promulgation of a regulation."); *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 579 nn.26 & 28 (D.C. Cir. 1981) (rejecting the argument that the court lacked jurisdiction to review an order "defer[ring] the implementation of regulations").

In addition to "mark[ing] the consummation of . . . [EPA's] decisionmaking process" with respect to the final rule's effective date, the stay also affects regulated parties' "rights or obligations." *Bennett*, 520 U.S. at 178 (citation and internal quotation marks omitted). Absent the stay, regulated entities would have had to complete their initial monitoring surveys by June 3 and repair any leaks within thirty days. *See* 40 C.F.R. § 60.5397a(f), (h). Failure to comply with these requirements could have subjected oil and gas companies to civil penalties, citizens' suits, fines, and imprisonment. *See* 42 U.S.C.

§ 7413(b)-(d) (providing for civil and criminal penalties for failure to comply with emissions rules); *id.* § 7604(a) (authorizing citizens' suits for alleged violations of emissions standards); 40 C.F.R. § 19.4 (establishing the schedule of fines for CAA violations). The stay—which EPA made retroactive to one day *before* the June 3 compliance deadline—eliminates that threat, *see* 82 Fed. Reg. at 25,731, and thus relieves regulated parties of liability they would otherwise face.

The dissent draws a sharp distinction between the denial of a stay, which would have required regulated entities to comply with the rule, and the imposition of the stay, which erased that obligation. As the dissent sees it, only forced compliance has "obvious consequences" for regulated parties. Dissent at 5. But this one-sided view of final agency action ignores that, by staying the rule's effective date and its compliance duties, EPA has determined "rights or obligations . . . from which legal consequences will flow." *Bennett*, 520 U.S. at 178. The dissent's view is akin to saying that incurring a debt has legal consequences, but forgiving one does not. A debtor would beg to differ.

The dissent also stresses that EPA's proceedings concerning the methane rule are ongoing. Dissent at 3; *see* 82 Fed. Reg. at 27,645; 82 Fed Reg. 27,641 (June 16, 2017). But as we have explained, "the applicable test is not whether there are further administrative proceedings available, but rather whether the impact of the order is sufficiently final to warrant review in the context of the particular case." *Friedman v. FAA*, 841 F.3d 537, 542 (D.C. Cir. 2016) (quoting *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 591 (D.C. Cir. 1971)). Here, because the stay relieves regulated parties of

any obligation to meet the June 3 deadline—indeed EPA has proposed to extend the stay for years, *see* 82 Fed. Reg. at 27,645—the "order is sufficiently final to warrant review," *Friedman*, 841 F.3d at 542. *Cf. Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) ("Once the agency publicly articulates an unequivocal position . . . and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review.").

EPA's argument that courts have no authority to review CAA section 307(d)(7)(B) stays is also at odds with the statute's language. Section 307(d)(7)(B) authorizes not only the Administrator, but also *courts* to stay a final rule. 42 U.S.C. § 7607(d)(7)(B) (authorizing "the Administrator or the court" to issue a three-month stay). Given that Congress granted this court the power to enter a stay, it seems quite anomalous that it did not also confer upon us the lesser power to review the Administrator's decision to issue a stay.

Indeed, EPA's reading would have the perverse result of empowering this court to act when the agency denies a stay but not when it chooses to grant one. Under section 307(d)(7)(B), if EPA had granted reconsideration but declined to impose a stay, the industry groups could have come to this court seeking a stay. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 558 (D.C. Cir. 2015) (declining to grant a stay during the pendency of a reconsideration proceeding because petitioners had failed to demonstrate irreparable harm). Yet, in EPA's view, where, as here, it grants reconsideration *and imposes a stay*, we have no power to hear the case. Nothing in section 307—or any other provision cited by the parties or the

dissent—suggests that this court's jurisdiction turns on whether EPA grants as opposed to denies a stay.

EPA and Industry Intervenors argue that Environmental Petitioners' motion amounts to a collateral attack on the underlying reconsideration proceeding. *See also* Dissent at 4. But CAA section 307(d)(7)(B) expressly links EPA's power to stay a final rule to the two requirements for mandatory reconsideration, *i.e.*, that it was "impracticable to raise" an objection during the public comment period and the objection is "of central relevance to the outcome of the rule." Only when these two conditions are met does the statute authorize the Administrator to stay a lawfully promulgated final rule. Accordingly, to determine whether the stay was lawful—that is, to assess EPA's final action—we must consider whether the agency met the statutory requirements for reconsideration. In other words, although absent a stay we would have no authority to review the agency's decision to grant reconsideration, because EPA chose to impose a stay suspending the rule's compliance deadlines, we must review its reconsideration decision to determine whether the stay was authorized under section 307(d)(7)(B).

III.

Environmental Petitioners seek two types of relief: a "judicial stay" of EPA's administrative stay, and in the alternative, "summary disposition and vacatur" of EPA's stay "because the stay is clearly unlawful." Environmental Petitioners' Mot. 1. To consider the former, we would have to assess Environmental Petitioners' motion under the four-factor standard for a stay pending judicial review: "(1) whether the

stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted).

For reasons explained below, however, we agree with Environmental Petitioners that the 90-day stay was unauthorized by section 307(d)(7)(B) and was thus unreasonable. Accordingly, we have no need to consider the criteria for a stay pending judicial review. *Cf. United States Association of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131, 1135 (D.C. Cir. 2017) ("When . . . the ruling under review rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, we may resolve the merits even though the appeal is from the entry of a preliminary injunction." (citation and internal quotation marks omitted)). We shall therefore vacate the stay as "arbitrary, capricious, [and] in excess of statutory . . . authority." 42 U.S.C. § 7607(d)(9)(A), (C).

A.

Defending the stay, EPA repeatedly invokes its "broad discretion" to reconsider its own rules. EPA Opp. 6. Agencies obviously have broad discretion to reconsider a regulation at any time. To do so, however, they must comply with the Administrative Procedure Act (APA), including its requirements for notice and comment. 5 U.S.C. § 553; *see Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1206 (2015) ("[T]he D.C. Circuit correctly read § 1 of the APA to

mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."). As we have explained, "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked" and "may not alter [such a rule] without notice and comment." *National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992).

EPA argues that it nonetheless has "inherent authority" to "issue a brief stay" of a final rule—that is, not to enforce a lawfully issued final rule—while it reconsiders it. *See* EPA Opp. 6, 10, 13. This argument suffers from two fundamental flaws.

First, EPA cites nothing for the proposition that it has such authority, and for good reason: as we have made clear, it is "axiomatic" that "administrative agencies may act only pursuant to authority delegated to them by Congress." *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014) (alteration and citations omitted); *see Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (rejecting the contention that the Department of Energy had "inherent power" to suspend a duly promulgated rule where no statute conferred such authority and contrasting the Energy Policy and Conservation Act with the reconsideration provision in the Clean Air Act at 42 U.S.C. § 7607(d)(7)(B)). Accordingly, EPA must point to something in either the Clean Air Act or the APA that gives it authority to stay the methane rule, and as we explain below, the only provision it cites—CAA section 307(d)(7)(B)—confers no such authority.

Second, when EPA granted reconsideration and imposed the stay of the methane rule, it did not rely on its so-called inherent authority. *See Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency" when it acted). Instead, EPA expressly acted "pursuant to section 307(d)(7)(B) of the CAA," 82 Fed. Reg. at 25,732, which clearly delineates when stays are authorized. As noted above, that section empowers EPA to stay a final rule if a petitioner demonstrates impracticability and central relevance, the two requirements for mandatory reconsideration.

EPA insists that "the statutory text [of section 307] suggests that Congress did not intend to cabin EPA's authority to issue a stay to only those circumstances where EPA is *mandated* to convene reconsideration proceedings . . . ." EPA Opp. 12 (emphasis in original). The language of section 307(d)(7)(B) is to the contrary: it authorizes the agency to grant a stay during "such reconsideration," a term that quite obviously refers back to the reconsideration that EPA "shall" undertake when someone presents an objection of "central relevance" that was "impracticable" to raise during the period for public comment. 42 U.S.C. § 7607(d)(7)(b).

B.

Under CAA section 307(d)(7)(B), then, the stay EPA imposed is lawful only if reconsideration was mandatory. Accordingly, the question before us is whether the industry groups that sought a stay of the methane rule met the two requirements for mandatory reconsideration.

The parties disagree about the appropriate standard of review for considering this issue. EPA argues that its view of whether it was "impracticable" to object during the notice and comment period is subject to arbitrary and capricious review. *See* EPA Opp. 5. For their part, Environmental Petitioners argue that "[l]imited deference on these notice questions makes sense" because "EPA has no greater expertise than this [c]ourt in determining whether a certain issue was impracticable to raise during the comment period." Environmental Petitioners' Reply 7 (internal quotation marks omitted). We need not resolve this dispute, however, because EPA's decision to stay the methane rule was arbitrary and capricious—that is, unlawful even under the more deferential standard.

We begin—and ultimately end—with impracticability. Environmental Petitioners and EPA agree that this issue turns on whether industry groups had an opportunity to raise their objections during the comment period, which in turn depends on whether the NPRM provided adequate notice of the final methane rule. This case hinges, then, on whether the final rule was a logical outgrowth of the NPRM. A final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (citation and internal quotation marks omitted). A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *Id.* (citations and alterations omitted).

EPA granted reconsideration and stayed the emissions standards on four grounds: (1) industry groups had no opportunity to object to provisions concerning "low production well sites," (2) the final rule included a process for demonstrating "alternative means" of compliance that was not in the NPRM, (3) without adequate notice or consideration of costs, the final rule required "certification by a professional engineer" that regulated entities had a proper closed vent system, and (4) without adequate notice, the final rule predicated an exemption from regulation for "well site pneumatic pumps" on a professional engineer's certification that "it is technically infeasible to route the pneumatic pump to a control device or a process." 82 Fed. Reg. at 25,731–32. An examination of the record demonstrates that each of these statements is inaccurate and thus unreasonable.

Low-Production Wells

The final rule subjects low-production wells to fugitive emissions requirements. 81 Fed. Reg. at 35,856. After EPA promulgated the rule, industry groups petitioned for reconsideration, arguing that the agency should have exempted such wells from regulation. *See, e.g.*, API Reconsideration Request, at 12. One group, IPAA, also argued that the low-production well provision conflicted with EPA's definition of when an existing well site has been "modifi[ed]." IPAA, Request for Administrative Reconsideration, at 6 (Aug. 2, 2016) ("IPAA Reconsideration Request").

When EPA granted reconsideration and imposed the stay, however, it invoked a wholly different rationale: acting pursuant to CAA section 307(d)(7)(B), EPA concluded that

"the final rule differs significantly from what was proposed in that it requires these well sites to comply with the fugitive emissions requirements based on information and [a] rationale not presented for public comment during the proposal stage." 82 Fed. Reg. 25,731. EPA, in other words, justified the stay on the ground that the final rule failed the logical outgrowth test.

Although it is true that the NPRM for the final methane rule proposed to *exclude* low-production well sites, EPA and Industry Intervenors ignore the fact that the notice went on to solicit comment on whether such an exclusion would be warranted. The NPRM states: "To more fully evaluate the exclusion, we solicit comment on the air emissions associated with low production wells . . . . [W]e solicit comment on the relationship between production and fugitive emissions over time." 80 Fed. Reg. 56,639 (Sept. 18, 2015). The NPRM also states that EPA "solicit[s] comment on whether [it] should include low production well sites for fugitive emissions and *if these types of well sites are not excluded*, should they have a less frequent monitoring requirement." *Id.* (emphasis added).

Many regulated entities responded with comments, including the industry groups that later sought reconsideration. *See, e.g.*, API, Comments on EPA's NSPS for the Oil and Natural Gas Sector, at 103 (Dec. 4, 2015) ("API Comments"). API, for instance, submitted extensive comments on low-production wells, noting its support for an exemption and clarifying that "fugitive emissions [from such wells] do not correlate to production." *Id.*

Responding to these comments in the final rule, EPA explained that it had decided not to exempt low-production

wells because, among other reasons, "[i]n discussions with us, stakeholders indicated that well site fugitive emissions are not correlated with levels of production, but rather based on the number of pieces of equipment and components." 81 Fed. Reg. at 35,856. The final rule thus responded directly to comments and information EPA now claims it was impracticable for industry groups to have presented.

Perhaps sensing the flimsiness of its claim that regulated entities had no opportunity to comment on low-production wells, EPA argues that the stay was also warranted because the low-production well provision is inconsistent with the rule's definition of well "modification." EPA Opp. 17–18. As noted above, this was one of IPAA's arguments for reconsideration. *See supra* 15. It was not, however, the rationale on which EPA relied when it granted reconsideration and stayed the rule. EPA cannot now justify its action on a rationale it failed to invoke when it imposed the stay. *See Chenery*, 332 U.S. at 196.

Alternative Means of Compliance

The final rule permits regulated entities to demonstrate that they comply with emissions regulations by alternative means, and thus, ought not be subject to the rule. Specifically, the rule provides that regulated entities may "submit an application requesting that the EPA approve certain state requirement [*sic*] as 'alternative means of emission limitations' under the NSPS . . . ." 81 Fed. Reg. at 35,871. The rule then lays out the process for filing such applications. *Id.*; *see also* 40 C.F.R. § 60.5398a.

After the rule was promulgated, TXOGA requested reconsideration of the process "for determining State Equivalency," *i.e.*, the alternative-means process. Administrative Petition for Reconsideration by the Texas Oil and Gas Association, No. EPA-HQ-OAR-2010-0505, at 2–3 (Aug. 2, 2016). EPA granted this request and stayed the rule on the ground that the alternative-means "process and criteria were included in the [final] 2016 Rule without having been proposed for notice and comment." 82 Fed. Reg. at 25,731.

In the NPRM, however, EPA expressly solicited "comments on criteria we can use to determine whether and under what conditions all new or modified well sites operating under corporate fugitive monitoring programs can be deemed to be meeting the equivalent of the NSPS standards . . . ." 80 Fed. Reg. at 56,638. The NPRM continued: "We also solicit comment on how to address *enforceability* of such alternative approaches . . . ." *Id.* (emphasis added). In response, industry groups commented on the issue, and API specifically requested a "streamlined approval process" for deeming regulated entities compliant by alternative means. API Comments at 138. The final rule adopted just such a process.

Here, too, the final rule was a logical outgrowth of the NPRM. No regulated entity had to "divine the agency's unspoken thoughts," *CSX Transportation*, 584 F.3d at 1080 (alteration omitted), in order to comment on the "alternative means" approval process. To the contrary, we know that affected parties anticipated the final rule because they expressly requested a streamlined approval process and commented on its contours.

Vent System Certification

The final rule requires regulated entities to obtain "certification by a qualified professional engineer [PE] that the closed vent system is properly designed . . . ." 81 Fed. Reg. at 35,871. API sought reconsideration on the grounds that "[t]he provisions [for] PE certification were not included in the proposed rule" and API was therefore unable "to raise an objection during the public comment period." API Reconsideration Request, at 1. Agreeing with API, EPA granted reconsideration because the agency "had not analyzed the costs associated with the PE certification requirement" before promulgating the rule, making it "impracticable for petitioners to provide meaningful comments during the comment period on whether the improved environmental performance this requirement may achieve justifies the associated costs and other compliance burden[s]." 82 Fed. Reg. at 25,732.

Yet again, even a brief scan of the record demonstrates the inaccuracy of EPA's statements. The NPRM "request[s] comment as to whether [EPA] should specify criteria by which the PE verifies that the closed vent system is designed to accommodate all streams routed to the facility's control system . . . ." 80 Fed. Reg. at 56,649. In the very next line, the NPRM "request[s] comment as to what types of cost-effective pressure monitoring systems can be utilized to ensure" proper design of closed vent systems. *Id.* The NPRM also includes a lengthy discussion of the "costs and benefits" of the rule. *Id.* at 56,596–97.

In response, industry groups submitted many comments on the PE certification requirement. API itself commented that requiring a PE to review vent system design was "unnecessary" because "[o]il and natural gas company engineering staff . . . are able to design systems effectively." API Comments at 48–49. API also expressed concern about the burden the PE requirement would impose on regulated parties, *id.* at 49, and argued that the certification requirement was an effort to shift the cost of enforcement from EPA to the industry, *id.* at 48. Separately, IPAA commented that the entire rule's "increased record-keeping and reporting requirements" imposed unreasonable costs on regulated parties. IPAA & American Exploration & Production Council, Comments for Three Regulatory Proposals, at 28 (Dec. 4, 2015).

These comments demonstrate that industry groups had an opportunity to express their views on PE certification of vent systems, including the rule's costs. As noted above, the NPRM not only sought comment on types of "cost-effective" measures for vent system design, 80 Fed. Reg. at 56,649, but it also included an analysis of the entire rule's costs and benefits, *id.* at 56,596–97. Had commenters been concerned about the cost of PE certification of vent systems, they could have argued that the cost-benefit analysis failed to address that specific provision of the regulation. It was thus entirely practicable for industry groups to lodge their objections to the PE certification requirement during the comment period.

Pneumatic Pumps

Finally, the 2016 rule exempts well-site pneumatic pumps from the final rule so long as a professional engineer has

certified that it is "technically infeasible to capture and route pneumatic pump emissions to a control device or process . . . ." 81 Fed. Reg. at 35,850. The rule explained that this exemption would not apply to "entirely new" facilities because "circumstances that could otherwise make control of a pneumatic pump technically infeasible at an existing location can be addressed in the site's design and construction." *Id.*

In its petition for reconsideration, IPAA objected to the idea that a professional engineer must certify "technical infeasibility," arguing that the final rule "added a variety of requirements associated with 'technical infeasibility' that were not purposed [*sic*] or even mentioned in the proposed rule." IPAA Reconsideration Request at 7. API mounted a similar objection to the pneumatic pump exemption, arguing that it had "no opportunity to comment" on the distinction between new construction sites (known as "greenfield" sites) and older emissions sites ("brownfield" sites). *See* API Reconsideration Request at 2.

Embracing these arguments, EPA granted reconsideration on the ground that it had never "propose[d] or otherwise suggest[ed] exempting well site pneumatic pumps from emission control based on such [PE] certification." 82 Fed. Reg. at 25,732. EPA added that the specific details of the exemption, including the distinction between old and new sites, "were included . . . without having been proposed for notice and comment." *Id.*

After proposing that a professional engineer certify regulated entities' closed vent systems, the NPRM states that operators of oil and natural gas facilities must also "connect the

pneumatic pump affected facility through a closed vent system . . . .” 80 Fed. Reg. at 56,649, 56,666. In response, API submitted extensive comments on the challenges of connecting pneumatic pumps to “an existing control device.” API Comments at 78. API explained that given the design of many *existing* sites, the pneumatic pump requirement was “not technically feasible.” *Id.* Accordingly, API expressly requested that EPA “provide [an] exclusion in the rule such that routing a pneumatic pump affected source to an existing control device or closed vent system is not required *if it is not technically feasible* . . . .” *Id.* (emphasis added). The comment continued: “If needed, EPA could provide provisions in the rule for an operator to make *an engineering determination* that an existing control device cannot technically handle the additional gas from a pneumatic pump affected source exhaust, document this determination, and make such a determination available for inspection by EPA or other competent authority.” *Id*. (emphasis added). API, in other words, proposed precisely the technical infeasibility language EPA adopted in the final rule, suggested that an engineer certify technical infeasibility, and justified its proposed exemption based on a lengthy description of why existing sites were not designed to “handle” EPA’s proposal. *Id.*

Given this, it was perfectly logical for EPA to adopt an exception to its proposed rule that requires a professional engineer’s certification of infeasibility, and to limit that exception to sites that had already been designed in a way that made compliance infeasible. The record thus belies EPA’s claim that no industry group had an opportunity to comment on the “scope and parameters” of the pneumatic pump exemption. EPA Opp. 22.

IV.

The administrative record thus makes clear that industry groups had ample opportunity to comment on all four issues on which EPA granted reconsideration, and indeed, that in several instances the agency incorporated those comments directly into the final rule. Because it was thus not "impracticable" for industry groups to have raised such objections during the notice and comment period, CAA section 307(d)(7)(B) did not require reconsideration and did not authorize the stay. EPA's decision to impose a stay, in other words, was "arbitrary, capricious, [and] . . . in excess of [its] . . . statutory . . . authority." 42 U.S.C. § 7607(d)(9)(A), (C). We shall therefore grant Environmental Petitioners' motion to vacate the stay.

We emphasize, however, that nothing in this opinion in any way limits EPA's authority to reconsider the final rule and to proceed with its June 16 NPRM. Although EPA had no section 307(d)(7)(B) *obligation* to reconsider the methane rule, it is free to do so as long as "the new policy is permissible under the statute . . , there are good reasons for it, and . . . the agency *believes* it to be better." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

So Ordered.

BROWN, *Circuit Judge*, dissenting: My colleagues are quick to claim we have jurisdiction to hear this motion, but I disagree. While we presumptively possess jurisdiction over "final agency action," the Administrative Procedure Act deprives us of jurisdiction when, *inter alia*, "agency action is committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2). The Court acknowledges EPA's decision to grant reconsideration "is not reviewable final agency action" as it "merely begins a process that could culminate in no change to the rule." Op. 6. The Court further claims the Clean Air Act provision at issue here "expressly links EPA's power to stay a final rule to the two requirements for mandatory reconsideration . . . ." *Id.* at 10. Indeed it does. *See* 42 U.S.C. § 7607(d)(7)(B) ("Such 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.").[1] Nevertheless, the Court concludes EPA's

[1] It is far from clear that designating the judiciary as an alternative forum to seek a stay, as the statute does, makes EPA action on stays subject to judicial review. *But see* Op. 9. The text's obvious reading is to give private parties power to seek a stay without having to ask the agency. Given the statutory context, this makes sense; an agency may not want to reconsider its rule, let alone stay its implementation to facilitate an undesired reconsideration. By establishing the judiciary as an alternative, the statute ensures stays result from factual warrant and not simply because the agency wills one. Even if the statute could be read to authorize judicial review of agency action on stays, there is no basis to conclude review extends beyond *denied* stays. A denied stay in this statutory context—reconsideration based on new grounds or grounds "impracticable" to raise during rulemaking—might be judicially reviewable for the same reason the denial of such reconsideration petitions are reviewable. *Cf. Sendra Corp. v. Magaw*, 111 F.3d 162, 166 (D.C. Cir. 1997) ("An agency's denial of a petition . . . for reconsideration is not itself subject to judicial review if the petition alleges only 'material error' in the agency's original decision. . . . On

decision to stay the rule pending reconsideration is subject to judicial review, claiming the stay is "final agency action" "with respect to" complying with the rule. *See* Op. 7. It also characterizes the stay as "essentially an order delaying the rule's effective date." *Id.* at 6. But hitting the pause button is the antithesis of ending the matter. The Court presumes a certain outcome from EPA's reconsideration, one that a stay alone gives us no basis to presume. A stay is, of course, "final" as to whether one must comply with the rule during reconsideration—just as a trial court's evidentiary determination is "final" until the time for appeal ripens. That some agency action resolves itself does not render it "final." If it did, every interlocutory action that leaves compliance to the discretion of the regulated party would justify judicial review. The stay is "essentially" nothing but a stay, and it does not qualify as "final agency action" under the two-part inquiry set forth by the Supreme Court.

As EPA's stay here is "of a[n] . . . interlocutory nature," it cannot satisfy the first element of "final agency action:" consummation of the agency's decision-making process. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *see also Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003) ("Agency action is considered final to the extent it imposes an obligation, denies a right, or fixes some legal relationship."). Here, EPA's ninety-day stay is limited to specific requirements within the rule that are among the subjects of reconsideration—

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the other hand, if an agency denies a petition for reconsideration alleging 'new evidence' or 'changed circumstances,' the agency's denial is reviewable as a final agency action . . . ."). But, EPA *granting* a stay does not present the same risk of agency short shrift toward reconsideration. Nothing about the text or its context justifies importing a new purpose into the statute to authorize judicial review of granted stays.

requirements for fugitive emissions, pneumatic pump standards, and certification requirements for professional engineers. *See* Pet'r Attach. 4–5. A temporary stay facilitates reconsidering these discrete issues; it does not resolve them. This is not the kind of agency action considered "final." *Cf. Reliable*, 324 F.3d at 731 ("The agency's conduct thus far amounts to . . . a statement of the agency's intention to make a preliminary determination . . . and a request for voluntary corrective action."). The Environmental Petitioners will be able to raise their arguments regarding the alleged harms of revisiting EPA's rule during the reconsideration process, and once again during the litigation that will surely follow EPA's reconsideration. With these available avenues, it belies the virtue of "final agency action" to include an agency's intermediate stay within the standard's ambit. *See id.* at 733 ("So long as Reliable retains the opportunity to convince the agency that it lacks jurisdiction over Reliable's sprinkler heads, it makes no sense for a court to intervene. It conserves both judicial and administrative resources to allow the required agency deliberative process to take place before judicial review is undertaken."); *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) ("Judicial review at [this] stage improperly intrudes into the agency's decisionmaking process. It also squanders judicial resources since the challenging party still enjoys an opportunity to convince the agency to change its mind.").

The Court relies on a series of pre-*Bennett* cases to equate EPA's stay with instances where this court has reviewed an agency amending or revoking a rule. *See* Op. 7. None of these cases are apposite.[2] And while *Int'l Union, United Mine*

[2] *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) holds "an agency decision which effectively suspends the implementation of important and duly promulgated standards . . .

Workers of Am. v. Mine Safety & Health Admin., 823 F.2d 608 (D.C. Cir. 1987) may seem analogous, it does not involve the sort of neutral, time-limited stay involved here.[3]

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constitutes rulemaking subject to notice and comment . . . ." *Id.* at 816 (citing *Council of the Southern Mountains, Inc. v. Donovan*, 653 F.3d 573 (D.C. Cir. 1981) and *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752 (3d Cir. 1982) as "stand[ing] for the [same] proposition"). It is not credible to suggest that, absent submitting its stay pending reconsideration through notice and comment rulemaking, EPA's action is *ultra vires* and thereby subject to judicial review.

[3] The question in *Int'l Union* was the following: Whether an administrative law judge could order the Mine Safety & Health Administration to grant a party "interim relief" from a mine-safety standard while that party awaited a decision on whether it could receive a "mine-specific exemption from [the] mandatory standard." *See* 823 F.3d at 610–12. Exemptions were only granted when the agency determined "an alternative method" to the mandatory standard could "guarantee no less than the same measure of protection" afforded by the standard "at all times." *See id.* at 611. But subjecting a particular regulated entity to a different compliance standard via an exemption is not the same as staying a rule pending its reconsideration—that exemption *alters* the *status quo* (the mandatory rule) as to one party, while here, staying the rule *preserves* the *status quo* (no rule in effect) as to everyone. Further, in the exemption context, the "interim relief" is akin to an injunction; an ALJ is ordering the agency not to enforce the existing standard as to the exemption-petitioning party, *and ordering the petitioning party* to comply with an interim standard. *See id.* at 612–13. In the context of this stay, however, EPA is not ordering anyone to do anything. The agency is merely announcing that it has decided to allocate its resources towards reconsideration rather than enforcing the rule. Despite the Court's contrary intimations, enjoining conduct is not the same action as issuing a stay. *Cf. Nken v. Holder*, 556 U.S. 418, 428–29 (2009) ("A stay pending appeal certainly has some functional overlap with an injunction . . . . Both can have the practical effect of preventing some action before the legality of that

In contrast to our precedent, the Court's opinion concludes a particular administrative proceeding has innumerable final agency actions, including intermediate decisions. No authority supports this proposition. The majority contends *Friedman v. FAA*, 841 F.3d 537 (D.C. Cir. 2016) does, Op. 8–9, but *Friedman* was *sui generis*; it spoke only to the "specific facts presented," a "constructive denial of Friedman's application for a first class [medical] certificate." 841 F.3d at 541. Here, unlike in *Friedman*, the agency has not placed Environmental Petitioners in an indefinite "holding pattern" preventing "any explicitly final determination." *Cf. id.* at 542. Rather, EPA has authorized a time-limited stay during which it will proceed through the rule reconsideration process—a process where, as mentioned above, the Environmental Petitioners are free to voice their objections and then sue the agency if they disagree with the agency's actions. *Cf. Ciba-Geigy*, 801 F.2d at 437 (finding "final agency action" when EPA's action, unlike the stay here, "gave no indication that [its position was] subject to further agency consideration or possible modification"). This is a far cry from an agency "clearly communicat[ing] it will not reach a determination on a petitioner's submission . . . [while] simultaneously refus[ing] to deny the petitioner's submission." *Friedman*, 841 F.3d at 542.

As a rule of decision, the Court's unbounded reading of *Friedman* creates a peculiar backdoor: The Court insists, correctly, EPA's decision to reconsider the rule is within the agency's discretion. But if the stay is not, and the stay is tied

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action has been conclusively determined. But a stay achieves this result by temporarily suspending the source of authority to act—the order or judgment in question—not by directing an actor's conduct.").

up with the reconsideration authority, deeming the stay "final agency action" allows the Court to review the basis for reconsideration itself. *See* Op. 10. Certainly, the rule of law would benefit from the judiciary shedding its unfortunate sheepishness towards reviewing agency action. But that noble goal does not absolve us from "carefully consider[ing] why and when we are meant to" review agency action. *See AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 769 (D.C. Cir. 2012) (Brown, J., concurring). Yes, the "reflex of deference" can be dangerous. *Id.* But so is an aneurysm of activism that enlarges a doctrine by engorging judicial prerogatives to the point of rupturing the separation of powers. *See Santa Monica Beach, LTD. v. Superior Court*, 968 P.2d 993, 1040 (Cal. 1999) (Brown, J., dissenting) ("Judicial review is properly conceived in narrow terms. It is not a license to supersede the exercise of power by a coordinate branch which acts well within constitutional boundaries."). If an intermediate stay is the *consummation* of an agency's decision-making, we have conflated the agency *preserving the status quo*, *i.e.*, forestalling the rule's requirements in order to reconsider them, with the agency *completing* a course of action, *i.e.*, ordering compliance. In my view, this is erroneous.

Turning to the second element of "final agency action," the Court establishes nothing by asserting the stay creates obvious consequences for the regulated parties. *See, e.g.*, Op. 8. Agency actions of various kinds, "final" or not, come with consequences. The relevant question is whether the consequences have a "legal force or practical effect" *beyond* "the disruptions that accompany" the agency making a decision to "initiate proceedings." *See Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 241, 243 (1980).

Here, EPA's unreviewable decision to reconsider its rule is akin to an agency making "a precatory finding of [a] 'reason

to believe'" legal action is warranted. *Cf. Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 173 F. Supp.2d 41, 44 (D.D.C. 2001) (quoting *Standard Oil Co.*, 449 U.S. at 234). The stay—designed so EPA can devote resources to reconsidering the rule rather than enforcing it, and so industry can avoid implementing changes that reconsideration may later obviate—is subsidiary to the reconsideration itself. If "final agency action" cannot encompass the decision to reconsider the rule, "it cannot possibly encompass the . . . steps that the [agency] has taken to date" to facilitate reconsideration. *See id.* at 44. EPA is not compelling compliance here. If a regulated entity wants to comport its conduct to the requirements of the stayed rule, it is free to do so. By issuing the stay, all the EPA has indicated it that it will not, legally or practically, enforce the rule under reconsideration. The stay's consequences therefore do not impose legal or practical requirements on anyone—separating them from the kind of consequences encompassed by "final agency action." *Cf. Reliable*, 324 F.3d at 735 ("The discovery orders in *ARCO* were legally binding orders, whereas here, there is no order, only the possibility of Reliable having to defend itself at an enforcement hearing if Reliable does not undertake certain voluntary action, and if the agency decides to proceed against it.").

The Court is thus in error to claim *Ciba-Geigy*. *See* Op. 9. *Ciba-Geigy* was a "comply-or-else" case; "the next step was not further adjudication, but an enforcement action in federal court." *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 32 (D.C. Cir. 2014) (explaining *Ciba-Geigy*). Here, Environmental Petitioners are not presented with agency conduct demonstrating EPA will take no additional action. EPA's stay does not ask anyone to alter their conduct, so "judicial review must wait." *See id.* That Petitioners are anxious to see their victory implemented and impatient with

delay does not make EPA's action final. It may be annoying, disappointing, ill-advised, even unlawful, but that does not transform a stay to facilitate reconsideration into "final agency action."

Without either element of the "final agency action" inquiry satisfied, I cannot conclude EPA's stay falls within our jurisdictional reach. Section 7607(d)(7)(B) renders a stay a mere means to facilitate a decision we lack the authority to review. Accordingly, I would dismiss the Environmental Petitioners' motion on the grounds that we lack jurisdiction to review EPA's stay, and not reach the remaining issues. As the Court does otherwise, I respectfully dissent from the Court's decision to grant the motion and vacate EPA's stay.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Intervenor-Respondents state as follows:

A. Parties and *Amici Curiae*

(i) Parties, Intervenors, and *Amici Curiae* 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 the 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: American Petroleum Institute; Interstate Natural Gas Association of America; GPA Midstream Association; Texas Oil and Gas Association; Independent Petroleum Association of America; American Exploration & Production Council; Domestic Energy Producers Alliance; Eastern Kansas Oil & Gas Association; Illinois Oil & Gas Association; Independent Oil and Gas Association of West Virginia, Inc.; Indiana Oil and Gas Association; International Association of Drilling Contractors; Kansas Independent Oil & Gas

Association; Kentucky Oil & Gas Association; Michigan Oil and Gas Association; National Stripper Well Association; North Dakota Petroleum Council; Ohio Oil and Gas Association; Oklahoma Independent Petroleum Association; Pennsylvania Independent Oil & Gas Association; Texas Alliance of Energy Producers; Texas Independent Producers & Royalty Owners Association; West Virginia Oil and Natural Gas Association; State of West Virginia; State of Alabama; State of Kansas; Commonwealth of Kentucky; State of Louisiana; Attorney General Bill Schuette for the People of Michigan; State of Montana; State of Ohio; State of Oklahoma; State of South Carolina; State of Wisconsin; Commonwealth Kentucky Energy and Environment Cabinet; Western Energy Alliance; Commonwealth of Massachusetts; City of Chicago; State of Connecticut; State of Delaware; District of Columbia; State of Illinois; State of Iowa; State of Maryland; State of New Mexico; State of New York; State of Oregon; Commonwealth of Pennsylvania; Pennsylvania Department of Environmental Protection; State of Rhode Island; State of Vermont; State of Washington; and State of Colorado.

(iii) *Amici* in this Case:

State of Texas and State of North Dakota.

B. Rulings Under Review

Petitioners seek review of the final action 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

Intervenor-Respondents are aware of the following consolidated case related to this matter, which may involve the same or similar issues: *American Petroleum Institute v. EPA*, D.C. Cir. No. 13-1108. That case, and the cases consolidated with it, are presently held in abeyance and challenge the 2016 Rule that is the subject of EPA's June 5, 2017, decision that is, in turn, the subject of challenge in the present case.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Intervenor-Respondents make the following disclosures.

American Exploration & Production Council ("AXPC") is an incorporated national trade association representing 29 of America's largest and most active independent oil and natural gas exploration and production companies. AXPC members are "independent" in that their operations are limited to exploration for and the production of oil and natural gas. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy business, such as downstream refining and marketing. AXPC members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce oil and natural gas, both offshore and onshore, from non-conventional sources in environmentally responsible ways. AXPC has no parent corporation and there is no publicly-held corporation that owns more than 10% of its stock.

American Petroleum Institute ("API") is a national trade association representing all aspects of America's oil and natural gas industry. API has more than 625 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply

companies that support all segments of industry. API has no parent company, and no publicly held company has a 10% or greater ownership interest in API.

Domestic Energy Producers Alliance ("DEPA") is a nationwide collaboration of 25 coalition associations, representing about 10,000 individuals and companies engaged in domestic onshore oil and natural gas production and exploration. Founded in 2009, DEPA gives a loud, clear voice to the majority of individuals and companies responsible for enduring work to secure our nation's energy future. DEPA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Eastern Kansas Oil & Gas Association ("EKOGA") is a nonprofit organization founded in 1957 to become a unified voice representing the unique interests of eastern Kansas oil and gas producers, service companies, suppliers and royalty owners on matters involving oil and gas regulations, safety standards, environmental concerns and other energy related issues. EKOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

GPA Midstream Association ("GPA Midstream") has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. GPA Midstream is composed of close to 100 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline

gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane, and natural gasoline. GPA Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. GPA Midstream's members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs. GPA Midstream has no parent companies, and no publicly-held company has a 10% or greater ownership interest in GPA Midstream.

Illinois Oil & Gas Association ("IOGA") was organized in 1944 to provide an agency through which oil and gas producers, land owners, royalty owners, and others who may be directly or indirectly affected by or interested in oil and gas development and production in Illinois, may protect, preserve, and advance their common interests. IOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Independent Oil and Gas Association of West Virginia, Inc. ("IOGA-WV"), is a statewide nonprofit trade association that represents companies engaged in the extraction and production of natural gas and oil in West Virginia and the companies that support these extraction and production activities. IOGA-WV was

formed to promote and protect a strong, competitive, and capable independent natural gas and oil producing industry in West Virginia, as well as the natural environment of our state. IOGA-WV has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Independent Petroleum Association of America ("IPAA") is an incorporated trade association that represents thousands of independent oil and natural gas producers and service companies across the United States that are active in the exploration and production segment of the industry, which often involves the hydraulic fracturing of wells. IPAA serves as an informed voice for the exploration and production segment of the industry, and advocates its members' views before the United States Congress, the Administration and federal agencies. IPAA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Indiana Oil and Gas Association ("INOGA") has a rich history of involvement in the exploration and development of hydrocarbons in the State of Indiana. INOGA was formed in 1942 and historically has been an all-volunteer organization principally made up of representatives of oil and gas exploration and development companies (operators), however, it has enjoyed support and membership from pipeline, refinery, land acquisition, service, supply, legal, engineering and geologic companies or individuals. INOGA has been an active

representative for the upstream oil and gas industry in Indiana and provides a common forum for this group. INOGA represents its membership on issues of state, federal, and local regulation/legislation that has, does and will affect the business of this industry. INOGA is a 501(c)(6) trade association incorporated as a Non-Profit Domestic Corporation under the statutes of Indiana. INOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

International Association of Drilling Contractors ("IADC"). Since 1940, IADC has exclusively represented the worldwide oil and gas drilling industry. IADC's contract-drilling members own most of the world's land and offshore drilling units that drill the vast majority of the wells producing the planet's oil and gas. IADC's membership also includes oil-and-gas producers, and manufacturers and suppliers of oilfield equipment and services. Through conferences, training seminars, print and electronic publications, and a comprehensive network of technical publications, IADC continually fosters education and communication within the upstream petroleum industry. IADC has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Interstate Natural Gas Association ("INGAA") is an incorporated, not-for-profit trade association representing the vast majority of the interstate natural gas transmission pipeline companies operating in the United States, operating

approximately 200,000 miles of pipelines and thousands of compressor stations in the United States. INGAA advocates regulatory and legislative positions of importance to the natural gas pipeline industry. Its member companies are regulated by the U.S. Environmental Protection Agency. INGAA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Most INGAA member companies are corporations with publicly traded stock.

Kansas Independent Oil & Gas Association ("KIOGA") is a nonprofit organization founded in 1937 to represent the interests of oil and gas producers in Kansas, as well as allied service and supply companies. Today, KIOGA is a trade association with over 4,200 members involved in all aspects of the exploration, production, and development of crude oil and natural gas resources. KIOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Kentucky Oil & Gas Association ("KOGA") was formed in 1931 to represent the interests of Kentucky's crude oil and natural gas industry, and more particularly, the independent crude oil and natural gas operators as well as the businesses that support the industry. KOGA is comprised of 220 companies which consist of over 600 member representatives that are directly related to the crude oil and natural gas industry in Kentucky. KOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Michigan Oil and Gas Association ("MOGA") represents the exploration, drilling, production, transportation, processing, and storage of crude oil and natural gas in the State of Michigan. MOGA has nearly 850 members including independent oil companies, major oil companies, the exploration arms of various utility companies, diverse service companies, and individuals. Organized in 1934, MOGA monitors the pulse of the Michigan oil and gas industry as well as its political, regulatory, and legislative interest in the state and the nation's capital. MOGA is the collective voice of the petroleum industry in Michigan, speaking to the problems and issues facing the various companies involved in the state's crude oil and natural gas business. MOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

National Stripper Well Association ("NSWA") was founded in 1934 as the only national association *solely* representing the interests of the nation's smallest and most economically-vulnerable oil and natural gas wells before Congress, the Administration and the Federal bureaucracies. It is the belief of NSWA that producers, owners, and operators of marginally-producing oil and gas wells have a unique set of needs and concerns regarding federal legislation and regulation. NSWA is a member based trade association with nearly 800 members nationwide across 43 states. NSWA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

North Dakota Petroleum Council ("NDPC") is a trade association representing more than 590 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, and storage, as well as mineral leasing, consulting, legal work, and oil field service activities in North Dakota, South Dakota, and the Rocky Mountain Region. Established in 1952, NDPC's mission is to promote and enhance the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas in North Dakota, South Dakota, and the Rocky Mountain region; to promote opportunities for open discussion, lawful interchange of information, and education concerning the petroleum industry; to monitor and influence legislative and regulatory activities on the state and national level; and to accumulate and disseminate information concerning the petroleum industry to foster the best interests of the public and industry. NDPC has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Ohio Oil and Gas Association ("OOGA") is a trade association with approximately 2,000 members involved in all aspects of the exploration, production, and development of crude oil and natural gas resources within the State of Ohio. OOGA represents the people and companies directly responsible for the production of crude oil, natural gas, and associated products in Ohio. OOGA has

no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Oklahoma Independent Petroleum Association ("OIPA"). Founded in 1955, OIPA represents more than 2,500 individuals and companies from Oklahoma's oil and natural gas industry. Established by independent oil and natural gas producers hoping to provide a unified voice for the industry, OIPA is the state's largest oil and natural gas association and one of the industry's strongest advocacy groups. OIPA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Pennsylvania Independent Oil & Gas Association ("PIOGA") is a non-profit corporation that was initially formed in 1978 as the Independent Oil and Gas Association of Pennsylvania ("IOGA of PA") to represent the interests of smaller independent producers of Pennsylvania natural gas from conventional limestone and sandstone formations. Effective April 1, 2010, IOGA of PA and another Pennsylvania trade association representing conventional oil and natural gas producers, Pennsylvania Oil and Gas Association ("POGAM"), merged and the name of the merged organization changed to its present name. PIOGA's membership currently is approximately 500 members: oil and natural gas producers developing both conventional and unconventional formations in Pennsylvania; drilling contractors; service companies; engineering companies;

manufacturers; marketers; Pennsylvania Public Utility Commission-licensed natural gas suppliers ("NGSs"); professional firms and consultants; and royalty owners. PIOGA promotes the interests of its members in environmentally responsible oil and natural gas operations, as well as the development of competitive markets and additional uses for Pennsylvania-produced natural gas. PIOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Texas Alliance of Energy Producers ("Texas Alliance") became a statewide organization in 2000 with the merger of two of the oldest oil & gas associations in the nation: the North Texas Oil & Gas Association and the West Central Texas Oil & Gas Association. The Texas Alliance is now the largest statewide oil and gas association in the country representing Independents. With members in 34 states, the Texas Alliance works on behalf of our members at the local, state, and federal levels on issues vital to the industry. The Texas Alliance is a non-profit entity, has no parent corporation, and there is no publicly held corporation that owns 10% or more of it stock.

Texas Independent Producers & Royalty Owners Association ("TIPRO") is a trade association representing the interests of 3,000 independent oil and natural gas producers and royalty owners throughout Texas. As one of the nation's largest statewide associations representing both independent producers

and royalty owners, members include small family businesses, the largest publicly-traded independent producers, and mineral owners, estates, and trusts. Members of TIPRO are responsible for producing more than 85 percent of the natural gas and 70 percent of the oil within Texas, and own mineral interests in millions of acres across the state. TIPRO has no parent corporation and there is no publicly-held corporation that owns more than 10% of its stock.

Texas Oil and Gas Association ("TXOGA") is a "trade association" within the meaning of Circuit Rule 26.1, is the largest and oldest petroleum organization in Texas, representing more than 5,000 members. The membership of TXOGA produces in excess of 90 percent of Texas' crude oil and natural gas, operates nearly 100 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. TXOGA has not issued shares or debt securities to the public, has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in TXOGA.

West Virginia Oil and Natural Gas Association ("WVONGA"). Chartered in 1915, WVONGA is one of the oldest trade organizations in the State, and is the only association that serves the entire oil and gas industry. The activities of our members include construction, environmental services, drilling, completion, gathering, transporting, distribution, and processing. WVONGA has no parent

corporation and there is no publicly held corporation that owns 10% or more of its stock.

Western Energy Alliance ("Alliance") is a non-profit, regional trade association representing more than 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the western United States. The Alliance advocates regulatory and legislative positions of importance to its members. Its member companies are regulated by the U.S. Environmental Protection Agency. The Alliance has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock.