ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1357

Consolidated with Nos. 20-1359, 20-1363

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

STATE OF CALIFORNIA, et al.,

Petitioners,

v.

ANDREW WHEELER, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

EMERGENCY MOTION FOR STAY PENDING REVIEW; MOTION FOR EXPEDITED REVIEW

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CERTIFICATE OF PARTIES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the State of California, by and through Attorney General Xavier Becerra, and the California Air Resources Board; the State of Colorado, by and through Attorney General Philip J. Weiser and the Colorado Department of Public Health and Environment; the States of Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; the City of Chicago; the District of Columbia; and the City and County of Denver (collectively, "State Petitioners") hereby certify as follows:

(A) Parties and Amici

Petitioners (Case No. 20-1357): the State of California, by and through Attorney General Xavier Becerra, and the California Air Resources Board; the State of Colorado, by and through Attorney General Philip J. Weiser and the Colorado Department of Public Health and Environment; the States of Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; the City of Chicago; the District of Columbia; and the City and County of Denver.

Petitioners (Case No. 20-1359): Environmental Defense Fund, Center for Biological Diversity, Clean Air Council, Earthworks, Environmental Integrity Project, Food & Water Watch, Ft. Berthold Protectors of Water and Earth Rights, National Parks Conservation Association, Natural Resources Defense Council, and Sierra Club.

Petitioners (Case No. 20-1363): Environmental Law & Policy Center.

Respondents (Case Nos. 20-1357, 20-1359, and 20-1363): United States Environmental Protection Agency and Andrew Wheeler, in his official capacity as Administrator of the EPA.

Intervenors: None.

Amici: None.

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

State Petitioners certify that this Emergency Motion for Stay complies with Circuit Rule 18(a)(1). State Petitioners requested relief from Respondents United States Environmental Protection Agency ("EPA") and Administrator Andrew Wheeler via letter submitted electronically and by hard copy on September 15, 2020. A070. After receiving no response to State Petitioners' letter requesting an immediate stay of the rule, State Petitioners filed this motion for emergency relief on September 18, 2020.

State Petitioners provided notice of this filing to Simi Bhat, counsel for EPA and Administrator Wheeler, via telephone on September 17, 2020.

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INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 18 and 27 and D.C. Circuit Rules 18 and 27, the States of California, by and through Attorney General Xavier Becerra, and the California Air Resources Board, the State of Colorado, by and through Attorney General Philip J. Weiser and the Colorado Department of Public Health and Environment, the States of Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the City of Chicago; the District of Columbia; and the City and County of Denver (collectively, "State Petitioners") respectfully move for a stay pending judicial review of a final action by the U.S. Environmental Protection Agency (EPA). 85 Fed. Reg. 57,018 (Sept. 14, 2020) (the Rescission Rule). The Rescission Rule took effect immediately upon publication, bypassing the usual 60-day delayed effective date with no explanation, and allowing emission of thousands of tons of harmful air pollutants that were previously controlled. On September 17, 2020, the Court entered an administrative stay of the Rule pending resolution of motions to stay. In the alternative, State Petitioners request expedited briefing and consideration of the case.

SUMMARY OF ARGUMENT

EPA's Rescission Rule repealed emissions standards for new, reconstructed, and modified sources in the oil and natural gas sector that had been in place for over four years. *See* 40 C.F.R. part 60, subpart OOOOa ("2016 Standard"); 81 Fed. Reg. 35,824 (June 3, 2016). The 2016 Standard secured reductions of methane, a potent greenhouse gas, from the largest industrial source of methane in the country. 85 Fed. Reg. at 57,030. The 2016 Standard thus helped to prevent and mitigate the significant harms that climate change poses to human health and the environment while increasing revenue from recovered natural gas that would otherwise be emitted. Finalization of the 2016 Standard for new sources also triggered the requirement for EPA to regulate existing sources in the oil and natural gas sector. *See* 42 U.S.C. § 7411(d); 40 C.F.R. § 60.22a(a).

But since the change of Administration, EPA has unlawfully stayed, amended, and now entirely reversed its own efforts to control methane emissions from the oil and natural gas sector.[1] The Rescission Rule thus marks the

[1] EPA also faces a legal challenge brought by a subset of State Petitioners seeking to enforce EPA's nondiscretionary duty under section 111(d) to issue methane emission guidelines for existing sources in the oil and natural gas sector. *See New York v. EPA*, No. 1:18-cv-00773-RBW (D.D.C. filed Apr. 5, 2018), A415. On August 13, 2020, one day before its opposition to Plaintiffs' Motion for Summary Judgment was due in the existing source litigation, EPA signed the Rescission Rule, which the agency now argues moots its obligation to regulate existing sources. A450-451.

culmination of EPA's efforts to dismantle the 2016 Standard by impermissibly removing sources in the transmission and storage segment of the oil and natural gas sector from all regulatory requirements, rescinding methane standards for the entire sector, and concluding that EPA now lacks authority to regulate methane emissions from over 850,000 existing oil and natural gas sources across the nation. Not even accounting for the impact on existing sources, EPA admits that the Rescission Rule will increase methane emissions by 448,000 tons (10.1 million tons in terms of carbon dioxide equivalent), volatile organic compound emissions by 12,000 tons, and hazardous air pollutants by 400 tons by 2030 as compared to the 2016 Standard. 85 Fed. Reg. at 57,065.

State Petitioners respectfully request that the Court stay the Rescission Rule. State Petitioners are likely to prevail on the merits and, absent a stay, State Petitioners would be significantly and immediately harmed by the increase in air pollution that will now be permitted, harming public health and the environment, and posing a special risk to our most vulnerable residents. In the alternative, State Petitioners respectfully request expedited briefing and consideration of this case.

BACKGROUND

I. STATUTORY AND REGULATORY FRAMEWORK

Section 111 of the Clean Air Act contains the New Source Performance Standards program, which requires EPA to follow certain steps in regulating categories of stationary (non-vehicle) sources of air pollution. First, EPA must establish a list of source categories and "shall include a category of sources in such list if in [the EPA Administrator's] judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). In making that determination, EPA evaluates the emissions from both new and existing sources, an industry-wide approach this Court has upheld. 84 Fed. Reg. 50,244, 50.269 n.85 (Sept. 24, 2019) (citing *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 433 n.48 (D.C. Cir. 1980)).

After listing a source category, EPA "shall" promulgate "standards of performance" for new sources in that source category, 42 U.S.C. § 7411(b)(1)(B), including existing sources that are modified or reconstructed thereafter, *id.* § 7411(a)(2). Once EPA establishes standards for new sources under section 111(b) of the Clean Air Act, EPA is then required under section 111(d) to publish guidelines for controlling emissions from existing sources in that source category. *See* 42 U.S.C. § 7411(d); 40 C.F.R. § 60.22a(a). Thus, EPA's issuance of new

source performance standards triggers the agency's obligation to control emissions from existing sources.

II. REGULATION OF THE OIL AND NATURAL GAS INDUSTRY UNDER SECTION 111 OF THE CLEAN AIR ACT

In 1979, EPA listed crude oil and natural gas production under section 111(b) of the Clean Air Act as a source category that contributes significantly to air pollution that may reasonably be anticipated to endanger public health and welfare based on emissions from both new and existing sources. *See* 44 Fed. Reg. 29,222 (Aug. 21, 1979). In 1985, EPA promulgated new source performance standards for the production and processing segment of the oil and natural gas source category. 50 Fed. Reg. 26,122 (June 24, 1985). In 2012, EPA updated the standards by adding volatile organic compound and hazardous air pollutant standards for the transmission and storage segment. 77 Fed. Reg. 49,490 (Aug. 16, 2012).

III. THE 2016 STANDARD

Based on compelling data and a robust administrative record, EPA promulgated the 2016 Standard to reduce emissions of methane, volatile organic compounds, and other pollutants from new and modified production, gathering, processing, transmission and storage equipment in the oil and natural gas industry. 81 Fed. Reg. 35,824 (June 3, 2016).

Methane emissions. The oil and natural gas industry is the largest industrial emitter of methane in the United States. Methane is a potent greenhouse gas and

the second leading climate-forcing agent after carbon dioxide. A181. In the 2016 Standard rulemaking, EPA explicitly determined under section 111(b)(1)(A) that methane emissions from the production, processing, transmission, and storage segments of the industry together significantly contribute to air pollution that may endanger public health or welfare. 81 Fed. Reg. at 35,833-40; *see also* 74 Fed. Reg. 66,496 (Dec. 15, 2009). The 2016 Standard aimed to reduce methane leaks from sources within the sector, such as hydraulic fracturing of wells, pumps and compressors that propel oil and natural gas through thousands of miles of pipelines, and the systems of piping at natural gas processing plants. 81 Fed. Reg. at 35,825. Additionally, the 2016 Standard also encouraged the use of emerging technology in leak monitoring. *Id.* at 35,826, 35,846.

Volatile Organic Compounds and Hazardous Air Pollutants. The 2016 Standard also tightened emission controls for volatile organic compounds and hazardous air pollutants for all regulated segments of the source category. 81 Fed. Reg. at 35,825. The public health impacts of volatile organic compounds, the main precursor to the formation of ozone, are well documented. *Id*. at 35,889. Short-term exposure leads to harmful respiratory symptoms such as airway inflammation and asthma, and long-term exposure may result in premature death from lung and heart disease. *Id.* Children and people with respiratory disease are most at risk. *Id.* EPA

has further found that harmful hazardous air pollutants associated with natural gas, like formaldehyde and benzene, cause cancer and other adverse health effects. *Id.*

According to EPA, the 2016 Standard was expected to reduce 510,000 tons of methane, 210,000 tons of volatile organic compounds, and 3,900 tons of hazardous air pollutants in 2025 alone. 81 Fed. Reg. at 35,827. Between the health benefits of the rule and the increased revenues that operators would realize from recovering natural gas that would otherwise be released, EPA determined that the 2016 Standard would result in a net benefit estimated at $35 million in 2020 and $170 million in 2025. *Id.* at 35,827-28.

Importantly, EPA's promulgation of the 2016 Standard also triggered its statutory obligation to issue methane emission guidelines for existing sources in the oil and natural gas sector. *See* 42 U.S.C. § 7411(d); 40 C.F.R. § 60.22a(a). In November 2016, the agency began developing existing source guidelines by issuing an information collection request to obtain specific information from facilities to use in addressing existing source emissions. *See* 81 Fed. Reg. 35,763-64.

IV. EPA'S REVERSAL ON REGULATING METHANE FROM THE OIL AND NATURAL GAS INDUSTRY

In March 2017, EPA withdrew the existing source information request, abruptly halting its efforts to regulate existing sources without any notice or opportunity to comment. 82 Fed. Reg. 12,817 (Mar. 7, 2017). EPA then issued an

administrative stay of the 2016 Standard, which this Court summarily vacated. *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017). EPA signaled that it had no intention to implement the 2016 Standard and proposed two additional stays of the requirements, which EPA never finalized. 82 Fed. Reg. 27,641 (June 16, 2017); 82 Fed. Reg. 27,645 (June 16, 2017). In October 2018, EPA proposed technical amendments to the 2016 Standard, which EPA recently finalized separately. 85 Fed. Reg. 57,398 (Sept. 15, 2020).

The Rescission Rule is the final chapter in EPA's serial attempts to undermine a common-sense rule that reduces emissions of harmful pollutants and recovers valuable natural gas that would otherwise be lost. The Rescission Rule deregulates sources in the transmission and storage segment of the oil and natural gas sector, rescinds methane standards for the entire sector, and concludes that EPA lacks authority to regulate methane emissions from existing sources.

PROCEDURAL HISTORY

On September 14, 2020, State Petitioners, Petitioners Environmental Defense Fund et al. ("Environmental Petitioners"), and Petitioners Environmental Law and Policy Center filed separate petitions for review of the Rescission Rule, which this Court consolidated. On September 15, State Petitioners sent a letter to Administrator Wheeler requesting that he stay the Rescission Rule. Also on September 15, Environmental Petitioners filed an Emergency Motion for Stay, or

in the alternative, for Summary Vacatur. On September 17, this Court ordered an administrative stay of the Rescission Rule pending consideration of all motions for stay. On September 17, counsel for the State of California informed opposing counsel that it would be seeking an emergency stay of the Rescission Rule.

LEGAL STANDARD

To obtain a judicial stay, State Petitioners must demonstrate: (a) likelihood of success on the merits; (b) that they are likely to suffer irreparable harm in the absence of injunctive relief; (c) that the balance of equities favors an injunction; and (d) that an injunction is in the public interest. *Winters v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The final two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

To obtain expedited consideration before this Court, State Petitioners must show good cause by demonstrating that "delay will cause irreparable injury" and "the decision under review is subject to substantial challenge." 28 U.S.C. § 1657(a); D.C. Cir. Handbook of Practice and Internal Procedures 34 (2019).

ARGUMENT

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE RESCISSION RULE IS ARBITRARY AND CAPRICIOUS AND UNLAWFUL

Under the Clean Air Act, an EPA rulemaking must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). "One of the basic procedural requirements of

administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *see also Motor Vehicle Mfrs. Ass'n of the U. S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

EPA reverses previous legal positions in the Rescission Rule. Thus, to justify each reversal, EPA must show that "the new policy is permissible under the statute" and provide "good reasons" for it. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Further, because the Rescission Rule rests upon factual findings that contradict a prior policy, EPA must include "a reasoned explanation…for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515-16. Because EPA fails this standard, the Rescission Rule is arbitrary and capricious and unlawful under the Clean Air Act.

A. EPA's Removal of Transmission and Storage from the Source Category Is Unlawful and Arbitrary and Capricious

In the Rescission Rule, EPA unlawfully and without reasoned explanation entirely removes the transmission and storage segment from the oil and natural gas source category, completely deregulating components that are responsible for 21 percent of methane emissions from the oil and natural gas industry. 85 Fed. Reg. at 57,022. Perhaps realizing that increasing dangerous pollution would be difficult to justify as a reasoned exercise of discretion, EPA contrives an argument that it was

compelled to do so under a new, untenable interpretation of its statutory authority. But EPA fails to grapple with the substantial record from the 2016 Standard demonstrating the reasonableness of regulating all segments of the oil and gas sector in one source category. EPA's novel interpretation of the Clean Air Act is unsupportable, and, even if it were colorable, does not supply a reasoned basis for EPA's reversal of its 2016 position.

Instead of providing "good reasons" for reversing its 2016 determination, *Fox*, 556 U.S. at 515, EPA claims it is "required" to treat the transmission and storage segment as its own source category, separate from the oil and natural gas source category, by creating a test that finds no basis in the statutory text.[2] In reality, nothing in section 111(b) compels the agency to rescind its prior determination. *See Dept. of Homeland Security v. Regents of Univ. of Cal.*, 140 S.Ct. 1891, 1912-13 (June 18, 2020) (finding agency's explanation that it was legally compelled to rescind prior policy arbitrary and capricious for failing to adequately evaluate legality of prior policy and failing to consider alternatives to total rescission).

[2] EPA asserts that segments within an industry must be "sufficiently related" in order to be grouped under one source category listing, a term that the agency acknowledges is not found in the Clean Air Act, but that the agency contends is "implicit in the everyday meaning of 'category.'" 85 Fed. Reg. at 57,027.

Even if EPA's newfound interpretation of the Clean Air Act was permissible, its application of its new test in this rulemaking is arbitrary and capricious. EPA states that sources must "have something in common" to be grouped under one source category, 85 Fed. Reg. at 57,027, but then brushes aside the many obvious and relevant commonalities between the transmission and storage segment and the production and processing segments. These commonalities were well-supported by the administrative record for the 2016 Standard and well-documented by commenters on the proposed Rescission Rule, including that all of these segments (i) use the same equipment, (ii) emit the same pollutants, and (iii) can be controlled by the same technologies and practices. *See* 81 Fed. Reg. 35,832; A332. Indeed, as detailed in Environmental Petitioners' Motion for Stay, EPA has broadly categorized sources since it began implementing section 111(b) in 1977, Motion at 12-14, and the segments at issue here are much more closely related than other segments EPA has reasonably chosen to regulate under one source category, *see, e.g.*, 40 C.F.R. § 60.100a (regulating disparate petroleum refinery sources, including those that are not physically located at refineries, that handle different gas compositions, and that are controlled with different technologies). The agency's failure to explain its inconsistent treatment of the oil and gas industry as compared to its historical treatment of many other industries, is arbitrary and capricious. *See ANR Storage Co. v. FERC*, 904 F.3d 1020, 1026 (D.C. Cir. 2018)

(finding agency's conclusion arbitrary and capricious for its internally inconsistent treatment of regulated parties).

EPA also ignores the significant reliance interests engendered by four years of emissions controls on components in the transmission and storage segment for both states and local communities (facing unexpected increases in volatile organic compounds and hazardous air pollutants) and the regulated industry (facing sunk emission control costs for sources previously subject to the 2016 Standard). *See Dept. of Homeland Security*, 140 S.Ct. at 1913.

In sum, EPA has not provided any "reasoned explanation…for disregarding facts and circumstances that underlay" EPA's prior determination that the oil and natural gas source category includes the transmission and storage segment. *Fox*, 556 U.S. at 515-16. EPA's rollback of requirements for the transmission and storage segment is therefore arbitrary and capricious and shows that State Petitioners are likely to succeed on their claims that the Rescission Rule is invalid.

B. EPA's Rescission of the Methane Regulations Is Unlawful and Arbitrary and Capricious

EPA's wholesale rescission of the remaining methane controls on the production and processing segment fares no better. EPA attempts to justify its decision by arguing that: (1) EPA failed to use "established criteria" in 2016 for judging the significance of methane emissions from the oil and natural gas source category, even though EPA had never done so before for any source category and

even today cannot say what those criteria are; (2) EPA's 2016 determination that methane emissions from the source category significantly contributed to dangerous pollution is invalid because EPA did not ignore emissions from the transmission and storage segment; and (3) the methane requirements provide no additional benefits and impose no additional costs compared to the requirements for volatile organic compounds, even though they trigger regulation of existing sources. These flawed justifications fail to provide the requisite reasoned explanations for its complete about face.

1. EPA's retroactive requirement that it employ unspecified significance criteria does not provide a reasoned explanation and creates unexplained inconsistencies.

EPA claims its 2016 significance finding was invalid because EPA did not employ "some type of (reasonably explained and intelligible) standard and/or established set of criteria" in making that finding. 85 Fed. Reg. at 57,038; *see also id.* at 57,019.[3] EPA's justification is arbitrary and capricious in that it fails to recognize and justify the inconsistency created by its retroactive application of this

[3] In the Rescission Rule, EPA issued a new interpretation of section 111(b)(1)(A), declaring that EPA may not regulate an additional air pollutant for an already-listed source category without determining that emissions of *that* air pollutant from *that* source category cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. The Court need not address this issue to determine State Petitioners' likelihood of success on the merits because, even if that particular finding was required, EPA concedes that it made it in 2016.

new requirement to the 2016 listing and not to the 1979 listing, nor to any other source category regulated under section 111(b) in the last 50 years.

While EPA fully explained in 2016 why it determined that methane from these sources contributes significantly to dangerous air pollution, 81 Fed. Reg. at 35,839-41, EPA now deems that explanation inadequate, not based on any substantive reexamination of the science or the record, but rather because the Agency did not apply a "standard" or "established set of criteria." 85 Fed. Reg. at 57,038. But even today, EPA is unable to articulate what criteria it says it was obligated to apply in 2016.

EPA completely fails to explain the inconsistency of its current position with its listings over the past 50 years. *See Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020) ("[W]hen departing from precedents or practices, an agency must 'offer a reason to distinguish them or explain its apparent rejection of their approach.'") (quoting *Sw. Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019)). EPA's past practice has never required the agency to first develop and then apply specific standards or criteria to constrain its judgment as to which sources and pollutants can be regulated under section 111(b). For example, the original 1979 listing for the oil and natural gas source category—which EPA now asserts is the only valid one—also addressed 58 other diverse source categories, including Synthetic Organic Chemical Manufacturing, Plywood

Manufacture, Asphalt Roofing Plants, Dry Cleaning, and Uranium Refining. In a five-page Federal Register notice, EPA announced, as to all 59 categories collectively:

> Promulgation of this list . . . constitutes notice that all source categories on the priority list are considered significant sources of air pollution and are hereby listed in accordance with section 111(b)(1)(A).

44 Fed. Reg. at 49,225. The 1979 listing does not apply, or even imply, a "standard or established set of criteria" for any of the 59 source categories; nor does it discuss a single pollutant to be regulated. The 1985 standards for volatile organic compound emissions from these sources similarly does not apply EPA's new test. Rather, EPA issued these standards based on the fundamental and self-explanatory finding required by section 111(b)(1)(A): "the Administrator's determination that emissions from the [source category] cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 50 Fed. Reg. at 26,122.

In neither the proposed nor final Rescission Rule did EPA provide a single example of a standard issued under section 111(b) that it previously issued using a "standard or established set of criteria" it now demands. EPA's application of its new constraint only to the 2016 significance finding for methane is thus the very definition of arbitrary. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Unexplained inconsistency" in agency policy is "a

reason for holding an interpretation to be an arbitrary and capricious change from agency practice."). Indeed, a comparison of the 1979 listing for this source category and the 2016 pollutant-and-source-category-specific finding for methane shows that it is actually the 2016 listing that explicitly analyzes the quantity and harms of pollution emitted by these sources.

EPA has articulated no rational basis for singling out the 2016 Standard for repeal based on its alleged failure to apply criteria that are not even known to EPA itself. *Encino Motorcars*, 136 S. Ct. at 2125 ("[A]n agency must give adequate reasons for its decisions.").

2. EPA arbitrarily divides the source category to justify ignoring emissions from the transmission and storage segment.

EPA also claims the rescission of methane standards is required because, when it determined in 2016 that methane emissions from the oil and natural gas source category contribute significantly to endangerment, it included emissions from the transmission and storage segment instead of ignoring them. For the reasons stated above, EPA's removal of the transmission and storage segments from the source category is unlawful. *See supra* I.A.

Further, given its factual determinations in 2016, EPA is no longer writing on a blank slate. The Rescission Rule does not contend that the oil and natural gas source category does not significantly contribute to the emission of greenhouse

gases like methane. EPA does not explain how the inclusion or exclusion of transmission and storage segments affects the agency's 2016 significant contribution finding. Indeed, the bulk of emissions from the source category come from the segments that EPA has retained, with only 21 percent being emitted from the now-excluded transmission and storage segments. EPA has merely announced a policy of non-regulation while disregarding the record and factual findings before it. Accordingly, EPA's rescission of methane standards is arbitrary and capricious.

3. EPA's redundancy rationale is legally baseless and arbitrary and capricious.

Nor can EPA justify its rescission of methane standards by claiming they are "redundant" of the remaining standards for volatile organic compounds. 85 Fed. Reg. at 57,019. As EPA admits, the Clean Air Act does not "explicitly authorize[] rescinding requirements on the ground that they are redundant." *Id*. at 57,049. In fact, while the industry currently controls these pollutants via the same technology and processes, EPA admits that in the future, control technologies, and thus the performance standards based on the capabilities of those technologies, could diverge. *Id*. at 57,049; *see also* A387-388. Further, removing methane from the 2016 Standard means that the methane requirements will not be subject to periodic mandatory review under section 111(b)(1)(B) of the Clean Air Act and possible revisions to reflect those changing realities. It is thus arbitrary and capricious to

remove methane controls on the basis of some claimed near-term redundancy when, as EPA admits, that redundancy may not last.

Critically, EPA's feeble rationale circumvents another significant—and patently intentional—consequence of its action: By rescinding methane standards for all new sources in the oil and natural gas sector, EPA claims that it is no longer statutorily obligated to promulgate emission guidelines for the more than 850,000 existing sources of methane nationwide. Methane emissions from existing oil and natural gas sources constitute the majority of methane emissions from the oil and natural gas sector in the United States and yet EPA declines to assess those impacts. *See* 85 Fed. Reg. at 57,033; *see also* Env'tl Petitioners' Motion at A0086-0087 (estimating 43.6 million metric tons of methane have been emitted from existing oil and natural gas sources since 2016). EPA's assertion that the new source methane standards are entirely redundant fails to consider this significant, entirely non-redundant direct effect of the Rescission Rule.

In sum, EPA's redundancy rationale does not supply the requisite "good reasons" for the Rescission Rule and indeed amounts to "an explanation for its decision that runs counter to the evidence before the agency." *North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008) (quoting *State Farm*, 463 U.S. at 43).

II. STATE PETITIONERS ARE BEING IRREPARABLY HARMED BY THE RESCISSION RULE

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

By EPA's removal of the transmission and storage segment from all regulatory requirements, owners and operators of these sources are no longer subject to any emission controls under section 111. As EPA admits, effective immediately, the Rescission Rule will thus increase emissions of volatile organic compounds (which are a precursor to ozone) and hazardous air pollutants, which "degrade air quality and adversely affect health and welfare." 85 Fed. Reg. at 57,020.

This increase in volatile organic compounds—and hence ozone—from the Rescission Rule is particularly significant for states like New Mexico that do not currently have state standards and rely on federal regulation of oil and natural gas sources. New Mexico is the third largest oil producing state in the United States. A027, ¶ 7. Ozone concentrations have increased throughout New Mexico to within five percent of federal ambient air quality standards as a result of volatile organic

compounds emitted by New Mexico's own oil and natural gas production and from interstate transport emissions from the Permian Basin in Texas. A028-029, ¶¶ 8-10, 13. The Rescission Rule will substantially and directly impede New Mexico's efforts to implement ozone control measures and keep its counties in attainment with the ozone national ambient air quality standards. A028-029, ¶¶ 9, 10, 12. Exceeding ozone standards may result in a nonattainment status designation under section 107(d) of the Clean Air Act, which carries potentially serious sanctions and damaging repercussions for New Mexico, including the loss of federal highway funding and economic development opportunities. A030, ¶¶ 14-15.

Further, by deregulating transmission and storage sources and removing the statutory trigger to regulate existing sources, the Rescission Rule will significantly increase methane emissions throughout the country. Methane is a potent greenhouse gas that warms the earth much faster than carbon dioxide, so efforts to reduce methane emissions can have an immediate beneficial effect. *See* A181. But instead of charting a path toward climate stabilization, the Rescission Rule reverses progress by *increasing* methane emissions, thereby contributing to climate change and harming State Petitioners. State Petitioners have experienced and will continue to experience substantial injuries from climate change-driven events and conditions. *See* A001-069. These injuries include destructive wildfires, droughts, sea level rise, damaging floods, and increased deaths and illnesses due to

intensified and prolonged heat waves. *See e.g.* A003-006 (detailing climate change impacts on California's beaches, cultural resources, and forests); A056-057 (quantifying Oregon's direct and indirect costs for wildfire suppression); A064-066 (detailing economic impact of ocean acidification on Washington's shellfish industry); A012-018 (describing impact of sea level rise on Massachusetts's coastal resources and communities).

In light of these irreparable and immediate injuries, State Petitioners have demonstrated strongly compelling reasons for a stay or, in the alternative, expedited briefing. *See* D.C. Cir. Handbook 34.

III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES SUPPORT THE ISSUANCE OF A STAY

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences" when issuing an injunction. *Winters*, 555 U.S. at 24. Here, the public benefits of staying the Rescission Rule far outweigh any harm that may occur to EPA and oil and natural gas companies from keeping the current regulatory requirements in effect pending litigation.

As stated, the Rescission Rule will result in an increase in air pollution that contributes to climate change—specifically from sources within the transmission and storage segment—previously subject to the 2016 Standard, with significant repercussions for public health and welfare and economic wellbeing. Indeed, EPA concluded the climate benefits of the 2016 Standard outweighed costs by $170

million in 2025 alone. *See* 81 Fed. Reg. at 35,828, 35,886, 35,889. And lost methane emissions also result in lost revenue for producing states and industry. Every ton of methane leaked to the atmosphere is a ton of methane that is wasted, and for producing states, may result in lost tax and royalty benefits.

By contrast, the costs to EPA and oil and natural gas companies are minimal. These regulations have been in place for years, and companies have invested in complying with the technically feasible, cost effective standards. The balance of equities of the parties and the public interest as a whole therefore overwhelmingly favor a judicial stay of the Rescission Rule.

CONCLUSION

Given the likelihood of success on the merits, the irreparable harm posed by the Rescission Rule, and all the reasons provided herein, State Petitioners respectfully request that the Court grant State Petitioners' motion for judicial stay of EPA's unlawful Rescission Rule. In the alternative, State Petitioners request expedited briefing and consideration of the case.

Dated: Sept. 18, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d) and D.C. Circuit Rule 27(a)(2), I hereby certify that the foregoing complies with all applicable format and length requirements, and contains 5,196 words as calculated by Microsoft Word, exclusive of the caption, signature block, and certificates of counsel.

/s/ Meredith J. Hankins
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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(c), I hereby certify that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which automatically sends a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

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