

Dated: June 21, 2017

WAYNE STENEHJEM
ATTORNEY GENERAL
STATE OF NORTH DAKOTA

Chief, Environmental Protection
Division

PAUL M. SEBY

Special Assistant Attorney General
State of North Dakota
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Tel. (303) 572-6584
Fax (303) 572-6540
Email: sebyp@gtlaw.com

MATTHEW A. SAGSVEEN
Assistant Attorney General
North Dakota Attorney General's
Office
500 N. 9th Street
Bismark, ND 58501
Tel. (701) 328-2925
Email: masagsve@nd.gov

*Counsel for Amicus Curiae
State of North Dakota*

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney
General

JAMES E. DAVIS
Deputy Attorney General for Civil
Litigation

PRISCILLA M. HUBENAK

CRAIG J. PRITZLAFF
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548 (MC-066)
Austin, Texas 78711-2548
craig.pritzlaff@oag.texas.gov
Tel: (512) 475-4138
Fax: (512) 320-0911

*Counsel for Amicus Curiae
State of Texas and its agencies the
Texas Commission on
Environmental Quality and the
Railroad Commission of Texas*

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. PARTIES AND AMICI

All parties, intervenors, and amici appearing in this court are listed in the Brief for Petitioners and Brief for Respondent EPA, except for Amici the State of North Dakota and the State of Texas.

B. RULINGS UNDER REVIEW

Reference to the agency decision under review appears in the Brief for Petitioners.

C. STATEMENT OF RELATED CASES

Reference to the related cases appears in the Brief for Responded EPA.

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s/ Paul M. Seby

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE IDENTITIES AND INTERESTS OF THE
AMICUS CURIAE..... 1

SUMMARY OF ARGUMENT2

ARGUMENT3

 I. EPA did not act arbitrarily or capriciously.....3

 II. Petitioners do not satisfy the requirements of an emergency stay.5

 A. A stay is not in the public interest, or supported by a balance of
 the equities.....6

 B. Any irreparable injury will actually be caused by the Methane
 Rule going into effect.....7

CONCLUSION.....9

TABLE OF AUTHORITIES

Federal Cases

<i>American Petroleum Institute, et al. v. E.P.A.</i> , No. 13-1108	1, 2
<i>Am. Petroleum Inst. v. U.S. E.P.A.</i> , 52 F.3d 1113 (D.C. Cir. 1995).....	3
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	4
<i>Gonzales v. Oregon</i> , 546 U.S. 243 (2006).....	6
<i>Nat. Res. Def. Council, Inc. v. Reilly</i> , 976 F.2d 36 (D.C. Cir. 1992).....	3, 4
<i>New Jersey v. E.P.A.</i> , 517 F.3d 574 (D.C. Cir. 2008).....	4
<i>Portland Cement Ass’n v. E.P.A.</i> , 665 F.3d 177 (D.C. Cir. 2011).....	4
<i>Treasure State Res. Indus. Ass’n v. E.P.A.</i> , 805 F.3d 300 (D.C. Cir. 2015).....	3
<i>Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.</i> , 559 F.2d 841 (D.C. Cir. 1977).....	5
<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).....	5

Statutes

5 U.S.C. § 706.....	3
42 U.S.C. § 7607	3, 4
42 U.S.C. § 7607(d)(7)(B)	3

Other Authorities

82 Fed. Reg. 25,730 (June 5, 2017).....	1
82 Fed. Reg. 25,733	4
82 Fed. Reg. 27,645	3

Fed.R.App. P. 27(d)(2).....	11
Fed.R.App. P. 27(d)(2)(B)	11
Fed.R.App. P. 29(a)(2).....	1
Fed.R.App. P. 32(a)(5).....	11
Fed.R.App. P. 32(a)(6).....	11
Fed.R.App. P. 32(g)	11
<i>Promoting Energy Independence and Economic Growth,</i> Exec. Order at §1(c).....	2

**STATEMENT OF THE IDENTITIES AND
INTERESTS OF THE *AMICUS CURIAE***

Amicus Curiae the State of North Dakota and the State of Texas respectfully submit this Brief of Amicus Curiae¹ in support of the Environmental Protection Agency’s (“EPA”) and Petitioner-Intervenors’ Opposition to Petitioners’ Emergency Motion for a Stay or, in the Alternative, Summary Vacatur of the EPA’s administrative stay of provisions of its “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule” (“Methane Rule”). 82 Fed. Reg. 25,730 (June 5, 2017) (“Methane Rule Stay”). The present action is, for practical purposes, a continuation of an existing consolidated case that is before this Court, *American Petroleum Institute, et al. v. E.P.A.*, No. 13-1108 (“Original Challenge”) involving the Methane Rule in which North Dakota and Texas have been consolidated as petitioners.

Texas and North Dakota are the largest and second largest oil and gas producing states in the United States, and both states comprehensively regulate oil and gas development. The outcome of this matter could have significant impact on their ability to administer their oil and gas regulatory programs.

¹ North Dakota and Texas file as of right, under Federal Rule of Appellate Procedure 29(a)(2).

SUMMARY OF ARGUMENT

EPA properly exercised its discretion in issuing the three-month Methane Rule Stay while it reconsiders provisions of the Methane Rule in accordance with Executive Orders issued by the President. The short stay will not cause the Petitioners' significant or permanent harm and is in accordance with the Clean Air Act ("CAA"), which expressly permits a short stay of a rule under administrative reconsideration.

Amici petitioned this Court for Review of the Methane Rule, and those petitions were consolidated challenges to the Methane Rule and two related rules in *American Petroleum Institute, et al. v. E.P.A.*, No. 13-1108 ("Original Challenge"). Before the final briefing schedule in Case No. 13-1108 was finalized, on March 28, 2017, the President signed an Executive Order entitled *Promoting Energy Independence and Economic Growth* ("Executive Order") which directed EPA to review and appropriately revise regulations that burden domestic energy development. Executive Order at § 1(c). At EPA's request, and with amici's support, the Court abated the Original Challenge to allow EPA to proceed with review and reconsideration, an action Petitioners challenged at the time, and implicitly challenge here. Doc. 1675813.

The present action, however, does not concern the legality of the Methane Rule or EPA's decision to reconsider the rule. Instead it concerns EPA's decision

to issue a stay of certain key compliance deadlines, previously June 3, 2017, until August 31, 2017, which is within its express authority under CAA section 307 and a reasonable exercise of discretion.²

ARGUMENT

I. EPA did not act arbitrarily or capriciously.

EPA promulgated the Methane Rule Stay under CAA section 307, 42 U.S.C. § 7607(d)(7)(B), which provides that upon reconsideration of a rule, “[t]he effectiveness of the rule may be stayed during such reconsideration, ... by the Administrator or the court for a period not to exceed three months.” EPA’s decisions regarding reconsideration are reviewed under an arbitrary and capricious standard. *Treasure State Res. Indus. Ass’n v. E.P.A.*, 805 F.3d 300, 306–07 (D.C. Cir. 2015). Petitioners must show that the Methane Rule Stay is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706.

“To determine whether EPA’s action is contrary to law, we must look to the CAA.” *Am. Petroleum Inst. v. U.S. E.P.A.*, 52 F.3d 1113, 1119 (D.C. Cir. 1995). “Petitions for reconsideration filed pursuant to section 307 of the Clean Air Act allow the EPA to delay the implementation of regulations for three months.” *Nat.*

² EPA has stated that it will propose an additional stay, not before the court, that will undergo formal notice and comment. 82 Fed. Reg. 27,645.

Res. Def. Council, Inc. v. Reilly, 976 F.2d 36, 38 (D.C. Cir. 1992). This statutory provision reasonably grants EPA wide discretion to issue brief stays , but prevents EPA from helping itself to unlimited additional stays without a separate rulemaking. *See id.* In the absence of clear statutory guidelines limiting EPA’s discretion, EPA’s determination of how to interpret and apply § 307 is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *New Jersey v. E.P.A.*, 517 F.3d 574, 581 (D.C. Cir. 2008).

Here, EPA has interpreted § 307 to authorize a stay when the Agency is conducting a serious reconsideration proceeding in response to an executive order and petitions for reconsideration and in light of a burdensome upcoming compliance deadline. 82 Fed. Reg. at 25733. This is a reasonable interpretation of the CAA. This Court, in fact, recently issued a judicial stay of an EPA rule on precisely the same grounds: a potential rule change, combined with substantial short term compliance costs. *Portland Cement Ass’n v. E.P.A.*, 665 F.3d 177, 189 (D.C. Cir. 2011).

There is no legal justification for requiring EPA to make a finding of irreparable injury or for prematurely scrutinizing the merits of the decision to open a reconsideration proceeding. Nothing in the CAA imposes these requirements, and any requirement of detailed findings could only serve to force EPA to prejudge issues that are more appropriately considered during reconsideration. Instead, the

three month time limitation ensures that this power to grant stays cannot be used to circumvent the normal protections of the CAA and APA.

II. Petitioners do not satisfy the requirements of an emergency stay.

Petitioners request an emergency judicial stay of the three-month administrative stay promulgated by EPA so that control and monitoring equipment will immediately be installed on “the more than 18,000 new and modified wells subject to the 2016 Rule.” Emergency Motion for a Stay or, in the Alternative, Summary Vacatur (“Emergency Motion”), at 3. This is not consistent with the purpose of an emergency stay, which is to maintain the status quo until further action can be taken. *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 845 (D.C. Cir. 1977). Rather than seeking to maintain the status quo, Petitioners seek significant immediate changes in the management and regulation of oil and gas wells, perhaps hoping to prevent EPA from following the direction of the Executive Order and responding to issues raised in the Original Challenge and petitions to reconsider, in spite of this Court’s Order abating the Original Challenge so that this review could occur.

A party seeking preliminary relief must demonstrate: “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555

U.S. 7, 20 (2008). As discussed above, Petitioners have little likelihood of succeeding on the merits in either their request for vacatur or for preliminary relief because the position taken by EPA is a reasonable interpretation of the CAA. They also fail to satisfy the other requirements for an emergency stay.

A. A stay is not in the public interest, or supported by a balance of the equities.

Petitioners' argument that a stay is in the public interest relies on the assumption that the Methane Rule, as originally adopted, is lawful and in the public interest. *See* Emergency Motion at 31. Petitioners should not be allowed to litigate in this proceeding, on an emergency basis and without all of the parties fully represented, the merits of the Methane Rule. Furthermore, Petitioners rely almost entirely on sources outside the administrative record, primarily self-serving declarations. *See* Emergency Motion at 26-29. Petitioners were not able to rely on an endangerment finding by EPA, which would have been part of the administrative record, because EPA failed to make those findings. *See*, No. 13-1108, Doc. 1642341 at 9.

Furthermore, Petitioners' concerns go directly to technical questions that are within the core expertise of EPA, and where judicial deference to expert agency decision-making is at its strongest. *See Gonzales v. Oregon*, 546 U.S. 243, 269 (2006). Such a finding cannot be made on the record before the Court. Far from

being arbitrary and capricious, EPA's decision to issue a three-month stay is a reasonable exercise of its discretion.

B. Any irreparable injury will actually be caused by the Methane Rule going into effect.

Existing state programs already heavily regulate the conduct of oil and gas operations, and these regulations will remain in effect during the three month stay, along with the supporting state infrastructure of inspections and enforcement proceedings. As described below, the Methane Rule, in fact, substantially conflicts and interferes with these state programs.

The North Dakota Industrial Commission ("NDIC"), the primary regulator of oil and gas development in North Dakota, has identified several conflicts between the Methane Rule and its own laws and regulations, which "could have significant impacts on North Dakota's ability to administer its oil and gas regulatory program." NDIC Comments, EPA Docket No. EPA-HQ-OAR-2010-0505-6977 at 1. For example, the Methane Rule replaces clear distinctions in North Dakota law, such as a distinction between the 14 day initial flowback stage and the 90 day separator flowback stage, or the distinction between the first well in a spacing unit and subsequent wells, with a "technically infeasible" standard or complicated categories of "delineation" or "non-delineation" wells that do not fit the current pattern of development in North Dakota. *Id.* at 2.

The North Dakota Department of Health (“NDDH”), which administers North Dakota’s CAA programs, has identified significant problems that it foresees in handling the Methane Rule, including unrealistically tight timeframes; a diversion of state resources from the “relatively small percentage of sources” that actually produce the majority of the pollution to “monitoring, recordkeeping and reporting” requirements for insignificant sources; and overreliance on technology that experience has shown to be unreliable in North Dakota’s harsh climate. NDDH Comments, EPA Docket No. EPA-HQ-OAR-2010-0505-6928 at 1.

Texas Commission on Environmental Quality (“TCEQ”), which administers Texas’ CAA programs has expressed similar concerns. *See* TCEQ Comments, EPA Docket No. EPA-HQ-OAR-2013-0685 (Dec. 4, 2015). Specifically, the TCEQ commented that the Methane Rule compliance schedule would be difficult to meet due to the limited availability of control equipment and that EPA seriously underestimated the number of sources affected by the Methane Rule and therefore the overall burden of the rule. *Id.* at 3-4. The Methane Rule also creates burdensome regulatory overlap, particularly with Texas’s leak detection and repair requirements. *Id.* at 5.

The Methane Rule interferes with existing and effective state programs, creates regulatory uncertainty, and diverts limited state resources from actually regulating oil and gas development to producing volumes of compliance

paperwork. Staying the Methane Rule for three months while these and other issues are being considered by EPA prevents, rather than causes, irreparable injury.

CONCLUSION

EPA acted reasonably and within the scope of its express authority under section 307 of the Clean Air Act when issuing the three-month Methane Rule Stay, and Petitioners have not shown that interference with this considered agency judgment is in the public interest or that the Methane Rule Stay will irreparably harm them. The Emergency Motion should be denied.

Dated: June 21, 2017

Respectfully submitted,

STATE OF NORTH DAKOTA
WAYNE STENEHJEM
ATTORNEY GENERAL

s/ Paul M. Seby _____
Paul M. Seby
Special Assistant Attorney General
State of North Dakota
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Tel. (303) 572-6584
Fax (303) 572-6540
Email: sebyp@gtlaw.com

Matthew A. Sagsveen
Assistant Attorney General
North Dakota Attorney General's
Office
500 N. 9th Street
Bismark, ND 58501
Tel. (701) 328-2925
Email: masagsve@nd.gov

*Counsel for Amicus Curiae
State of North Dakota*

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

s/ Craig J. Pritzlaff

CRAIG J. PRITZLAFF
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548 (MC-066)
Austin, Texas 78711-2548
craig.pritzlaff@oag.texas.gov
Tel: (512) 475-4138
Fax: (512) 320-0911

*Counsel for Amicus Curiae
State of Texas and its agencies the
Texas Commission on Environmental
Quality and the Railroad Commission of Texas*

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 19, 29 and 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that North Dakota's and Texas' Brief as Amicus Curiae in Support of EPA's and Petitioner-Intervenors' Opposition to Petitioners' Emergency Motion for a Stay or, in the Alternative, Summary Vacatur complies with the type-volume limitation of Fed.R.App. P. 27(d)(2)(B) because the brief contains 2,821 words, as counted by Microsoft Office Word 2010 used to prepare the brief; and complies with the typeface and type style requirements of Fed.R.App.P. 32(a)(5) and 32(a)(6) because the brief is prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 pt. Times New Roman font.

s/ Paul M. Seby

CERTIFICATE OF SERVICE

I hereby certify that on this day, June 21, 2017, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

s/ Paul M. Seby _____