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.

REPLY IN SUPPORT OF STATE PETITIONERS' EMERGENCY MOTION FOR STAY OR EXPEDITED CONSIDERATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

State Petitioners[1] respectfully submit this reply in support of their September 18, 2020 emergency motion 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), or in the alternative for expedited briefing and consideration of the case. Respondents Andrew Wheeler, et al. (EPA) and Movant Intervenor-Respondents American Petroleum Institute, et al. (Intervenors) filed their oppositions to State Petitioners' motion on September 28, 2020. Neither provides any basis to deny State Petitioners' motion.

EPA attempts to persuade the Court that this case is "complex." It is not. This case presents straightforward legal questions of arbitrary and capricious rulemaking that this Court is capable of assessing in a preliminary motion. Further, the evidence of irreparable public health impacts in the States if the Rescission Rule is not stayed is largely uncontested. EPA's deregulation of sources in the transmission and storage segment will cause emissions of volatile organic

[1] 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").

compounds to increase, which will in turn result in higher concentrations of ozone—including in regions of New Mexico that are already exceeding or are close to exceeding the health-based federal ambient air quality standards for ozone. And the deregulation of methane will increase emissions of a climate super-pollutant with cumulative impacts that grow worse with every ton emitted. State Petitioners like California, currently battling five of the six largest wildfires in the state's history, are already feeling the significant, cumulative impacts of these emissions.

State Petitioners are likely to prevail on the merits and, absent a stay, will be irreparably harmed by the increase in air pollution that would result under the Rescission Rule. The balance of equities and the public interest support a stay. Accordingly, State Petitioners respectfully request that the Court stay the Rescission Rule pending consideration of this case, or, in the alternative, expedite consideration of this case.

DISCUSSION

I. EPA HAS NOT PROVIDED REASONED EXPLANATIONS FOR REVERSING ITS PRIOR DECISIONS

EPA argues that the Rescission Rule is justified under the standards applicable to issuing new rules, as if it were writing on a blank slate. But in issuing the Rescission Rule, EPA is summarily reversing detailed findings the agency made in issuing the 2016 Standard. *See* 81 Fed. Reg. 35,824 (June 3, 2016). While

EPA arguably "display[s] awareness" that it is dramatically changing position in the Rescission Rule, mere acknowledgement of its reversal is not sufficient. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Rather, EPA must provide "good reasons" for its new policies, and a "reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by" the 2016 Standard. *Id.* at 515-6. It has failed to do so.

EPA's attempts in its response to defend the reasonableness of its *new* interpretations in the Rescission Rule are inadequate. Administrative rulemaking is not an exercise in results-oriented post-hoc rationalization. The issue here is the unreasonableness of EPA's departure from prior determinations, factual findings, and decades of standard agency practice, as well as EPA's failure to justify rolling back standards that many in the regulated industry supported and State Petitioners have relied on for more than four years. *See* State Petitioners Mot. 10-11, 14-17; *see also* Envtl. Petitioners Mot. A0512-A0559. EPA fails to adequately explain its departures from prior, longstanding positions. Whether EPA could choose not to regulate transmission and storage sources or choose not to regulate methane emissions in a hypothetical world in which it had not already adopted final regulations doing so is wholly beside the point and irrelevant to the issues properly before this Court.

A. EPA Does Not Provide a Reasoned Explanation for Its Change in Position in Deregulating the Transmission and Storage Segment

EPA devotes four pages of its response to a detailed technical discussion of components in the transmission and storage segment. EPA Resp. 16-20. But the Court need not delve into this largely irrelevant factual recitation to decide this preliminary motion, as EPA has simply not met its burden to adequately explain its dramatic change in position.

"When an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Dep't of Homeland Security v. Regents of Univ. of Cal.*, 140 S.Ct. 1891, 1913 (2020) (internal quotation marks omitted). EPA disregarded the reliance interests engendered by its regulation of the transmission and storage segment in 2012 and 2016 when it issued the Rescission Rule. State Petitioners Mot. 13; *see also* SA004-005. New Mexico, for example, has relied on the 2016 Standard in its long-term air quality planning, leaving its future ability to meet ambient air quality standards uncertain if the Rescission Rule goes into effect. State Petitioners Mot. A026-A031.

In its response, EPA does not dispute that it ignored reliance interests engendered by its previous rulemakings when it issued the Rescission Rule. EPA instead seeks to dismiss these reliance interests on the basis that sources in the

transmission and storage segment have been regulated only since 2012 and both the 2012 and 2016 regulations have been the subject of ongoing litigation. EPA Resp. 23-24. But the existence of legal threat does not extinguish reliance interests, *DHS v. Regents*, 140 S.Ct. at 1914-15, and is particularly inapposite here, where Intervenors have been content to sit on their challenge to the 2012 regulations for seven years rather than litigate them in this Court. *See Amer. Pet. Inst. v. EPA*, No. 13-1108 (D.C. Cir. filed April 3, 2013) (held in abeyance since 2013). As in *DHS v. Regents*, EPA is not working on a blank slate and is therefore "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." 140 S.Ct. at 1915.

EPA attempts to distinguish *DHS v. Regents* on the basis that, unlike DHS, EPA did consider one alternative to total rescission in its Notice of Proposed Rulemaking. EPA Resp. 22 n.6. But EPA fails to acknowledge that it did not consider any other reasonable alternatives "within the ambit" of its prior rulemaking, such as regulating the transmission and storage segment as its own source category. *See DHS v. Regents*, 140 S.Ct. at 1913 ("[W]hen an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy.") (internal quotation marks and brackets omitted).

EPA claims that it is entitled to deference for deregulating the transmission and storage category because it is merely prioritizing among sources. But EPA cannot resort to the one-step-at-a-time doctrine when it takes a step *backward* rather than "*toward* a complete solution." *See City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) (emphasis added); *see also Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 477 (D.C. Cir. 1998) ("[I]t would be arbitrary and capricious for an agency simply to thumb its nose at Congress and say—without any explanation—that it simply does not intend to achieve a congressional goal on any timetable at all."). The only support EPA provides are cases that involve *new* regulations, not the rescission of existing regulations. EPA Resp. 20 (citing *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1039 (D.C. Cir. 1987) (upholding FERC's decision to issue order concerning transportation issues without reaching sales issues) and *Wildearth Guardians v. EPA*, 751 F.3d 649, 654 (D.C. Cir. 2014) (upholding EPA's denial of a petition for rulemaking for new coal mines)).

As this Court noted in *Wildearth Guardians*, decisions concerning the "timing" of regulation are fundamentally different from decisions concerning "whether to regulate." *Wildearth Guardians*, 751 F.3d at 654 (citing *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)). Deregulating the transmission and storage segment concerns the latter, and it is a longstanding principle of administrative law

that such reversals in agency policy require that the agency provide a "reasoned explanation" for disregarding its prior factual findings. *See FCC v. Fox*, 556 U.S. at 515-6; *see also DHS v. Regents*, 140 S.Ct. at 1912; *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125-6 (2016); *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 42 (1983). EPA has provided no such reasoned explanation for disregarding its prior finding that emissions from the transmission and storage segment are independently significant. *See, e.g.*, SA026. EPA's only other proffered basis for deregulating is a flawed narrowing of its statutory authority that is entirely inconsistent with past agency practice, *see* State Petitioners Mot. 10-11, an unreasonable legal interpretation that is entitled to no deference at all. *See* Envtl. Petitioners Reply at 4-11 (noting other infirmities with EPA's purported justifications).

Even if EPA were operating on a blank slate, and did not have to engage with the detailed factual findings in the 2016 Standard, its flawed justification for not regulating the transmission and storage segment is entirely arbitrary and capricious. *See* State Petitioners Mot. 12-13; Envtl. Petitioners Mot. 10-15. EPA focuses on irrelevant (and minor) distinctions in gas composition between the segments to argue that the segments must be regulated separately, EPA Resp. 16-17, but disregards that the applicable air pollution controls are identical, State Petitioners Mot. 12; Envtl. Petitioners Mot. 12-13. The agency's failure to consider

such a key aspect of emissions regulation—how to control the pollution—is arbitrary and capricious. *State Farm*, 463 U.S. at 43; *see also* Envtl. Petitioners Reply 7-10.

B. EPA Does Not Provide a Reasoned Explanation for Its Change in Position in Rescinding Its Regulation of Methane

EPA also failed to provide a reasoned explanation for contradicting decades of agency practice and retroactively applying its newly contrived and undefined "some type of . . . standard and/or established set of criteria" requirement only to its 2016 significance finding and not to any of the dozens of other significance findings EPA has made over the past 50 years. *See Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 644-45 (D.C. Cir. 2020) (agency must distinguish or explain its rejection of its precedents or practices). Rather than defend its inconsistency, EPA only seeks to minimize the importance of its unprecedented new interpretation as mere fallback reasoning the Court can disregard. EPA Resp. 35. EPA's new test, one of only two bases it claims for invalidating its detailed 2016 significance finding, is indeed indefensible.

EPA cannot explain why using its newfound constraint solely for the purpose of rescinding the 2016 finding is not arbitrary and capricious, so it instead attacks a *Chevron* deference strawman. EPA Resp. 32-35 (explaining that EPA now considers terms it has been applying for decades to be ambiguous). Whether EPA has the discretion to develop—through a future rulemaking—criteria to guide its

application of the phrase "significantly contributes" in Section 111(b)(1)(A) is not at issue here. EPA has not developed such criteria and, even if they existed, has not explained why it could selectively, retroactively apply them only to one source category and not others.[2]

EPA suggests that it can address the repercussions of it deeming "arbitrary and capricious" all of its dozens of previous Section 111(b)(1)(A) significance findings over decades "in separate rulemakings." EPA Resp. 35. That EPA might later attempt to deregulate other Section 111 sources one step at a time does not provide the reasoned explanation for why EPA is justified in reversing its decades-old policy now solely for the 2016 significance finding.

Moreover, for all the reasons addressed in State Petitioners' September 18 motion, Mot. 18-19, the methane standards are not redundant, not least because of the regulatory effect on existing sources of rescinding those standards. *See also* Envtl. Petitioners Reply 11-16.

[2] In *American Lung Association v. EPA* (D.C. Cir., No. 19-1140), EPA is currently defending its authority to regulate greenhouse gas emissions from existing fossil-fuel power plants on the basis of its valid 2015 Section 111(b)(1)(A) significance finding; in making that finding, the agency did not apply the "established criteria" that EPA here tells the Court are mandatory. *See* 85 Fed. Reg. at 57,039-40 n.49.

II. STATE PETITIONERS HAVE DEMONSTRATED THEY WILL BE IRREPARABLY HARMED IF THE RESCISSION RULE IS NOT STAYED

A. State Petitioners Will Suffer Irreparable Public Health Impacts Absent a Stay

State Petitioners will suffer irreparable harm in the form of public health impacts resulting from increased emissions of volatile organic compounds and hazardous air pollutants if the Rescission Rule goes into effect. *See* State Petitioners Mot. 20-22. EPA does not and cannot rebut that fact. Instead, EPA dismisses the emission increases *the agency itself calculated* would occur in the first year of rule implementation, State Petitioners Mot. A180, by claiming that the regulated industry will voluntarily comply with the 2016 Standard. EPA Resp. 37-39. (Notably, industry Intervenors make no such claim in their response.) This contention of voluntary compliance conflicts with EPA's claim elsewhere that rolling back the 2016 Standard will save the industry money by reducing regulatory burdens. EPA Resp. at 45. EPA cannot claim its actions will reduce regulatory burdens while simultaneously asserting that industry will voluntarily continue to bear those same burdens anyway. EPA's speculative assertion also directly contradicts the findings in EPA's Regulatory Impact Analysis for the Rescission Rule, which explains that the expected increase in volatile organic compounds "will worsen air quality and adversely affect health and welfare" by increasing concentrations of ambient ozone, which "is associated with adverse

health effects, including premature mortality and cases of respiratory morbidity." State Petitioners Mot. A175, A187. This type of harm is the quintessential environmental injury that "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

EPA also attempts to minimize State Petitioners' irreparable injury by claiming that states can simply "impose their own requirements." EPA Resp. 39. Not only does this presume without basis that states have the resources to fill the regulatory gap, it ignores that some states like New Mexico incorporate by reference the federal regulations into their own state regulations. State Petitioners Mot. A031. Further, this argument ignores the essential interstate pollution-control role that EPA's regulations play. For example, ozone concentrations in New Mexico are significantly impacted by interstate pollution from Texas, for which New Mexico has previously relied on federal regulation to control and could not address through state regulation. *Id.* A029.

B. EPA Cannot Rebut State Petitioners' Irreparable Injury by Pointing to the Agency's Own Unlawful Inaction

Promulgating the 2016 Standard triggered EPA's 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). Yet, after promulgating the 2016 Standard, EPA halted its active process to fulfill this obligation, necessitating

legal action by a subset of State and Environmental Petitioners seeking to enforce EPA's nondiscretionary duty under section 111(d) to issue these methane emission guidelines for existing sources. *See New York v. EPA*, No. 1:18-cv-00773-RBW (D.D.C. filed Apr. 5, 2018); State Petitioners Mot. A415.

EPA's argument that any harms caused by emissions from existing sources "are too speculative and distant to justify a stay" because any federal emission guidelines for existing sources are "years away" is thus disingenuous and unconvincing. EPA Resp. 43-44. That "years-long" process would already be well underway—if not complete—but for EPA's decision in March 2017 to withdraw its existing source information request, thereby abruptly and unlawfully halting its efforts to regulate existing sources without any notice or opportunity to comment. 82 Fed. Reg. 12,817 (Mar. 7, 2017).[3] EPA now seeks to benefit from its dereliction both by arguing in this Court that any reduction in emissions from existing sources is not imminent due to its inaction in issuing guidelines, and by simultaneously arguing before the District Court in *New York v. EPA* that it cannot be compelled to issue guidelines because the Rescission Rule moots its obligation to regulate

[3] 51 months passed between when EPA issued the new source standard in June 2016 and when it finalized the Rescission Rule in September 2020, well past the period EPA claims it would typically need to issue existing source guidelines. *See* EPA Resp. 44.

existing sources. State Petitioners Mot. A450-451.[4] This Court should reject EPA's "administrative law shell game." *See Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 731-33 (D.C. Cir. 1992).

In truth, State Petitioners are already harmed by EPA's failure to promulgate methane emission guidelines, and every additional month of delay in initiating this process constitutes continued irreparable harm, as methane from hundreds of thousands of existing sources in the oil and gas sector continues to enter the atmosphere. State Petitioners Mot. A181 (identifying methane as 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 also* Envtl. Petitioners Mot. A0086-87 (estimating 43.6 million metric tons of methane have been emitted from existing oil and natural gas sources since 2016). 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, thereby contributing to climate change and harming State Petitioners. *See* State Petitioners Mot. A001-A025, A032-A069.

[4] The District Court in *New York v. EPA*, No. 1:18-cv-00773-RBW, has now stayed resolution of Petitioners' motion for summary judgment pending a status conference on October 16, 2020. Whether or not the Rescission Rule is stayed will inform that court's decision on whether that case should proceed.

III. EPA HAS NOT PROVIDED THIS COURT WITH ANY BASIS FOR FINDING THAT THE BALANCE OF EQUITIES OR THE PUBLIC INTEREST COUNSEL AGAINST A STAY

EPA contends that "the public is served when EPA properly implements its statutory obligations." EPA Resp. 45. State Petitioners agree. EPA's primary statutory obligation under the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Absent a stay, the Rescission Rule will worsen air quality, public health, welfare, and economic wellbeing. State Petitioners Mot. 22-23. Any alleged harm to the oil and gas industry, a significant segment of which supported the 2016 Standard, *see* Envtl. Petitioners Mot. A0512-A0559, is far outweighed by the irreparable harms the Rescission Rule will cause State Petitioners. And, tellingly, Intervenors do not contend that a stay will prejudice them in any way.

CONCLUSION

State Petitioners respectfully request that the Court grant State Petitioners' motion for judicial stay or, in the alternative, order expedited briefing and consideration of the case.

Dated: Oct. 5, 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 3,192 words as calculated by Microsoft Word, exclusive of the caption, signature block, and certificates of counsel.

Petitioners jointly filed a timely unopposed motion for a proportionate word limit for their replies. ECF 1864002. That motion sought a combined word limit of 8,700 words for both replies, to be divided as Petitioners saw fit. *Id.* Petitioners have agreed that Environmental Petitioners' reply brief will not exceed 5,500 words, and State Petitioners' reply brief will not exceed 3,200 words. Petitioners' replies comply with the requested word count. D.C. Cir. Rule 27(h)(4).

/s/ Meredith J. Hankins
MEREDITH J. HANKINS

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.

/s/ Meredith J. Hankins
MEREDITH J. HANKINS