ORAL ARGUMENT NOT YET SCHEDULED

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

No. 20-1357 (consolidated with No. 20-1359)

STATE OF CALIFORNIA, ET AL.,

and

ENVIRONMENTAL DEFENSE FUND, ET AL.,

Petitioners

v.

ANDREW WHEELER, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING REVIEW; MOTION FOR SUMMARY VACATUR

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GLOSSARY

Administrator	Andrew Wheeler, Administrator, Environmental Protection Agency
EPA	Environmental Protection Agency
Rescission Rule	Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review Rule, 85 Fed. Reg. 57,018 (Sept. 14, 2020)
Section 111	42 U.S.C. § 7411
Section 112	42 U.S.C. § 7412
VOCs	Volatile organic compounds
2016 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

The legal violations in this case are simple and clear. The Rescission Rule presents a textbook example of arbitrary and capricious agency action.

The Administrator's determination that pollution sources in the upstream and downstream segments of the oil and gas industry are so different that the Clean Air Act *requires* him to divide the preexisting source category "is so implausible it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). His determination that methane and volatile organic compound ("VOC") standards are redundant entirely ignores "an important aspect of the problem" as determined by Congress—the implications for pollution from hundreds of thousands of existing sources. *Id.* (Even those industry trade groups that have moved to intervene do not defend this position.) And his rescission of extant standards now while promising the required "satisfactory explanation" of the applicable criteria later violates the most basic requirements of reasoned decision-making. *Id.*

In their responses, the Administrator and movant-intervenors ("Trade Group Intervenors") analyze the issues as though the Administrator were operating on a blank slate. He is not. The Rescission Rule is a final action that repeals public health protections, without anything approaching an adequate explanation for doing so. No technical expertise is needed to see that the Rule is unreasoned, internally inconsistent, and a blatant abdication of the Administrator's charge to protect the public from dangerous pollution. Summary vacatur is warranted.

At the very least, a stay pending review is warranted. The Administrator and Trade Group Intervenors do not dispute that the Rescission Rule permits over a thousand currently regulated sources to cease controlling pollution immediately, or that the Rule bars EPA from regulating hundreds of thousands of existing oil and gas sources emitting millions of tons of methane pollution. They also do not dispute that methane is a powerful climate pollutant with near-term impact, or that it contributes to the unprecedented warming that is increasing wildfires, storm severity, and heat-related deaths. Nor do they dispute that operators have been complying with EPA's prior rules without any

problem or undue burden. Indeed, Trade Group Intervenors do not even argue that a stay would prejudice their interests. Meanwhile, as the agency's response to comments document acknowledges, "50 percent [of industry] oppose[s]" the Rescission Rule, and at least one major company, Shell Oil, publicly supports a stay in this litigation. *Infra* pp. 28-29. Petitioners have satisfied the prerequisites for a stay.

ARGUMENT

I. Petitioners Are Likely to Succeed on the Merits, and the Administrator's Clear Legal Violations Justify Summary Vacatur.

Like a house of cards, the Rescission Rule collapses under the weight of its basic administrative law errors: it ignores obviously relevant considerations, fails to provide reasoned explanations, and is riddled with contradictions.

A. Dividing and deregulating the downstream segment is arbitrary and capricious.

The first issue presented is straightforward: Has the Administrator shown that the upstream and downstream segments of the oil and gas industry are *so different* that EPA's 2016 single source category combining the two was unlawful? The answer is easy: No.

In their responses, the Administrator and Trade Group Intervenors attempt to confuse matters by arguing that an Administrator acting on a blank slate *could have* chosen to create and regulate two different source categories. *E.g.*, ECF 1863772 ("EPA Resp.") 9 (claiming segments "are sufficiently distinct" that they "*should* not" be included in the same source category) (emphasis added); ECF 1863774 ("Trade Resp.") 6-7 (asserting that dividing the source category is "*a* [r]easoned approach," reflecting "EPA's evaluation of how to *best* define a source category") (emphasis added).

But that is not what happened here. Rather, the Administrator claimed he was *required to reverse* EPA's 2016 Rule and divide the source category, and denied having exercised any policy discretion in doing so. EPA Resp. 16, 18, 22.[1] Petitioners have shown, however, that EPA reasonably established a single category in 2016, and that the Administrator has therefore failed to justify his reversal. Env. Mot. 9-

[1] *E.g.*, 85 Fed. Reg. 57,018, 57,029 (Sept. 14, 2020) (combined source category "exceed[s] the reasonable boundaries of EPA's authority"); Supplemental Appendix ("SA") 5 ("EPA does not consider [its revision of the source category] to be a discretionary action but rather is an action to correct an earlier error."); ECF 1861564 ("Env. Mot.") 16 n.4. This is in sharp contrast to his rescission of the methane standards, which he expressly defended as an exercise of discretion. 85 Fed. Reg. at 57,030.

15. Thus, the Rescission Rule must be vacated. *See U.S. v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017) (where agency claims it is compelled to take action, court cannot uphold action "as an exercise of the discretion that the agency disavows").

The Administrator contends that, as a matter of law, he cannot keep the production and processing ("upstream") segments and transmission and storage ("downstream") segment in one category because they are not "sufficiently related." To pass the "sufficiently related" test, he states, sources must exhibit "commonality in emissions, processes and applicable controls." EPA Resp. 14 (citing 85 Fed. Reg. at 57,027). Considering precisely these same factors in 2016, EPA reasonably determined that the three segments of the industry belonged in the same category. Env. Mot. 9-10. The Administrator has failed to show that this determination was outside the bounds of EPA's authority because sources in the upstream and downstream segments plainly check all of these "commonality" boxes.

First, the segments have commonality in emissions. Methane—*by far* the dominant pollutant across the entire supply chain—is emitted in large quantities in *all* segments. Env. Mot. 11-13. Second, there are

functionally identical "processes" (i.e., equipment and operations) throughout the different segments. *All* of the downstream equipment covered by the 2016 Rule (compressors, pneumatic pumps and controllers, storage vessels, etc.) is found in the upstream segments and operates in similar fashion. *Id.* 13. Third, the "applicable controls" (a mix of equipment specifications and leak detection and repair protocols) are the same in both the upstream and downstream segments. *Id.*

Accordingly, the category as defined in 2016 passes the Administrator's "sufficiently related" test with flying colors and was plainly authorized. Indeed, the agency's response to comments document concedes as much, directly contradicting the Administrator's position. SA7 ("EPA agrees that the [Clean Air Act] does not preclude the EPA from regulating sources in the production, processing, and transmission and storage segments of the oil and gas industry as a single source category.").

In the face of these obvious commonalities, the Administrator strains to assert two irrelevant factual distinctions: supposed differences in the composition of the gases and supposed differences in

business purpose.[2] But his response fails to show that either purported distinction is relevant, much less *requires* division of the source category.

The Administrator does not explain how "the chemical composition" of the natural gas stream is "*materially* different" in the upstream and downstream segments. EPA Resp. 17 (emphasis added). As Petitioners demonstrated, Env. Mot. 11-12, methane is the major component of the gas handled in, and the pollution emitted from, all segments of the industry. The quantity of *additional* chemicals (VOCs and hazardous air pollutants) does not change the dominance of methane in all segments or have any bearing on the applicable emission controls. *Id*. The Administrator admits this point in attempting to justify rescission of the methane standards. EPA Resp. 28 ("[T]he

[2] In his response, the Administrator offers a third, brand new rationale for dividing the category: that the upstream segments emit more pollution than the downstream. EPA Resp. 17-18. The Court cannot credit this post-hoc rationalization. *Natural Res. Def. Council v. EPA*, 755 F.3d 1010, 1020-21 (D.C. Cir. 2014). Further, with regard to methane, this is not even an accurate distinction. EPA's data show that emissions from the gas transmission and storage segment are comparable to—and sometimes much greater than—other parts of the industry (like petroleum production and gas processing) that the Administrator states are properly within the source category. SA10-12.

higher proportion of methane to VOC in oil and gas production and processing is immaterial to the applicable standards because the 'requirements of the [2016 Rule]' apply 'to each emission source's methane and VOC emissions, in precisely the same way.'"). The differences in gas composition cannot be so "materia[l]" as to require dividing the source category and also completely "immaterial" to how pollution is controlled.

Likewise, the Administrator fails to show that the asserted differences in the business "purposes" of the segments, EPA Resp. 16-17, have any relevance to controlling emissions. Compressors, pneumatic pumps, storage vessels, and other polluting equipment found throughout the segments serve the same operational purposes regardless of location. For example, all compressors pressurize gas to push it through the interconnected system of equipment, and compressor emissions are controlled the same way regardless of where they are situated in the supply chain.

The Administrator's only response is to claim that "what sources properly belong in a particular source category" is "distinct" from "how that category should be regulated." EPA Resp. 22. But that proposition

is directly contradicted by his own "sufficiently related" test, which turns on commonalities in "emissions, processes and applicable controls," *id.* 14, all of which relate to how pollution is regulated. It also makes no sense. If how the category should be regulated is unrelated to how a category is defined, it is difficult to understand what makes any particular commonality or distinction "material." *Id.* 17.[3]

In the past, EPA has regularly formed categories based upon how pollution sources are to be regulated. Petitioners' motion described numerous examples that are at least as inclusive as the 2016 oil and gas source category. Env. Mot. 12-14. The Administrator and Trade Group Intervenors respond that EPA has placed sources in the oil industry into several source categories. EPA Resp. 19; Trade Resp. 10-11. EPA's treatment of the oil industry, however, emphasizes that the relevant factors are the characteristics of the emitting equipment, not the business purpose of the industry in which the equipment sits. Indeed, four of the nine source categories that Intervenors list as part of

[3] It is thus the *Administrator's* approach that would "aggrandize [the agency's] authority beyond Congress's intended bounds," EPA Resp. 14, by allowing the agency to make category decisions (and, on that basis, deregulate sources) based on distinctions that do not relate to controlling air pollution.

"the oil industry" cover multiple disparate industries. Trade Resp. 10-11 (citing steam generators, internal combustion engines, stationary combustion turbines, and storage vessels, all source categories that cover multiple industries). The relevant commonalities are the processes of the polluting sources and the applicable controls.

Moreover, neither the Administrator nor Trade Group Intervenors assert that EPA was *required* to divide the oil industry in this manner. As the Administrator notes, categorization is a "case-by-case" inquiry. EPA Resp. 23. While prior examples demonstrate that EPA's 2016 category was well within the norm, they cannot (and do not) show that the 2016 determination was unauthorized. And notably, in every example that the Administrator and Intervenors cite, EPA *regulated* each part of the industry, so there was little reason to quibble with how the agency organized the categories. By contrast, the Administrator here has divided the source category to deregulate more than a thousand sources that were formerly controlled. Even if the Administrator had attempted to justify dividing the category as a

matter of discretion (he has not), it would be arbitrary to do so in order to deregulate the pollution sources in a major part of this industry.[4]

In short, the Administrator fails to point to a single relevant difference that justifies dividing the source category—let alone carry the burden of demonstrating that the 2016 category was *unlawful*. The Administrator's action "is so implausible it [cannot] be ascribed to a difference in view," nor can it be "the product of agency expertise," *State Farm*, 463 U.S. at 43, and is plainly arbitrary and capricious.

B. Eliminating methane standards as "redundant" is arbitrary and capricious.

The second issue presented is also straightforward: Are the methane and VOC standards redundant? Once again, the answer is easy: No. Indeed, Trade Group Intervenors decline to defend the rescission of the methane standards.

[4] Nor is it probative that upstream and downstream sources are regulated separately under a different provision of the Clean Air Act. *See* EPA Resp. 19. Unlike Section 111, Section 112 includes specific provisions directed at oil and gas production wells and transmission compressor stations, and prohibits the aggregation of emissions from *similar types of equipment*, 42 U.S.C. § 7412(n)(4), which limits the scope of oil and natural gas source categories under that program. And no segment of the industry is *unregulated* under Section 112.

The Administrator's "primary basis for [the] rescission," EPA Resp. 35—that methane standards are redundant of VOC standards—is flatly incorrect. First, and most obviously, the issuance of methane standards for new sources triggered EPA's obligation to regulate hundreds of thousands of existing sources, while VOC standards did not. This is an enormous repercussion that the Administrator cannot ignore consistent with the statute and administrative law. Indeed, given that he does not claim any "special burden" or "practical impact" on the industry from complying with the allegedly redundant new source standards, EPA Resp. 26-27, it is difficult to see why rescinding methane standards is worth the effort unless the Administrator's intent is to strip the agency of authority to regulate existing sources.

The Administrator does not dispute the factual basis of Petitioners' non-redundancy argument: that existing sources are responsible for the vast majority of the millions of tons of methane emitted annually from the source category. Env. Mot. 19-20. And he acknowledges that he would be obliged to regulate existing sources if he retained methane standards for new sources, but not if he limits new source standards to VOCs alone. EPA Resp. 29; 85 Fed. Reg. at 57,033.

He insists, however, that "the impacts on existing sources were beyond the scope of [EPA's] consideration in this rulemaking" and thus "not relevant here." EPA Resp. 29-30 & n.7.

Bunkum. Once EPA regulates emissions of a pollutant like methane under Section 111(b), the Clean Air Act *requires* EPA to issue existing source regulations under Section 111(d). 42 U.S.C. § 7411(d) (requiring "standards of performance for any existing source of any air pollutant … to which a standard of performance under this section would apply if such existing source were a new source"). Eliminating the agency's obligation and authority to regulate existing sources is thus an obvious impact that EPA must consider when deciding whether to repeal new source methane standards on the basis that they are "redundant." *See Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020) ("[I]n failing to grapple with how EPA's policy affected its statutory … mandates, the [agency] 'failed to consider an important aspect of the problem.'").

While the Administrator pretends that Section 111 is only about new sources, EPA Resp. 30, "the stubborn fact remains" that Congress included existing source regulation as a key component of this program.

Time Warner Entm't Co. v. FCC, 56 F.3d 151, 174-75 (D.C. Cir. 1995) (dismissing contention that the governing statute "is concerned only (or even more concerned)" with one thing Congress included to the exclusion of another). And his claim that existing sources are "grandfathered" under Section 111, EPA Resp. 30, is wrong. Congress enacted Section 111(d) precisely to ensure that existing sources of dangerous pollutants like methane, which are not regulated under other provisions of the Act, are controlled. The Administrator's attempt to push beyond his reach this "important issue that falls smack-dab within the agency's regulatory ambit," *Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 744 (D.C. Cir. 2017), completely subverts Congress's intent.

Second, the Administrator does not dispute that methane and VOC standards are not redundant for new sources in the downstream segment of the industry. EPA Resp. 27. Because the Administrator's decision to divide and deregulate downstream sources is unlawful, *supra* pp. 3-11, so is his decision to rescind methane standards based solely upon redundancy for upstream sources. This is the fatal circularity of the Rescission Rule. Only by ignoring downstream sources

can the Administrator purport to find methane regulation redundant. And only by identifying gas composition and business "purpose" distinctions related to other pollutants that simply do not matter with regard to regulating methane can the Administrator purport to divide and deregulate downstream sources. He is not regulating methane because he is not regulating downstream sources, and he is not regulating downstream sources because he is not regulating methane. The Court should decline to ride this merry-go-round.

The Administrator's brief also offers a newly-minted rationale for eliminating methane standards instead of VOC standards—that VOC standards reach sources built or modified before the methane standards were proposed. *See* EPA Resp. 26 (including a "*see*" cite to a page that does not make this argument); *Natural Res. Def. Council*, 755 F.3d at 1020-21 (rejecting post-hoc rationalizations). But this argument only underscores the non-redundancy of those standards by demonstrating that each standard does different work. While the VOC standards cover earlier-constructed sources that the methane standards do not, the methane standards trigger regulation of existing sources and enable additional controls in the downstream segment that the VOC standards

do not. This is not a problematic "patchwork," EPA Resp. 29—without any conflict, the regulations do overlapping but different work to carry out Congress' intent.[5]

Methane and VOC standards simply are not redundant and the Administrator's effort to ignore "an important aspect of the problem" is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

C. The Administrator's "alternative" basis for rescinding methane standards is also arbitrary and capricious.

The final issue presented is also straightforward. In the 2016 Rule, EPA determined that methane emissions from the oil and gas category "contribute significantly" to the endangerment of public health and welfare. Env. Mot. 4. After dividing the category, the Administrator now claims the need for a segment-specific "do-over" on this determination. EPA Resp. 31-32. This claim fails because the Administrator's removal of the downstream segment was invalid. *Supra* pp. 3-11.

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[5] The Administrator's invocation of *Chevron* deference at the tail end of his redundancy argument, EPA Resp. 31, is puzzling. He identifies no statutory language, ambiguous or not, that he purports to interpret. Deference in statutory interpretation is not a roving deference to anything an agency would like to do.

The Administrator also argues he must rescind that determination and methane standards because EPA may not make significant contribution findings on a case-by-case basis as it has for nearly fifty years. EPA Resp. 32-35. Instead, he argues that he must first establish a uniform "standard" or "set of criteria"—a task he says he will undertake at some point in the future.

This is the height of arbitrary and capricious action. The Administrator does not explain why it is permissible to make category determinations case by case, but impermissible to make significant contribution findings on the same case-by-case basis.[6] He cannot rescind pre-existing standards for a failure to meet criteria that he will establish, and provide a "satisfactory explanation" for, only in some speculative future rulemaking. *State Farm*, 463 U.S. at 43. And he cannot target only one standard for rescission now while claiming that the agency has been acting unlawfully for decades.

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[6] The Administrator's attempt to distinguish *Coalition for Responsible Regulation*, EPA Resp. 34-35, falls flat. The question whether a source "significantly contributes" to dangerous pollution *is* "a complex question of risk to the environment," *id.* 35, which varies from pollutant-to-pollutant and source-to-source. Env. Mot. 27-28.

An administrative law class could be taught on the textbook arbitrary and capricious violations in the Rescission Rule. This Court should summarily vacate the Rule, or, at a minimum, should conclude that Petitioners are likely to succeed on the merits.

II. Petitioners and Their Members Are Irreparably Harmed by the Rescission Rule.

The substantial climate and health harms caused by the powerful greenhouse gas methane, ozone-forming VOCs, and cancer-causing toxic air pollution emitted by the oil and gas sector are undisputed. Env. Mot. 29-30. The Administrator and Trade Group Intervenors cannot, and do not, dispute that allowing the Rescission Rule to go into effect during the pendency of this litigation will result in millions of tons of this pollution that would otherwise be prevented, starting immediately, including in areas already overburdened by unhealthy air quality. *Id.* 15-16, 19.[7] And there is no disagreement that many of Petitioners'

[7] The Administrator's argument that EPA was *required* to forgo the usual 60-day effective date, EPA Resp. 4 n.1, appears to be entirely novel and was not presented in the Rescission Rule. At any rate, the Rescission Rule, just like the 2012 and 2016 Rules, clearly qualifies as "major," and, indeed, EPA denominated it a "significant regulatory action" under Executive Order 12866. 85 Fed. Reg. at 57,067. The Administrator's attempt to characterize it as non-major is based on

members are already suffering the impacts of a changing climate and that many live near sources that will emit greater quantities of pollutants under the Rule, absent a stay. *Id.* 32-33, 35-36.

These unchallenged facts alone demonstrate irreparable harm. *See Sierra Club v. U.S. Dep't of Agric., Rural Utils. Serv.*, 841 F. Supp. 2d 349, 358 (D.D.C. 2012) (plaintiff demonstrated irreparable harm based on expert affidavit showing expansion of a single coal plant would "emit substantial quantities of air pollutants that endanger human health and the environment"). Petitioners are irreparably harmed by both the Rescission Rule's deregulation of downstream sources and rescission of methane requirements. Because these two actions are legally interdependent, *see supra* pp. 14-16, the irreparable harm associated with either necessitates a stay of the entire Rule.

A. Petitioners are irreparably harmed by the removal of pollution standards for downstream sources.

The Administrator does not dispute that, during the pendency of litigation, the Rescission Rule permits substantial quantities of previously-controlled pollution to be emitted by more than a thousand

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arbitrarily ignoring and minimizing benefits forgone by the Rescission Rule. *See supra* pp. 12-13; *infra* p. 20 n.8.

sources in the downstream segment. And he cannot: the Rescission Rule and its supporting analysis specifically disclose these emissions. 85 Fed. Reg. at 57,020 (Tbl. 1); SA21, 23.[8]

Rather than acknowledge the resulting harm, the Administrator principally offers new, undocumented, and unquantified speculation that he "anticipates" *some* unspecified number of operators will ignore the Rescission Rule and voluntarily control emissions in accordance with the 2016 Rule. EPA Resp. 2, 37-39. The Administrator then proceeds to flatly contradict his own claim, calculating and claiming credit for cost savings operators would realize only by fully avoiding pollution controls. *Id*. 45. Notably, Trade Group Intervenors do not claim that their members will voluntarily continue to observe the former regulatory requirements. Nor do they contest that Petitioners'

[8] The quantities the Administrator discloses are more than sufficient to irreparably harm Petitioners' members. Even so, they vastly underrepresent the actual emissions. Env. Mot. 31-32. The Administrator systemically underestimates the Rescission Rule's impacts by failing to account for the well-documented problem of "super-emitting" sites, underestimating the growth in new downstream facilities, and assuming, based on limited data, that there would be no sources affected by certain provisions of the 2016 Rule. *Id.* 32 n.10; A68-69 (¶¶11-12). The true emissions resulting from the deregulation of downstream sources are likely an order of magnitude higher than the Administrator's estimates. Env. Mot. 31-32.

members will suffer irreparable harm from the removal of standards for downstream sources.

In addition, the Administrator offers no evidence that operators would voluntarily continue to undertake *ongoing quarterly* leak detection and repair efforts. EPA Resp. 38-39. Indeed, his Regulatory Impact Analysis notes that downstream compressor stations "are expected to cease [2016 Rule]-required activities related to the [leak detection and repair] requirements." SA16. Likewise, the Administrator's claim that downstream operators have a financial incentive to fix leaks is belied by his observation that downstream operators "do not typically own the natural gas they transport," and, therefore, do not directly accrue the benefits of capturing lost gas. SA24. He also argues feebly that removing these requirements will have no impact because the sources still must report emissions under the Greenhouse Gas Reporting Program. Yet that program mandates only *annual* (not quarterly) surveys, and does not require that operators *actually fix leaks found*. *See* 40 C.F.R. §§ 98.231(a)(4), 98.232(e)(7)-(8), 98.236.

The Administrator's new speculation likewise ignores his own findings that operators will continue to construct and begin operating hundreds of *new* sources after the Rescission Rule takes effect—all exempt from the former control requirements. *See* SA18, 21 (estimating that *hundreds* of high-emitting new pneumatic controllers will come online each year through the next decade). This Court should ignore the Administrator's unsupported and contradictory speculation.

Next, attempting to downplay the harm from the emissions he discloses, the Administrator compares the methane emissions permitted by the Rescission Rule to *total global* emissions of all greenhouse gases. EPA Resp. 40. Other courts have rightly rejected this gambit. *See California v. BLM*, 286 F. Supp. 3d 1054, 1073 (N.D. Cal. 2018) (finding irreparable harm from rule that would increase methane emissions by less than one percent of total U.S. methane emissions, rejecting agency's characterization of those emissions as "infinitesimal"); *cf. Massachusetts v. EPA*, 549 U.S. 497, 523-24 (2007) (rejecting similar argument and "erroneous assumption" that agency cannot be held accountable for failure to take a "small incremental step, because it is incremental"). The Administrator also ignores the extensive scientific

evidence on methane's disproportionate near-term impact on warming and associated harms—harms that Petitioners' members are already experiencing. *See* A173-75 (¶3).

The Administrator also attempts to diminish the Rescission Rule's localized health impacts by pointing to other Clean Air Act programs for reducing emissions. EPA Resp. 41-42. But even if new regulations under these programs could eventually replace the protections the Rule eliminates, they would do nothing to prevent the immediate emissions from downstream sources that, absent a stay, will occur during the pendency of this litigation. Nor would they ameliorate the resulting irreparable harm to Petitioners' members, thousands of whom live close to affected sources, including in ozone nonattainment areas. Env. Mot. 33; *see also* A100 (identifying affected downstream compressor stations located in 14 states).

Any additional VOC emissions in these nonattainment areas will worsen unhealthy air, and *any* additional emissions of hazardous air pollutants harm Petitioners' members living near these sources because there is no safe level of human exposure. A207 (¶¶19-21). His attempt to diminish these harms is also contradicted by his admission that these

very pollutants "may also degrade air quality and adversely affect health and welfare." 85 Fed. Reg. at 57,020.

The Rescission Rule's deregulation of downstream sources will cause immediate, real-world, and irreversible harm to Petitioners' members and the public at large.

B. Petitioners are irreparably harmed by the removal of methane standards and authority to regulate existing sources.

Neither the Administrator nor Trade Group Intervenors dispute that more than 850,000 existing sources—including those located near tens of thousands of Petitioners' members—currently emit millions of tons of methane and VOC pollution each year. They do not contest that, prior to removing methane standards, EPA had a binding duty to regulate methane emissions from existing sources and had initiated that regulatory process in 2016. That legal obligation would be restored by a judicial stay. The harm from the Rescission Rule—that it *prohibits* EPA from taking any action under Section 111(d) to control the ongoing, massive emissions from existing sources that the Administrator would

otherwise be *required* to control—is not merely imminent; it is immediate.[9]

Absent a stay, EPA's delay in issuing existing source regulations will be further extended by at least the time this litigation is pending. Notably, while EPA claims that rulemakings take years, the agency does not claim that the time lost during this litigation could later be made up. Thus, every day of delay now means another day of delay in reducing emissions from those 850,000 existing sources. That uncontrolled pollution is occurring now, the harm it causes Petitioners' members is certain and great, and the Administrator's delay in curbing it—which corresponds to millions of tons of methane emissions that could be prevented—is an ongoing result of the Rescission Rule.

[9] The Administrator suggests that Petitioners cannot claim irreparable harm from the agency's protracted delay in issuing existing source regulations until and unless Petitioners succeed in a separate lawsuit to compel EPA to take action. EPA Resp. 43. This argument—that EPA would not fulfill its statutory duties absent court order—is particularly galling as EPA has admitted that the *only* reason for delay was its anticipated rescission of methane standards. Env. Mot. 34. At any rate, with vacatur or a stay of the Rescission Rule, the agency would no longer have any defense, so it is not speculative that the district court would order EPA to promulgate existing source regulations.

Petitioners' expert Dr. Renee McVay conducted a quantitative analysis of the existing source pollution that EPA regulation could reduce, accounting for factors such as retirement of older sources and reasonably assuming similar requirements for new and existing sources. A82-97. The Administrator declined to contest Dr. McVay's conclusions, and undertook no such analysis in the Rescission Rule. *See* 85 Fed. Reg. at 57,041 (acknowledging there will be emissions impacts from the Rule's preclusion of existing source regulation but declining to quantify them). And contrary to the Administrator's assertion, EPA Resp. 44, merely because there may be a range for the amount of pollution reduced by existing source regulations depending on their content and timing does not mean that the *harm* from forgoing those regulations is speculative.

The Administrator's and Trade Group Intervenors' assertions that emissions reductions from existing source regulation are years away only underscore the urgent need to avoid any further delay. *See* EPA Resp. 43-44; Trade Resp. 22-24. As Dr. McVay's analysis shows, each additional year without existing source standards equates to more than two million tons of methane pollution and more than half a million tons

of VOC pollution that could otherwise be prevented. A90 (Tbl. 6) (showing emissions and potential reductions from existing sources for each year from 2017-2021).

Ultimately, both the Administrator's delay in developing existing source regulations and the time it will take to implement them *compound* the irreparable harms of the Rescission Rule, forcing Petitioners to bear the additional pollution resulting from the Administrator's failure to adopt these regulations for far longer than would have been the case had the Administrator expeditiously discharged his obligation to protect human health and welfare.

III. The Public Interest and Balance of the Equities Support a Stay.

The harm to the public interest caused by the Rescission Rule is great. *Supra* pp. 18-27. There is simply no harm on the other side of the balance. Not even the Trade Group Intervenors contend that operators are harmed by a stay or that the public interest favors allowing the Rescission Rule to take effect.

The Administrator tries to claim that a stay would somehow "sacrifice economic growth." EPA Resp. 45. But this is directly contradicted by his conclusions in the Rescission Rule that the Rule

would only "partially reduce" the "small impacts on crude oil and natural gas markets of the 2016 Rule." 85 Fed. Reg. at 57,065; *see* A252-53 (¶18) (compliance costs amount to only 0.11% of capital expenditures and only 0.14% of annual revenue in the downstream segment); *see* Env. Mot. 38-39. It is also contradicted by his failure to claim any "special burden on industry" from the 2016 Rule, EPA Resp. 26, and his suggestion that operators will comply with the 2016 Rule anyway, *id.* 38-39.[10]

Indeed, many in industry *oppose* the Rescission Rule, arguing it *harms* their business interests. *See* SA3 ("Industry support for EPA proposed amendments is largely split, with … 50 percent opposing the proposal."); Env. Mot. 39-40. Just this week, the president of Shell Oil Company expressed support for this legal action and Petitioners' request for a stay, explaining that the Rescission Rule harms Shell's business by threatening access to markets for natural gas and

[10] Even if the Administrator were able to substantiate an economic impact, any "adverse economic effect[s]" do not outweigh "the irreparable injury that air pollution may cause." *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313-14 (1977).

undermining investment certainty. SA26-28; *see also* SA30 (investor support for legal challenge to Rescission Rule).

In contrast, a stay will substantially and concretely benefit the public by preventing significant climate and health-harming pollution, which is especially critical for the millions of Americans living next door to sources that would not have to control emissions due to the Rescission Rule. *See* Env. Mot. 30.

CONCLUSION

Petitioners respectfully request that this Court summarily vacate the Rescission Rule or stay the Rule pending review.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the forgoing motion was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 5,482 words.

Petitioners jointly filed an unopposed motion for a proportionate word limit for their replies more than five days before this filing. 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.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2020, I served the foregoing Reply in Support of Motion for a Stay or, in the Alternative, Summary Vacatur, on all parties through the Court's electronic filing (ECF) system and by email.

DATED: October 5, 2020

/s/ *Susannah L. Weaver*
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