ORAL ARGUMENT NOT SCHEDULED

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

CLEAN AIR COUNCIL, EARTHWORKS, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL INTEGRITY PROJECT, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB, Petitioners, v. SCOTT PRUITT, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondents.	)	No. 17-1145

On Petition for Review of Final Action of the United States Environmental Protection Agency

MOTION OF THE STATE OF COLORADO FOR LEAVE TO INTERVENE IN SUPPORT OF PETITIONERS

DANIEL N. RECHT
RICHARD K. KORNFELD
HEATHER R. HANNEMAN
MARK G. GRUESKIN

Attorneys for the State of Colorado

The State of Colorado ("State" or "Colorado"), hereby moves pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b) for leave to intervene in support of petitioners Clean Air Council, Earthworks, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club ("Petitioners") in this case, for the reasons set forth below:

1. Petitioners have sought review of the United States Environmental Protection Agency's ("EPA") final action, published in the Federal Register at 82 Fed. Reg. 25,730, on June 5, 2017, titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay" ("Administrative Stay").

2. EPA's Administrative Stay exempts industry from compliance with key pollution safeguards under EPA's New Source Performance Standards ("NSPS") to control leaking methane—one of the most potent greenhouse gases—and limit other harmful air pollutants from the oil and gas industry, including volatile organic compounds ("VOCs") and hazardous air pollutants – which contribute to the formation of ground-level ozone pollution. EPA promulgated the final NSPS rule on June 3, 2016, and it went into effect on August 2, 2016. 81 Fed. Reg. 35,824 (June 3, 2016) ("2016 Rule"). The 2016 Rule includes measures that will "achieve reductions of [greenhouse gases] and VOC emissions through direct

regulation and reduction of hazardous air pollutant (HAP) emissions as a co-benefit of reducing VOC emissions." *Id*. at 35,827. EPA concluded that the 2016 Rule would substantially reduce these air pollutants, for example, by preventing the emission of 300,000 tons of methane, 150,000 tons of VOCs, and 1,900 tons of hazardous air pollutants by 2020. *Id*.

3. Importantly, the 2016 Rule mandates that oil and gas companies monitor their well sites and compressor stations to detect air pollutant leaks ("fugitive emissions") and repair them ("leak detection and repair" or "LDAR"). *See* 40 C.F.R. § 60.5397a. The 2016 Rule imposes specific timelines on owners and operators, whereby their initial monitoring was to have been completed by June 3, 2017, and any leaks found were to be fixed within 30 days of detection. 40 C.F.R. § 60.5397a(f), (h).

4. In April 2017, however, EPA Administrator Pruitt notified counsel for the oil and gas industry, by letter, that he intended to reconsider aspects of the 2016 Rule and also stay the June 3 compliance deadline. On June 5, two days after that June 3 deadline and ten months after the 2016 Rule went into effect, Administrator Pruitt published the Administrative Stay in the Federal Register, suspending the LDAR program and other requirements of the 2016 Rule until August 31, 2017.

5. Petitioners commenced this action on June 5, 2017, filing an emergency motion for a stay to restore the effectiveness of the 2016 Rule. *See*

Emergency Motion for a Stay or, in the Alternative, Summary Vacatur ("Emergency Motion" or "Pet. Mot.").[1] As set forth in Petitioners' Emergency Motion, Administrator Pruitt relies on Clean Air Act § 307(d)(7)(B) as authority for issuing the Administrative Stay. That provision allows the EPA Administrator to reconsider a final rule—and to stay its effectiveness for up to three months—when (i) a party raises an objection to the rule that could not have been raised during the public comment period and (ii) that objection "is of central relevance to the outcome of the rule." *See* Pet. Mot. at 4-5; 42 U.S.C. § 7607(d)(7)(B). As Petitioners explained in their Emergency Motion, these threshold requirements for reconsideration of the 2016 Rule—and, therefore, for the Administrative Stay—were not met and the Administrative Stay and order for reconsideration are therefore unlawful. *See* Pet. Mot. at 4-5; 10-11; 14-22.

6. The State has the right to intervene in this case under Rule 15(d). Through this intervention, the State seeks to support Petitioners' Petition for Review and request in their Emergency Motion that this Court stay the unlawful Administrative Stay so that the 2016 Rule is immediately effective. As this Court has stated,

[1] For purposes of judicial economy, Colorado adopts and incorporates by reference the contents of Petitioners' 343-page "Attachments to Emergency Motion for a Stay Or, In the Alternative, Summary Vacatur, Volume 1 – Attachments 1 to 16," as filed with this Court on June 5, 2017 (Doc. #1678141).

> In deciding whether a party may intervene as of right, we employ a four-factor test requiring: (1) timeliness of the application to intervene; (2) a legally protected interest; (3) that the action, as a practical matter, impairs or impedes that interest; and (4) that no party to the action can adequately represent the potential intervenor's interest.

Crossroads Grassroots Policy Strategies v. FEC, 788 F.3d 312, 320 (D.C. Cir. 2015). The State meets each requirement.

7. The State's application is timely under Rule 15(d). This application is within the thirty-day window, which opened on June 5, 2017, with the filing of Petitioners' Petition for Review and Emergency Motion. This application is also consistent with the Court's Order of June 16, 2017 that required, within fourteen days of such Order, written notice to the Court of intent to intervene on behalf of Petitioners.

8. The State has a demonstrated, legally protected interest as a sovereign in protecting its territory and residents from harmful air pollution, including both ground-level ozone pollution as well as greenhouse gases that contribute to climate change and its attendant, potentially catastrophic harms. *See Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007); *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237 (1907).

9. The EPA's stay undermines the State's legally protected interest in protecting its citizens from harmful ground-level ozone air pollution. Ozone is formed when oxides of nitrogen and VOCs—a category of pollutants at issue

here—react in the presence of sunlight. EPA has determined the existence of significant negative health effects in individuals exposed to elevated levels of ground-level ozone, including coughing, throat irritation, lung tissue damage, and aggravation of existing conditions, such as asthma, bronchitis, heart disease, and emphysema. 80 Fed. Reg. 65,292, 65,302-11 (Oct. 26, 2015). Exposure to ozone has also been linked to premature death. *Id*. at 65,302; *see also* Lyon Decl. at 11 (ground-level ozone "can cause respiratory disease and premature death."); *see also* Decl. of Dr. Elena Craft, at 3-5 (Pet. Attach. 6) ("Craft Decl.").

10. Currently, the Denver Metro/North Front Range Area is designated as a nonattainment area for purposes of the 2008 national ambient air quality standard for ground-level ozone air pollution. 40 C.F.R. 81.306 (2016). Effective June 3, 2016, the Denver Metro/North Front Range Area was reclassified as a "moderate" nonattainment area. *Reclassification of Several Areas for the 2008 Ozone NAAQS*, 81 Fed. Reg. 26697 (May 4, 2016). As a result, the region is required to enact numerous strategies to reduce ozone precursor emissions, including installing reasonably available controls at major sources. 42 U.S.C. 7511a(b).

11. Colorado has already undertaken significant efforts to reduce ground-level ozone air pollution within the nonattainment area. First, in 2010, Colorado passed the Clean Air Clean Jobs Act, § 40-3.2-201 *et seq*, C.R.S., which will

reduce ozone-forming pollutants significantly. Under the Clean Air Clean Jobs Act and Colorado's related Visibility and Regional Haze State Implementation Plan, emissions of nitrogen oxide are being reduced by 89% from the covered facilities operated by Colorado's largest utility. Colorado Visibility and Regional Haze State Implementation Plan at 89, 95 (Jan. 7, 2011).

12. In 2014, the State became the first state in the country to regulate methane emissions from oil and gas operations with the goal of curbing the State's greenhouse gas emissions and making our air cleaner. *Control of Ozone via Ozone Precursors and Control of Hydrocarbons via Oil and Gas Emissions,* 5 C.C.R. 1001-9 (Revised Feb. 23, 2014). The State worked in concert with the oil and gas industry to formulate the regulations. These regulations have resulted in the reduction of approximately 64,000 tons of methane and ethane and 93,500 tons of VOC from Colorado's oil and gas industry per year. Colo. Dept. of Pub. Health & Environment, *Cost-Benefit Analysis for Proposed Revisions to AQCC Regulations No. 3 and 7* (Feb. 7, 2014). In fact, operators reported that they identified and fixed approximately 36,000 leaks in 2015 alone as a result of the rules. 2015 LDAR Annual Report Summary (Nov. 22, 2016).

13. While Colorado has taken significant steps to curb ozone-forming pollutants from sources within its borders, Colorado has no ability to control emissions from sources outside the state whose pollution then travels across our

state boundaries and into our communities and public lands. Delaying the implementation of the 2016 Rule could negatively affect Colorado's ability to attain the national ambient air quality standard for ozone because it removes several requirements for sources of emissions in upwind states to curb those emissions. The states that are in the vicinity of Colorado – Utah, Wyoming, North Dakota, South Dakota, and New Mexico – do not have leak detection and repair requirements of the sort that has been administratively stayed by EPA. On certain days, two-thirds or more of the ozone concentrations in the Denver Metro/North Front Range Non-Attainment Area emanate to that region from sources outside of Colorado. Ramboll Environ, "Denver Metro/North Front Range Local Source 2017 Ozone Source Apportionment Modeling" at 29 (April 2017) ("Ozone transport from outside of Colorado (i.e., BC-4km) is the largest contributor to 2017 high ozone concentrations at monitoring sites in the DM/NFR NAA typically contributing 70-80% of the ozone on high ozone days"). Moreover, oil and gas emissions from the Uintah and Ouray Reservation in Utah -- which is subject to EPA's (and not the State of Utah's) jurisdiction -- have resulted in high ozone concentrations around Rio Blanco County, Colorado, an area with few of its own emission sources. CDPHE, "Technical Support Document for Recommended 8-hour Ozone Designations" at 53-61 (Sept. 15, 2016) ("Oil and gas sources are a significant contributor to VOC emissions in Rio Blanco County, but are far below

Uintah County [Utah], where oil and gas VOC emissions are more than double"). Strong federal standards controlling emissions from the oil and gas sector are thus imperative for Colorado to meet applicable clean air standards.

14. The 2016 Rule also provides significant benefits in the form of reducing methane emissions, which are a potent greenhouse gas that is contributing to climate change. Colorado will be significantly and concretely harmed by climate change. Potential harms that directly affect the State of Colorado and its inhabitants include: increased heat-related deaths and transmission of insect-borne disease; damage to public property and infrastructure; major changes in winter snowpack in mountainous regions, affecting continuity of and access to water storage; alterations to the condition of public lands and natural resources that represent a significant economic driver for the State's economy; more frequent and prolonged drought, compromising access to water for consumption, sanitation, and agriculture and increasing the likelihood of wildfires that devastate forests, habitat for wildlife, residential dwellings, and businesses in different parts of the State; more and more severe extreme weather events, and ever-increasing costs of emergency response measures that must be paid for by Colorado residents; and disrupted ecosystems and food systems. *See Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007).

15. The State has taken significant steps to protect those interests and prevent those harms, including through the issuance of the oil and gas regulations discussed above, through the Clean Air Clean Jobs Act of 2010, § 40-3.2-201 *et seq*, C.R.S., and by participating in regulatory proceedings at the federal level to advocate for federal action to limit greenhouse gas emissions.

16. Likewise, the State has actively engaged in efforts to protect its residents from the substantial health threats posed by exposure to hazardous air pollutants by participating in the regulatory proceedings that led to the promulgation of EPA's Mercury and Air Toxics Standards in 2012.

17. The Administrative Stay concretely and negatively affects the State's protected interests in controlling leaks of methane, VOCs, and hazardous air pollutants that cause public health and environmental harms. As Petitioners note, EPA's own analysis of the 2016 Rule indicated that, overall, the LDAR program stayed by the Administrative Stay would account for nearly half of the 2016 Rule's projected reductions in VOCs, more than half the projected reduction in methane emissions, and roughly 90 percent of the reduction in hazardous pollutants like formaldehyde and benzene. *See* Pet. Mot. at 2; EPA, Regulatory Impact Analysis 3-13 (Table 3-4) (May 2016) (Pet. Mot. Attach. 3). As a result of the Administrative Stay of the LDAR program, more than 18,000 new or modified oil and gas wells—and any additional new wells currently under development—

will *not* be required to inspect and repair leaks of these pollutants. *See* Administrative Stay, 82 Fed. Reg. 25,730, 25,732 ("Specifically, the EPA is staying the effectiveness of the fugitive emissions requirements . . . ."). Therefore, absent a judicial stay, thousands of tons of air pollutants will be emitted that would have been avoided had the 2016 Rule remained in effect. *See* Decl. of Dr. David R. Lyon, at 6 (Pet. Attach. 5) ("Lyon Decl."). Specifically, during the 90-day Administrative Stay, at least 5,349 tons of methane, 1,475 tons of VOCs, and fifty-six tons of hazardous air pollutants will be emitted that, but for the Stay, would have been controlled and prevented. *Id.* at 13.

18. These additional emissions will harm the State's interest in protecting its residents from the effects of harmful air pollution and climate change described above. Likewise, EPA has found that harmful air pollutants like formaldehyde and benzene are known to cause cancer and other adverse health effects. *See*, *e.g.*, 2016 Rule, 81 Fed. Reg. 35,824, 35,837 (June 3, 2016) ("[B]enzene . . . can lead to a variety of health concerns such as cancer and noncancer illnesses (e.g., respiratory, neurological)."); Lyon Decl. at 11; Craft Decl. at 9-11. As EPA noted in promulgating the 2016 Rule, "methane is a potent [greenhouse gas] with a 100-year [global warming potential] that is 28-36 times greater than that of carbon dioxide." *Id.* at 35,830; *see also* Lyon Decl. at 11. The

unlawful Administrative Stay measurably increases emissions of these harmful pollutants and therefore will harm the health and well-being of Colorado residents.

19. Colorado's peak ozone period is the summer generally, making the immediate health threats to Coloradans and its visitors even more pronounced due to the Administrative Stay. And the summer of 2017 presents a particular challenge to our State; if ozone concentrations exceed certain authorized levels, Colorado could be reclassified as a serious ozone nonattainment area by January, 2019, which will increase regulatory burdens on those within the State.

20. Colorado has unique interests that may not be represented by Petitioners, in large part because pollutants such as methane and ozone-forming pollutants from other oil and gas producing states in the region know no borders. Thus, regardless of Colorado's efforts, its air quality under the Stay is subject to the policy choices of other states, over which it has no control. Further, the State's reliance upon tourism and outdoor recreation for jobs and diverse economic activity means that air quality degradation affects not only its inhabitants; it also affects many tens of thousands of visitors and employees in other industries

21. As a sovereign state, Colorado must protect the health and safety of its residents, its natural resources, and state-owned property and infrastructure, from the effects of pollution. *See Massachusetts v. EPA*, 549 U.S. at 518-19. Colorado's success in addressing the greenhouse gas emissions and VOC leaks that

occur within its borders is offset by the federal government's failure to similarly regulate methane and VOC emissions from other states and, as such, poses an ongoing threat to the health and welfare of the State's residents.

22. In addition to the harms the State will already suffer under the Administrative Stay, Colorado will suffer still more harm if the EPA extends the Administrative Stay, as it has publicly stated it is considering. After Petitioners filed their motion for emergency relief with this Court, on June 12, EPA proposed two new rules designed to extend the stay of portions of the 2016 Rule for *an additional two years and three months*, respectively. *See* Proposed Rule, "Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements," EPA-HQ-OAR-2010-0505, RIN 2060-AT59 (June 12, 2017); Proposed Rule, "Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources: Three Month Stay of Certain Requirements," EPA-HQ-OAR-2017-0346, RIN 2060-AT65 (June 12, 2017). These stays would compound the harm to public health and the environment the Administrative Stay has already created by dramatically increasing the total volume of dangerous air pollution, none of which would occur but for the Administrative Stay. Even without new wells, if the 2016 Rule is stayed for the proposed additional 27 months, at least 48,138 tons of methane, 13,272 tons of VOCs, and 506 tons of hazardous air pollutants will be emitted during that period

that would have been controlled and prevented under the 2016 Rule.[2] Given the impact of neighboring states' air quality on that of Colorado, an expansion of hazardous air pollutants in other states, including those oil and gas producing states that share borders with Colorado, undermines Colorado's efforts to achieve reasonable and otherwise attainable air quality for its inhabitants. EPA points to no statutory authority for these extended stays.

23. Colorado's own methane regulations can inform this Court about the effects of such regulation. As noted above, in 2014, the State became the first state in the country to regulate methane emissions from oil and gas drilling with the goal of curbing the State's greenhouse gas emissions and making our air cleaner. EPA modeled key portions of its 2016 Rule on the State's regulations. The State's regulatory efforts to date demonstrate that requirements similar to those in the Federal 2016 Rule can be achieved without unduly burdening the oil and gas sector. Indeed, data from the Colorado Oil and Gas Conservation Commission shows that statewide oil production increased more than 21% in 2015, the year after the State adopted its methane and hydrocarbon rules.

24. The State's participation in this matter will not unduly delay or prejudice the rights of any other party. In light of the compressed timeframe and

[2] *See* Lyon Decl. at 13 (stating that stay of 2016 rule for one year would result in 21,395 tons of methane, 5,899 tons of VOCs, and 225 tons of hazardous air pollutants).

need for immediate review of the Administrative Stay, the State is not seeking leave to file its own brief in support of Petitioners' requested emergency relief. For the purposes of Petitioners' pending Emergency Motion, the State supports the arguments set forth in that motion.[3]

25. On June 15, 2017, several other states, led by West Virginia, filed a motion to intervene as respondents, in support of EPA and Administrator Pruitt. The Court granted that motion on June 16, 2017.[4] On June 20, other states, led by Massachusetts, filed a motion to intervene as petitioners, and the Court granted that motion as well.[5]

26. Counsel for the State sought the position of Petitioners, Respondents, Intervenor-Petitioners, and Intervenor- Respondents concerning this Motion on June 30, 2017.

---

[3] Should the Court enter a stay of EPA's Administrative Stay, the 2016 Rule will once again be in effect, and the immediate harm associated with excess air pollution emissions will be mitigated so long as the Rule remains in effect. Petitioner-Intervenor States suggest that any further review by this Court of the Administrative Stay could therefore occur on a non-expedited basis.

[4] The intervenor-respondents included West Virginia, Alabama, Kansas, Louisiana, Montana, Ohio, Oklahoma, South Carolina, Wisconsin, the Commonwealth of Kentucky, the Commonwealth of Kentucky Energy and Environment Cabinet, and Attorney General Bill Schuette for the People of Michigan.

[5] The intervenor-petitioners included Massachusetts, Pennsylvania, Connecticut, Delaware, Illinois, Iowa, Maryland, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, as well as the District of Columbia and the City of Chicago ("Intervenor-Petitioner States").

- Petitioners and Intervenor-Petitioner States consent to Colorado's Motion to Intervene.
- Respondents EPA and Pruitt and Amicus Curiae State of North Dakota reserve taking a position on this motion until they review the Motion.
- Intervenor-Respondent Western Energy Alliance objects to the granting of this Motion.
- The following Intervenor-Respondents take no position on the Motion: Texas Oil and Gas Association, Interstate Natural Gas Association of America, American Petroleum Institute, and the Intervenor-Respondent States take no position on this Motion.

At the time of filing this Motion, other parties, intervenors, and amici have not responded to the undersigned's request for a statement of position on this Motion.

27. The Court should grant the State's application to intervene in this action to seek a stay of EPA's unlawful action.

Dated: June 30, 2017

Respectfully submitted,

FOR THE STATE OF COLORADO

By RECHT KORNFELD P.C.

MARK G. GRUESKIN

/s/ Mark G. Grueskin

MARK G. GRUESKIN
SPECIAL ASSISTANT ATTORNEY GENERAL, STATE OF COLORADO
1600 Stout Street, Suite 1400
Denver, CO 80202
(303) 573-1900 x 124
mark@rklawpc.com

DANIEL N. RECHT
RICHARD K. KORNFELD
HEATHER R. HANNEMAN
SPECIAL ASSISTANT ATTORNEYS GENERAL, STATE OF COLORADO

(Applications for admission pending)

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the foregoing was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word, it contains 3,447 words, in accordance with Federal Rule of Appellate Procedure 27(d)(1) and (2).

Dated: June 30, 2017

/s/ Mark Grueskin
Mark Grueskin

CERTIFICATE OF SERVICE

I certify pursuant to Federal Rule of Appellate Procedure 25(d) that a copy of the foregoing Unopposed Motion for Leave to Intervene in Support of Petitioners was filed on June 30, 2017, using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

Dated: June 30, 2017

/s/ Mark G. Grueskin
Mark G. Grueskin

CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Pursuant to D.C. Circuit Rule 27(a)(4), the State certifies as follows:

1. Parties, Intervenors, and Amici Who Appeared in the District Court

None—this case is a petition for review of final agency action, not an appeal from the ruling of a district court.

2. Parties to this Case

Petitioners: Clean Air Council, Earthworks, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club.

Respondents: The United States Environmental Protection Agency ("EPA") and Scott Pruitt, in his official capacity as Administrator of EPA.

Intervenors for Respondents: American Petroleum Institute, Interstate Natural Gas Association of America, American Exploration & Production Council, Domestic Energy Producers Alliance, Eastern Kansas Oil & Gas Association, Illinois Oil and Gas Association, Independent Oil and Gas Association of West Virginia, Inc., Independent Petroleum Association of America, International Association of Drilling Contractors, Kansas Independent Oil and Gas Association, Kentucky Oil and Gas Association, Michigan Oil and Gas Association, National Stripper Well Association, North Dakota Petroleum Council, Ohio Oil and Gas

Association, Oklahoma Independent Petroleum Association, Pennsylvania Independent Oil & Gas Association, Texas Alliance of Energy Producers, Texas Independent Products & Royalty Owners Association, West Virginia Oil and Natural Gas Association, GPA Midstream Association, Texas Oil and Gas Association, Attorney General Bill Schuette for the People of Michigan, Commonwealth Kentucky Energy and Environment Cabinet, Commonwealth of Kentucky, State of Alabama, State of Kansas, State of Louisiana, State of Montana, State of Ohio, State of Oklahoma, State of South Carolina, State of West Virginia, State of Wisconsin, Western Energy Alliance, and Indiana Oil and Gas Association, all for Respondents.

Intervenors for Petitioners: Commonwealth of Massachusetts, City of Chicago, State of Connecticut, State of Delaware, District of Columbia, State of Illinois, State of Iowa, State of Maryland, State of New Mexico, State of New York, State of Oregon, Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection, State of Rhode Island, State of Vermont, and State of Washington, all for Petitioners.

Amici Curiae for Respondent: State of Texas and State of North Dakota.

3. Circuit Rule 26.1 Disclosures.

Because the State is not a corporation, association, joint venture, partnership, syndicate, or other similar entity, no Circuit Rule 26.1 disclosure is required.

Dated: June 30, 2017

/s/ Mark G. Grueskin
Mark G. Grueskin