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Editorial Office
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U.S. Court of Appeals for the District of Columbia Circuit Vacates EPA's Stay of Compliance Deadlines of Methane Rule

*By Amy L. Barrette**

The author of this article discusses a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit granting a petition by several environmental organizations that sought to vacate the Environmental Protection Agency's decision to stay the methane rule.

In a recent 2-1 opinion, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition by several environmental organizations that sought to vacate the Environmental Protection Agency's ("EPA") decision to stay the methane rule. In vacating the EPA's stay, the court concluded that the EPA lacked authority under the Clean Air Act ("CAA") to stay the rule.

BACKGROUND

The saga began in June 2016, when former EPA Administrator McCarthy issued a final rule establishing "new source performance standards" for the oil and gas industry in connection with fugitive emissions of methane and other pollutants.

The methane rule required regulated entities to conduct monitoring surveys and identify fugitive emission leaks by June 3, 2017, and repair any leaks within 30 days. The failure to comply with these requirements could have subjected oil and gas operators to civil penalties, fines, imprisonment, as well as citizen suits.

After the rule was published, multiple industry groups sought administrative reconsideration under the Clean Air Act. On April 17, 2017, Administrator Pruitt announced that the EPA was going to convene proceedings for reconsideration and issue a 90-day stay of the compliance date related to emissions requirements.

On June 5, 2017, the EPA issued a notice of reconsideration and partial stay of the methane rule. The EPA granted reconsideration on four aspects of the methane rule, to which the EPA determined industry groups did not have an adequate opportunity to object during the notice and comment period. The EPA reasoned that the notice of proposed rulemaking ("NPRM") did not provide adequate notice of the final rule. The EPA's June 5 notice also stayed the effectiveness of fugitive emissions requirements for 90 days pending reconsideration.

* Amy L. Barrette is a partner and trial attorney at Blank Rome LLP, who focuses her energy industry practice on oil and gas and environmental matters. She may be contacted at abarrette@blankrome.com.

Shortly thereafter, the EPA published an NPRM announcing its intention to extend the stay for two years and broadly look at the entire 2016 rule during the reconsideration proceeding.

JURISDICTION

Environmental groups responded to the EPA's stay by filing an emergency petition seeking a judicial stay of the EPA's stay, or, in the alternative, an order holding that the EPA's stay was unlawful. Before reaching its determination that the EPA's stay was unlawful, the court first reasoned away the EPA's and industry group-intervenors' challenges to the court's jurisdiction to consider the activists' petition in the first instance. For the court to have jurisdiction to review an agency decision, such as the EPA stay at issue here, the decision must constitute a "final action" i.e., the action must mark the consummation of the agency's decision-making process and be one that determines a regulated party's rights or obligations, or subjected a regulated party to legal consequences.

Although the EPA's stay was neutral and time-limited, the majority concluded that the stay constituted a "final agency action" in that it:

- (1) Marked the consummation of the EPA's decision-making by delaying the rule's effective date, which was tantamount to "amending or revoking" the rule; and
- (2) Affected the regulated parties' obligations with respect to requirements for compliance with the initial monitoring surveys and leak repair.

In his dissent, Judge Brown likened the majority decision to an "aneurysm of activism."

THE COURT'S DECISION

After determining that it had jurisdiction to review the stay, the majority then determined that the EPA lacked statutory authority to issue the stay.

The court linked the EPA's power under the CAA to issue a stay of a final rule with the two requirements for mandatory reconsideration:

- (1) That it was impracticable to raise an objection during the public comment period; and
- (2) The objection is of central relevance to the outcome of the rule.

Because the EPA's stay suspended the rule's compliance obligations, the court reasoned that it was required to review the grounds for the EPA's reconsideration in order to determine whether the stay was authorized under the CAA. For each of the four grounds upon which the EPA based its reconsideration decision, the court referred to specific instances in the administrative record

where industry groups responded, or had opportunity to respond and comment. Because it was not “impracticable” for the industry groups to raise their objections during the notice and comment period, the court found that the CAA did not require EPA reconsideration and did not authorize the stay.

The court also directed the clerk to immediately issue the mandate to the EPA, requiring immediate compliance with its decision and, therefore, immediate compliance with the full scope of the 2016 Rule.

Ordinarily the EPA and regulated parties would be provided with 52 days, or longer, before compliance was required. On July 7, 2017, however, the EPA filed a motion to recall the mandate.

In its motion, the EPA stated that it was evaluating the court’s decision in order to determine whether to seek further relief. “The unusual posture of the Court’s decision—summary vacatur, without full briefing or oral argument, of an agency decision involving first-impression issues of EPA’s authority to briefly stay a rule under 42 U.S.C. § 7606(d)(7)(B) where it decided, rather than is required, to grant reconsideration—further renders this case extraordinary and illustrates why it is appropriate that the mandate be recalled.”

The EPA further relied on Judge Brown’s dissent which cast doubt on the court’s authority to hear the case in the first instance. The court set a quick briefing schedule on the motion.

On July 13, 2017, in response to the EPA’s motion, the court entered an order recalling the mandate for a period of 14 days from the date of its order. The full D.C. Circuit subsequently ruled eight to three to deny petitions for rehearing *en banc* filed by industry and state intervenors.