

INSIGHTS

DC Circuit Vacates EPA's Initial Stay of Methane Rule Requirements

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On July 3, 2017, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision vacating the U.S. Environmental Protection Agency's ("EPA's") initial 90-day stay of parts of the 2016 rule establishing methane emissions standards for the oil and gas industry ("Methane Rule"). *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir, July 3, 2017). The Methane Rule applies to oil and gas facilities for which construction, modification, or reconstruction started after September 18, 2015. See 40 C.F.R. Part 60, Subpart OOOOa (40 C.F.R. § 60.5360a *et seq.*, adopted at 81 Fed. Reg. 35824 (June 3, 2016)).

On April 18, 2017, EPA Administrator Pruitt announced that EPA would convene a proceeding to reconsider certain elements of the Methane Rule. The rule elements that were identified as specific subjects of the reconsideration proceeding include: (1) the fugitive emissions monitoring and repair requirements of 40 C.F.R. § 60.5397a, including the inclusion of low-production wells and the provisions relating to approvals for alternative means of compliance; (2) the requirement that the design and capacity assessment of a closed vent system used to comply with the rule be performed by a Professional Engineer; and (3) the requirement that the determination that it is technically infeasible to route a pneumatic pump to a control device or process be made and certified by a Professional Engineer.

EPA has also taken a number of steps to delay the compliance dates for those Methane Rule requirements during the reconsideration process. EPA announced an initial 90-day stay in the Federal Register notice of reconsideration. 82 Fed. Reg. 25730 (June 5, 2017). EPA then, on June 16, proposed an additional, separate two-year stay of the same requirements, to give the agency sufficient time to propose, take public comment, and issue a final action on the Methane Rule requirements for which EPA granted reconsideration. 82 Fed. Reg. 27645 (June 16, 2017). (On that same day, EPA proposed a *third* stay of these same requirements, this one a 90-day stay, for the sole purpose of filling any potential gap between the expiration of the initial 90-day stay and the start of the longer two-year stay. 82 Fed. Reg. 27641 (June 16, 2017)).

The July 3 court decision addressed only the initial 90-day stay of the Methane Rule requirements. EPA claimed authority for the stay under federal Clean Air Act ("CAA") section 307(d)(7)(B). CAA 307(d)(7)(B) gives EPA the authority to convene a reconsideration proceeding where a commenter raises an objection and can demonstrate that it was impracticable to raise that objection during the public comment period – or the grounds for the objection arose after the close of the comment period. Under CAA 307(d)(7)(B), EPA can also stay the effectiveness

of the rule in question, for a period of up to three months.

The DC Circuit, in a 2-1 decision in which one member of the panel dissented, rejected EPA's basis for granting reconsideration and issuing the 90-day stay. The court found that it was *not* impracticable for the industry groups to have raised, during the rulemaking process, the issues that EPA cited as grounds for the reconsideration and stay. *Clean Air Council*, Opinion at 23. The court also rejected EPA's claim that it had "inherent authority" to issue a brief stay of the final rule during reconsideration. *Clean Air Council*, Opinion at 12.

While it vacated the 90-day stay of the Methane Rule requirements, the court emphasized that nothing in its opinion limits EPA's authority to reconsider the final rule, or to proceed with the proposed stay published on June 16. *Clean Air Council*, Opinion at 23. As a result, while compliance with the parts of the Methane Rule is no longer delayed by an administrative stay, EPA will likely continue with its plans to finalize the separate, longer stay of the Methane Rule requirements that it proposed on June 16. While a review of the June 16 proposal did not identify the specific authority cited for the proposed two-year stay, EPA has previously claimed authority for such stays under both its general rulemaking authority under CAA section 301(a)(1), as well as an agency's authority under section 705 of the federal Administrative Procedure Act ("APA") to postpone the effective date of an action pending judicial review "when an agency finds that justice so requires."

The vacatur of EPA's initial stay of the Methane Rule requirements creates significant uncertainty for the regulated community, with the requirements in question springing back into effect as of July 3, 2017 – though likely remaining in effect for only an interim period, pending EPA taking final action on the proposed two-year stay. A two-year stay that, when finalized, will inevitably be the subject of a prompt court challenge by environmental petitioners.

[Click here](#) to view a copy of the panel's July 3, 2017 opinion in *Clean Air Council v. Pruitt*.