

December 7, 2017

Environmental Protection Agency
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**Re: EPA's Proposed Two Year Stay of Oil and Gas New Source Performance Standards
(Docket ID EPA-HQ-OAR-2010-050)**

To Whom It May Concern:

The Sabin Center for Climate Change Law submits these comments in response to the U.S. Environmental Protection Agency ("EPA")'s request for input on the notice of data availability ("NODA")¹ issued in support of the proposed rule titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements" published on June 16, 2017 ("Proposed Rule").²

The Sabin Center submitted initial comments opposing the Proposed Rule on August 8, 2017 (see Docket ID No. EPA-HQ-OAR-2010-0505-11102). As explained in our initial comments, implementing the Proposed Rule would delay, for twenty-four months (i.e., until December 2019), compliance with key provisions of EPA's New Source Performance Standards (NSPS) for Oil and Gas Facilities.³ We expressed concern that this delay would result in a substantial increase in emissions of methane, a highly potent greenhouse gas, which EPA has found to endanger public health and welfare.⁴ We wish to reiterate those concerns here. We also wish to address supplementary issues raised in EPA's NODA.

¹ Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 51,788 (Nov. 8, 2017) [hereinafter NODA].

² Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27,645 (Jun. 16, 2017) [hereinafter Proposed Rule].

³ Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (Jun. 3, 2016) [hereinafter Oil and Gas NSPS].

⁴ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) [hereinafter Endangerment Finding].

In the NODA, EPA requested comments on its legal authority to stay the NSPS and, in particular, the bases for such authority identified by the American Petroleum Institute (“API”). For the reasons explained below, we disagree with API’s assessment, and conclude that EPA has not established a valid legal basis for its proposed stay of the NSPS. Nor has EPA established a valid basis for its alternative proposal to extend the compliance deadlines in the NSPS. In both cases, EPA has sought to justify its conduct based on faulty data, which fails to account for the full costs of delaying NSPS implementation.

I. EPA Has Not Identified a Valid Legal Basis for the Stay

In the NODA, EPA asserted legal authority to stay the NSPS, based on the analysis in API’s submission on the Proposed Rule. API’s submission argued that the stay is authorized under section 705 of the Administrative Procedure Act (“APA”)⁵ and section 301 of the Clean Air Act (“CAA”)⁶. In our view, however, neither provision authorizes EPA to issue a stay in this case.

A. Section 705 of the APA Does Not Authorize EPA to Stay the NSPS

Under section 705 of the APA, an agency may “postpone the effective date of action taken by it, pending judicial review.”⁷ The requirements for postponement were discussed by the U.S. District Court for the District of Columbia in *Sierra Club v. Jackson*.⁸ The court held that, for a postponement to be upheld, “the agency must have articulated . . . a rational connection between its stay and the underlying litigation.”⁹ The agency must also establish that justice requires the stay, having regard to the same four factors as are considered by the courts in evaluating requests for interim injunctive relief, namely: “(1) the likelihood that the party seeking the stay will prevail on the merits [in the litigation]; (2) the likelihood that the . . . party [seeking the stay] will be irreparably harmed absent the stay; (3) the prospect that others will be harmed if the . . . stay [is granted]; and (4) the public interest in granting the stay.”¹⁰

The two requirements identified in *Sierra Club v. Jackson* have not been established in this case and are not supported by the available evidence. While API asserts that a “stay is warranted here, as litigation [concerning the NSPS] is pending,” EPA has not provided any evidence to show that its stay is “connected to” the pending litigation. In fact, EPA’s Proposed Rule did not even mention the pending litigation, and merely described the stay as necessary to “provide the EPA

⁵ 5 U.S.C. § 705.

⁶ 42 U.S.C. § 7601.

⁷ 5 U.S.C. § 705.

⁸ *Sierra Club v. Jackson*, 833 F. Supp. 2d 11 (D.D.C. 2011).

⁹ *Id.* at 34.

¹⁰ *Id.* at 30-31.

sufficient time . . . to complete its reconsideration process.”¹¹ As the court recognized in *Sierra Club v. Jackson*, the APA does not authorize rules to be stayed pending reconsideration.¹²

As well as failing to establish a rational connection to the pending litigation, EPA has also failed to show that justice requires the stay. There is no evidence to support API’s assertion that staying the NSPS is necessary to avoid irreparably harming regulated entities. The available evidence indicates that the stay would harm the public, resulting in the loss of significant environmental and other benefits. As discussed in our August 2017 submission, the NSPS was intended to:

- reduce methane emissions by 510,000 tons by 2025, thereby mitigating climate change which, as EPA has itself acknowledged, “affects all American’s lives” and places “[t]he most vulnerable among us – including children [and] older adults” – at particular risk;
- reduce emissions of volatile organic compounds (VOCs) by 210,000 tons by 2025 and thereby avoid “a variety of serious public health effects” including respiratory and cardiovascular disease; and
- reduce emissions of hazardous air pollutants (HAPs) by 3,900 tons by 2025 and thereby minimize the risk of “health concerns such as cancer and non-cancer illnesses.”¹³

These emissions reductions will not be realized, in full, unless the NSPS is implemented immediately.¹⁴ Contrary to API’s claim, the NSPS is not merely “duplicative of state-level regulation,” and thus unnecessary to reduce emissions. Rather, the NSPS fills an important gap in the regulatory framework, as only a subset of states have adopted their own regulations. Moreover, even where state regulations exist, they are often less stringent than the NSPS. For example, whereas the NSPS would require well sites to be surveyed for leaks semi-annually and compressor stations to be surveyed quarterly,¹⁵ most state regulations require annual (or less frequent) leak surveys.¹⁶ As a result, staying the NSPS will cause leaks to go undetected for

¹¹ Proposed Rule, *supra* note 2, at 27,645.

¹² *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 34 (invalidating a stay on the basis that “its stated purpose . . . was to delay [previously adopted] Rules pending reconsideration”).

¹³ Oil and Gas NSPS, *supra* note 3. *See also* EPA, EPA’s Actions to Reduce Methane Emissions from the Oil and Natural Gas Industry: Final Rules and Draft Information Collection Request 2 (2016), <http://perma.cc/FA55-R3BR>.

¹⁴ As noted in our initial submission on the Proposed Rule, we estimate that the proposed stay would increase methane emissions by 66,406 metric tons, at a cost of over \$75.6 million. This calculation is based on a two year stay of the leak control and pneumatic pump requirements in the 2016 Rule. The calculation uses the same basic methodology as was used by EPA to calculate the climate benefits of the 2016 Rule. *See* Regulatory Impact Analysis of the Final Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources 4-16 (2016), <https://perma.cc/33MF-6CSQ>. Using EPA’s estimate of the number of sources covered by the 2016 Rule, we determined that 38,000 fugitive emissions sources and 1,580 pneumatic pumps would be affected by the stay. *See Id.* at 3-10. This represents forty percent of the total number of facilities affected in 2020. Assuming constant per-facility methane emissions, we calculated forty percent of the 2020 avoided emissions, which equals 66,406 metric tons. *See Id.* at 4-18. We then multiplied this figure by the social cost of methane for 2015 (i.e., \$1,100 per metric ton, assuming a three percent discount rate) to produce a total of \$75,610,647.

¹⁵ Oil and Gas NSPS, *supra* note 3, at 35, 846.

¹⁶ *See, e.g.*, CAL. CODE REGS., tit. 17, § 95669(g) (requiring annual leak surveys using optical gas imaging).

longer periods, resulting in higher emissions. The stay would, therefore, cause irreparable harm and is not in the public interest.

B. Section 301 of the CAA Does Not Authorize EPA to Stay the NSPS

Section 301(a) of the CAA authorizes the EPA Administrator “to prescribe such regulations as are necessary to carry out his functions under this chapter.” In *Natural Resources Defense Council v. EPA*, the D.C. Circuit held that regulations promulgated under this section must be “necessary and reasonable to effect the purposes” of the CAA, and not clearly prohibited by it.¹⁷ EPA appears to have concluded that these requirements are met here, claiming in the NODA that its proposed stay is “authorized under section 301(a).”¹⁸ The NODA does not, however, establish any factual basis for that claim.

Despite recognizing that regulations promulgated under section 301 of the CAA must be reasonably related to the purposes of the Act, EPA fails to explain how its proposed stay meets this requirement.¹⁹ Rather, EPA pays mere lip service to the requirement, declaring that the “stay . . . is consistent with the purposes of the CAA,” without articulating a single reason to support that view.²⁰ This is hardly surprising given that the key purpose of the CAA is to prevent pollution, and thereby promote public health and welfare, whereas staying the NSPS will have the opposite effect. As explained in section (I)(A) above, the proposed stay would result in a significant increase in emissions of methane, which EPA has found to endanger public health and welfare by contributing to climate change.²¹

As well as being contrary to the purposes of the CAA, EPA’s proposed stay is also inconsistent with the clear statement, in section 111 of the Act, that NSPS “shall become effective upon promulgation.” In *Clean Air Council v. Pruitt*, the D.C. Circuit held that EPA’s initial three month stay of the NSPS was “essentially an order delaying the rule’s effective date,” as is its proposed two year stay.²² Thus, in adopting the stay, EPA would be acting contrary to the express direction of Congress in section 111 of the CAA. As such, the stay cannot be adopted under section 301(a) of the CAA. As the D.C. Circuit previously held, the section does not authorize EPA to contravene “a clear statement by Congress.”²³

¹⁷ *Natural Resources Defense Council v. EPA*, 22 F.3d 1125, 1148 (D.C. Cir., 1994).

¹⁸ NODA, *supra* note 1, at 51,790.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Endangerment Finding, *supra* note 4.

²² *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir., 2017).

²³ *Natural Resources Defense Council v. EPA*, 22 F.3d 1125, 1148.

II. EPA Has Not Established a Valid Basis for Extending the Compliance Deadlines in the NSPS

In the NODA, EPA indicated that it is considering extending the deadlines for compliance with the NSPS, as an alternative to staying its requirements. EPA suggested that an extension may be needed to allow sufficient time to obtain the equipment and personnel required for compliance.²⁴ However, this issue was already addressed in the NSPS though the inclusion of “phase-in periods,” reflecting EPA’s best estimate of the time needed for compliance. EPA now asserts that a longer period may be required, but provides no evidence to support this view or justify its change in position.

It is well established that agency rulemaking must be based on a consideration of relevant evidence and accompanied by a clear statement of how that evidence supports the action taken. As the Supreme Court explained in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, the agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”²⁵ Where, as here, the agency is reversing a previously held position, its explanation for doing so must be particularly strong. This is because, according to the Supreme Court, “a settled course of behavior embodies the agency’s informed judgement that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.”²⁶ As a result, “an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency . . . acts in the first instance.”²⁷

Neither the Proposed Rule, nor the NODA, provide a convincing explanation as to why the NSPS compliance deadlines should be extended. EPA merely points to concerns, expressed by some stakeholders, about the difficulty of obtaining necessary equipment and personnel.²⁸ Similar concerns were raised during development of the NSPS and addressed by including phase-in periods therein. Notably, in adopting the NSPS, EPA rejected calls for longer phase-in periods including because the production of necessary equipment can be ramped-up quickly.²⁹ EPA has not identified any evidence contradicting this finding or otherwise supporting extension of the compliance deadlines in the NSPS.

²⁴ NODA, *supra* note 1, at 51,791 – 51,792.

²⁵ *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁶ *Id.* at 41-42 (quoting *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973)).

²⁷ *Id.* at 42.

²⁸ NODA, *supra* note 1, at 51,791 – 51,792.

²⁹ Oil and Gas NSPS, *supra* note 3, at 35,855.

III. EPA Seeks to Rely on Flawed Data to Justify Staying, or Extending the Compliance Deadlines in, the NSPS

In the NODA, EPA asserts that staying the NSPS or extending the compliance deadlines therein would result in significant cost savings, and only minimal foregone benefits.³⁰ EPA bases this assertion on an updated economic analysis in which it recalculates the climate benefits associated with reducing methane emissions in accordance with the NSPS.³¹ Whereas climate benefits were previously calculated based on the global social cost of methane (“SC-CH₄”), EPA now proposes to use a domestic-only SC-CH₄, which reflects “an approximation of the climate change impacts that occur within U.S. borders.”³² This new approach is seriously flawed.

By focusing solely on climate change impacts within the U.S., EPA’s domestic SC-CH₄ likely underestimates the cost of emissions. This is because, as EPA has itself recognized, “[t]he impacts of climate change outside the United States . . . will also have relevant consequences on the United States and our citizens.”³³ According to EPA, the U.S. will likely be forced to increase humanitarian aid, deal with mass migrations, and manage changing security needs (e.g., in the Arctic) as a result of overseas climate change impacts.³⁴ Overseas impacts could also affect the U.S. economy, disrupting international trade and undermining financial markets.³⁵

Given these spill-over effects, failing to account for overseas climate change impacts will lead to poor regulatory decisions, which fail to adequately protect public health and welfare.³⁶ Accordingly, many countries have based their climate policies on the global costs and benefits of reducing greenhouse gas emissions (e.g., the global social cost of carbon (“SCC”)).³⁷ Examples include Germany, which uses a global SCC of US\$167 per ton in 2030 and the U.K., which uses US\$115 per ton in 2030.³⁸ The U.K. also applies a global SC-CH₄, equal to approximately US\$400 in 2010, rising to US\$1200 by 2040.³⁹

³⁰ NODA, *supra* note 1, at 51,794.

³¹ Memorandum to Docket for rulemaking, “Oil and Natural Gas Sector – New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, and Control Techniques” (EPA-HQ-OAR-2010-050) (Oct. 17, 2017).

³² *Id.* at 15.

³³ Oil and Gas NSPS, *supra* note 3, at 35,836.

³⁴ *Id.*

³⁵ For a discussion of these effects, see Dr. Peter H. Howard & Jason A. Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 COLUM. J. ENVTL. L. 203 (2017).

³⁶ *Id.* at 222 (“If all countries . . . set their greenhouse gas emissions levels based on only their domestic costs and benefits, ignoring the large global externalities, the collective result would be substantially sub-optimal climate protections”).

³⁷ *Id.* at 223.

³⁸ *Id.* at 285 – 286.

³⁹ U.K. Department for Environment, Food and Rural Affairs, *The Social Cost of Carbon (SCC) Review – Methodological Approaches for Using SCC Estimates in Policy Assessment* 58 (2005) (specifying an average SC-CH₄ of £317 in 2010 and £920 in 2040).

Contrary to EPA's assertion, switching from a global to domestic-only SC-CH₄ is not required to comply with OMB Circular A-4, which states that regulatory analyses "should focus on the benefits and costs that accrue to [U.S.] citizens and residents." Given that overseas climate change impacts will inevitably effect the U.S., accurately assessing costs and benefits to U.S. citizens and residents requires a global focus. Thus, a working group of twelve federal government agencies (including OMB) has repeatedly determined that global climate impacts should be considered, notwithstanding the references to domestic effects in Circular A-4.⁴⁰ Consistent with this determination, EPA has long used global values in its regulatory analyses.⁴¹

IV. Conclusion

For the reasons explained above, we conclude that EPA has not established a valid legal basis for staying the NSPS or extending the compliance deadlines therein, and has sought to justify such action based on faulty data. As a result, and given the significant adverse effects of delaying the NSPS, we urge EPA to immediately implement it in full.

The studies referred to in this letter are attached for your reference. Please do not hesitate to contact me if you have any questions about the letter or attachments.

Sincerely,



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⁴⁰ Interagency Working Group on the Social Cost of Carbon, U.S. Government, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 10-11 (2010), <https://perma.cc/L8YG-R42D>; Interagency Working Group on the Social Cost of Carbon, U.S. Government, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 17 (2016), <https://perma.cc/H5G5-9SP6>.

⁴¹ See e.g., Regulatory Impact Analysis: Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units (2010), <https://perma.cc/S4QR-2NWG>; Regulatory Impact Analysis: Petroleum Refineries New Source Performance Standards Ja (2010), <https://perma.cc/86QV-Z66G>; Regulatory Impact Analysis for the Final Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (2015), <https://perma.cc/W2CB-SXHH>; Regulatory Impact Analysis for the Clean Power Plan Final Rule (2015), <https://perma.cc/4FEC-4WXV>.