

*Clean Air Council, et al. v. E. Scott Pruitt—Methane gas emission rule*

By Meaghan A. Colligan\*

On July 3, 2017 a D.C. Circuit panel issued an opinion in [\*Clean Air Council, et al. v. E. Scott Pruitt\*](#), No. 17-1145 (D.C. Cir. July 3, 2017), rejecting EPA’s announced reconsideration and a 90-day stay imposed on portions of its final rule (“Methane Rule”) requiring regulated entities to conduct an “initial monitoring survey” by June 3, 2017 to identify methane emissions at 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)). EPA’s 90-day stay had effectively suspended the Methane Rule’s compliance deadlines.

On July 13, 2017, the D.C. Circuit issued a [recall of its writ of mandate](#) in order to give EPA time to “determine whether to seek panel rehearing, rehearing *en banc* or pursue other relief.” To date, the Agency has not indicated which of those options, if any, it might select.

In EPA’s [notice that it intended to reconsider the methane gas rule](#), (82 Fed. Reg. 25,730 (June 5, 2017)) the Agency invoked it’s authority under Clean Air Act (“CAA”) § 307(d)(7)(B), 42 U.S.C. § 7607 (d)(7)(B), and cited four grounds to reconsider the prior rule: (1) industry groups had no opportunity to object to provisions concerning “low production well sites;” (2) the final rule included a process for demonstrating “alternative means” of compliance that was not in the notice of proposed rulemaking (“NPRM”); (3) without adequate notice or consideration of costs, the final rule required “certification by a professional engineer” that regulated entities had a proper closed vent system; and (4) without adequate notice, the final rule predicated an exemption from regulation for “well site pneumatic pumps” on a professional engineer’s certification that “it is technically infeasible to route the pneumatic pump to a control device or a process.” *Clean Air Council, et al. v. E. Scott Pruitt* at 15.

The Court held that the EPA does *not* have the authority to issue a brief stay of a final rule under CAA § 307(d)(7)(B), 42 U.S.C. § 7607 (d)(7)(B) or the Administrative Procedure Act, 5 U.S.C. § 500, et seq. While EPA alleged “inherent authority” to impose a stay of a final rule in its papers, the Court noted that a reviewing court may only review the grounds invoked by the agency when it acted. The EPA had only raised authority

under the CAA. The Court agreed that the EPA does have broad authority, but held that the EPA must nonetheless comply with the Administrative Procedure Act when reconsidering a rule. Accordingly, citing to [National Family Planning and Reproductive Health Association, Inc. v. Sullivan](#), 979 F.2d 227, 234 (D.C. Cir. 1992), the Court reiterated that an agency is bound by the rule until it is amended or revoked, and may not alter a rule without notice and comment. *Clean Air Council, et al. v. E. Scott Pruitt* at 12.

Furthermore, the Court held that the EPA's reconsideration of the final Methane Rule was arbitrary and unreasonable since the EPA's four grounds for reconsideration were inaccurate. The opinion reviewed each ground, and cites to the notice, comment, and agency response for each ground, determining that the final rule was a logical outgrowth of the notice of proposed rulemaking, or noted industries failure to comment on a specific portion of the proposed regulation. See *Id.* at 15-22.

The court held, contrary to EPA's argument, that courts have the authority to review agency stays promulgated pursuant to CAA § 307(d)(7)(B), 42 U.S.C. § 7607 (d)(7)(B), based on courts' greater authority to promulgate stays under the same provision.

For more information on the methane gas rule and its current regulatory status: <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/actions-and-notices-about-oil-and-naturalgas#regactions>

For more information on Trump administration actions to revise environmental rules affecting climate change, see J. Rubin & D. Furstenwerth, "Trump seeks to the Obama climate change agenda, but can he succeed?" at: <https://www.americanbar.org/publications/trends/2016-2017/julyaugust-2017/trump-seeks-to-uproot-the-obama-climate-changeagenda.html>

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