

ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1357
(and consolidated cases)

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

STATE OF CALIFORNIA, ET AL.,

Petitioners,

v.

ANDREW WHEELER, ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

**MOVANT INTERVENOR-RESPONDENTS' OPPOSITION TO
EMERGENCY MOTIONS FOR STAY PENDING REVIEW, MOTION
FOR EXPEDITED BRIEFING, AND MOTION
FOR SUMMARY VACATUR**

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GLOSSARY

BLM	Bureau of Land Management
EPA	U.S. Environmental Protection Agency
Final Rule	Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57018 (Sept. 14, 2020)

INTRODUCTION

This case involves the U.S. Environmental Protection Agency's ("EPA") routine implementation of section 111 of the Clean Air Act, 42 U.S.C. § 7411, specifically EPA's exercise of its discretion to define the scope of a source category and to remove duplicative regulations. In their emergency motions, Petitioners characterize EPA's actions as "dismantl[ing]" the regulations applicable to the oil and gas industry. *See* Emergency Motion of California, et al. at 3, ECF No. 1862368 ("State Motion"). Nothing could be further from the truth. Far from being an irrational new development, EPA's decision to define the oil and natural gas source category as the production and processing segments merely returns the source category to the way EPA had defined and regulated the category for decades. Further, as the record makes clear, EPA's decision to remove duplicative and redundant regulations does not adversely affect the environment. Petitioners have not met—and cannot meet—the burden necessary for this Court to grant extraordinary emergency relief.

The background of this dispute is as follows. On September 14, 2020, EPA issued a final rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review." 85 Fed. Reg. 57018 (Sept. 14, 2020) ("Final Rule"). The Final Rule amended the 2012 new source performance standards codified at 40 C.F.R. part 60, Subpart OOOO, and the 2016 standards codified at 40 C.F.R. part 60, Subpart OOOOa. In the 2012 Subpart OOOO rule, EPA purported

for the first time to find that the oil and natural gas source category encompassed not only production and processing, but also took the unprecedented step of bundling with those segments the transmission and storage of natural gas. 77 Fed. Reg. 49490 (Aug. 16, 2012).

Both Subpart OOOO and Subpart OOOOa were the subject of petitions for administrative reconsideration and litigation in this Court. *See, e.g., American Petroleum Institute v. EPA*, No. 13-1108 and consolidated cases (D.C. Cir.). Those actions included challenges to, and requests for reconsideration of, EPA's addition of new source performance standards for the transmission and natural gas storage segments. None of the litigation challenges have been resolved, as the matters have been in abeyance pending EPA's reconsideration.

On reconsideration, EPA determined in the Final Rule that Subpart OOOO and Subpart OOOOa improperly combined two disparate industry segments into a single ill-fitting source category. 85 Fed. Reg. at 57019. EPA corrected this error by removing the natural gas transmission and storage segment from the source category that originally had been defined to include only crude oil and natural gas production emission sources. *Id.* EPA reserved for later the decision as to whether new source performance standards should be established for the transmission and storage segments.

EPA also determined that establishing emissions standards for methane in Subpart OOOOa was an unreasonable and unwarranted extension of the regulation

because the methane standards accomplish no more environmental protection than the previously-established standards for volatile organic compounds. EPA rescinded the methane standards to simplify the rule and eliminate unnecessary duplicative regulations but, importantly, concluded this action would “maintain[] health and environmental protections.” *Id.*

Movant Intervenor-Respondents (“Intervenors”) are trade associations whose members own and operate countless facilities that are subject to Subpart OOOO and Subpart OOOOa. The operations of Intervenors’ members span the full range of affected operations—from oil and gas wells, to midstream processing of natural gas, to transmission, to end users, and to local distribution systems. The member companies of Intervenors have a deep understanding of the industries, practices, and equipment being regulated here. In contrast, the emergency stay motions filed by Petitioners State of California and by Petitioners Environmental Defense Fund, et al., ECF No. 1861564 (“ENGO Motion”) plainly show that Petitioners have only a superficial and uninformed understanding of the operations covered by the Final Rule.

Intervenors respectfully file this response in opposition to provide the Court with more accurate information to provide a richer context for the determinations made by EPA, the expert agency, in the Final Rule. When put into the proper context, it is clear that EPA made reasonable, fact-based decisions that are fully consistent with the Clean Air Act and this Court’s precedents. Petitioners fail to make

the necessary showing that there is a likelihood that they would prevail on the merits. Moreover, Petitioners have failed to demonstrate that they will suffer irreparable harm in the absence of a stay. In short, extraordinary relief is not justified. Petitioners' claims can and should proceed in the normal course.

Because Petitioners have failed to meet the burden necessary for this Court to grant emergency relief, Petitioners' motions should be denied.

STANDARD OF REVIEW

“On a motion for stay, it is the movant’s obligation to justify the court’s exercise of such an extraordinary remedy.” *Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985). A movant must demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury if relief is withheld; (3) lack of harm to other parties from a stay; and (4) that a stay would serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see also* D.C. Cir. R. 18(a)(1).

ARGUMENT

Petitioners’ unwarranted motions for emergency relief should be denied. Intervenors make two arguments to augment EPA’s opposition to Petitioners’ motions. *First*, Petitioners have failed to establish a likelihood of success on the merits justifying extraordinary relief. In the Final Rule, EPA correctly reconsidered an ill-advised combination of disparate oil and gas activities into one category—and based its reconsideration on an informed understanding of the industry that is well-documented in the record. In fact, as detailed in Section I below, Petitioners’

simplistic view wholly misapprehends how the industry actually operates—and how EPA has historically regulated it.

Second, Petitioners have not proffered any basis for claiming an irreparable harm warranting immediate relief. The core premise of Petitioners' claim for relief is that the Final Rule has the secondary effect of foreclosing EPA from issuing at some unspecified time in the future Clean Air Act emission guidelines governing future state rules of unknown effect that may regulate existing oil and gas sources. Yet, as discussed in Section II, forgone alleged emissions reductions from possible future state rules twice removed from the Final Rule are not the concrete, imminent, irreparable harm that is required under long-settled principles of equitable relief. Indeed to grant relief on that basis would be wholly unprecedented.

I. PETITIONERS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

To obtain extraordinary relief, Petitioners must satisfy the familiar four part test for preliminary relief – including to demonstrate a likelihood of success on the merits. *Nken* 556 U.S. at 434. That is a high burden, particularly given the “extreme degree of deference” afforded to EPA on technical matters such as those presented here. *E.g.*, *Hüls America Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996).

Here, Petitioners have failed to meet their burden to demonstrate a likelihood of success on the merits of their petitions. One of Petitioners' core contentions is that EPA erred in defining the sector because the substantial differences in equipment

and operations across the oil and gas sector highlighted by EPA in the Final Rule are, they assert, immaterial and do not justify separating production and processing from transportation and storage. *See, e.g.*, ENGO Motion at 9 (“minor distinctions”) and 10 (purported distinctions are “illusory, entirely irrelevant”); State Motion at 12 (EPA “brushes aside the many obvious and relevant commonalities”).

Petitioners’ uninformed and inaccurate assertions are without merit, as they are fundamentally at odds with the practical realities of the diverse oil and gas industry and, ironically, would promote the very arbitrary regulatory scheme that Petitioners seek to avoid. Moreover, it is EPA that is charged with making this determination, and its determination should be upheld unless arbitrary and capricious or not in accord with the law. 42 U.S.C. § 7607(d)(9)(A).

Petitioners’ mere disagreement with EPA’s evaluation of how best to define a source category under the Clean Air Act is not a basis for granting the extraordinary relief they seek. More importantly, assessing the strength of these arguments requires a detailed, fact-based inquiry into the function of each industry segment and the way in which equipment is used in the segments. That is EPA’s role under the Clean Air Act. Petitioners’ superficial arguments fall far short of demonstrating a likelihood of success on the merits.

A. EPA’s Decision to Exclude the Transmission and Storage Segments Is a Reasoned Approach Wholly Consistent with EPA’s Similar Regulation of the Oil Industry

Under the Clean Air Act, EPA is charged with defining source categories. 42 U.S.C. § 7411(b) (“The Administrator shall ... publish (and from time to time thereafter shall revise) a list of categories of stationary sources.”). After careful reconsideration and an extensive public comment process, EPA rightfully finds in the Final Rule that equipment, operations, and gas composition in the natural gas transmission and storage segments are “distinctly different” than those in the production and processing segments. 85 Fed. Reg. at 57028. As such, EPA reasonably concluded on reconsideration that transmission and storage are not “sufficiently related” to be merged into a single source category with production and processing. *Id.*

Petitioners suggest that EPA’s decision to remove the natural gas transmission and storage sector from the Crude Oil and Natural Gas Production source category is an aberration. That is simply not correct. EPA’s decision squares fully with EPA’s prior decision to divide the oil industry into several discrete source categories in order to properly regulate the industry under section 111 of the Clean Air Act. The decision likewise is clearly justified by the differences between the segments in equipment, operations, and gas composition. *See* discussion, *infra* at I.B and I.C. In any event, Petitioners’ have failed to meet their heavy burden – particularly on this preliminary motion – that EPA’s judgment was arbitrary.

That EPA's judgment simply follows the long-settled approach EPA has followed for the oil industry is clear. The Crude Oil and Natural Gas Production source category is at the apex of two closely-related, but ultimately discrete industries – the oil industry and the natural gas industry. This source category unavoidably covers both industries because wells often produce a mixture of crude oil and natural gas. 84 Fed. Reg. 50244, 50247 (Sept. 24, 2019). Soon after production, the crude oil and natural gas are separated. *Id.* at 50248. Beyond that point, the oil industry and natural gas industry diverge onto two different paths.

With regard to the oil industry, the Crude Oil and Natural Gas Production source category stops at the point that crude oil leaves the production segment and is delivered to petroleum refineries. *Id.* Petroleum refineries themselves and the other elements of the chain of petroleum refining and distribution to the marketplace belong to and are regulated under several separate source categories that EPA created to allow for sensible regulation of distinctly different parts of that industry.

As for the natural gas industry, in the Final Rule, EPA retained natural gas processing in the Crude Oil and Natural Gas Production source category. 40 C.F.R. §§ 60.5365a, 60.5430a (definition of “Crude Oil and Natural Gas Production source category”). This differs from the oil industry, but the difference is warranted because aspects of processing occur across the source category – from the wellhead through gas processing plants. 84 Fed. Reg. at 50248 (“Typically, processing of natural gas begins in the field and continues as the gas is moved from the field through gathering

and boosting stations to natural gas processing plants, where the complete processing of natural gas takes place.”). In the Final Rule, EPA merely determined the source category covering oil and natural gas production should stop at the point that pipeline quality gas is delivered to transmission pipelines, rather than merging the natural gas transmission and storage segments with Crude Oil and Natural Gas Production and forcing the bulk of the natural gas industry into a single source category.

Petitioners in both motions argue that EPA’s decision to restore the scope of the original Crude Oil and Gas Production source category is somehow arbitrary because it is purportedly inconsistent with other broadly defined source categories. *See, e.g.*, ENGO Motion at 12-13 (“EPA’s category for industrial-commercial-institutional steam generating units encompasses steam generators that burn wood, solid waste, natural gas, and coal, among other things, with hugely different emissions characteristics.”); State Motion at 12 (“The agency’s failure to explain its inconsistent treatment of the oil and gas industry as compared to its historical treatment of many other industries, is arbitrary and capricious.”). Petitioners’ comparisons completely miss the mark.

Rather, the closest and best comparison—EPA’s approach to regulating the oil industry—is wholly consistent with EPA’s approach for the natural gas industry in the Final Rule. As EPA observed in the Final Rule, “[P]roduction facilities, refineries, and bulk gasoline terminals all have operational differences, and the EPA placed them in three different source categories. Those operational differences are similar to the

operational differences between the production and processing segments and the transmission and storage segment at issue in this final rule.” 85 Fed. Reg. at 57029.

Hence, far from being arbitrary, EPA’s action in the Final Rule falls squarely within settled agency practice, as EPA has divided equipment and operations in the oil industry into at least nine separate source categories under its new source performance program:

- (1) Oil and Natural Gas Production (40 C.F.R. part 60, Subpart OOOOa, which applies to oil wells through the delivery of crude oil to petroleum refineries);
- (2) Petroleum Refining (*Id.* at Subpart Ja, which covers key refinery operations);
- (3) Equipment Leaks at Petroleum Refineries (*Id.* at Subpart GGGa, which covers fugitive leaks from equipment such as pumps, valves, and pipe connections);
- (4) Petroleum Refinery Wastewater (*Id.* at Subpart QQQ, which covers wastewater collection and treatment systems);
- (5) Storage Vessels (*Id.* at Subpart Kb, applicable to petroleum liquid storage tanks, wherever they are located);
- (6) Bulk Gasoline Terminals (*Id.* at Subpart XX, which covers gasoline distribution facilities);

- (7) Stationary Gas and Combustion Turbines (*Id.* at Subpart KKKK, applicable to combustion turbines used to generate steam and/or electricity at petroleum refineries and combustion turbines used to power natural gas compressors);
- (8) Stationary Internal Combustion Engines (*Id.* at Subparts IIII and JJJJ, applicable to stationary engines used throughout the oil production, refining, and distribution sectors); and
- (9) Industrial, Commercial, and Institutional Steam Generating Units (*Id.* at Subparts Db and Dc, applicable to boilers used to generate steam and/or electricity at petroleum refineries).

Given that the natural gas industry is a close cousin to the oil industry, this segmentation of the oil industry provides the most highly relevant precedent for EPA's decision to separate the natural gas transmission and storage segments from the natural gas production and processing segments. This decision is wholly analogous to EPA's prior decision to create separate source categories for petroleum refining and bulk gasoline terminals—i.e., to create separate source categories for gasoline production and gasoline distribution.

Thus, contrary to Petitioners' assertions, EPA's conclusion that natural gas transmission and storage should not be lumped together with natural gas production and processing is rational and consistent with its regulatory precedent, as reflected in the way that EPA decided to regulate the oil industry.

B. EPA's Final Rule Reflects an Accurate Understanding that Equipment and Operations in the Production and Processing Segment Are Fundamentally Different From Those in the Transmission and Storage Segment.

Not only is EPA's approach fully consistent with how it has long regulated the analogous oil industry, the agency's determination to distinguish natural gas production and processing from transmission and storage are well-supported by substantial evidence in the record. As EPA explained:

The operations of the production and processing segments differ from the transmission and storage segment operations because in the latter, the natural gas does not undergo changes in composition, except for some limited removal of liquids that condensed during the temperature and pressure changes as the natural gas moves through the pipeline. Second, there are statistically significant differences in the emissions profiles between the production and processing segments and the transmission and storage segment. Third, there are equipment types and processes present in the oil and natural gas production and processing segments that are not present, or not common, at natural gas transmission and storage facilities.

85 Fed. Reg. at 57029.

Petitioners nonetheless challenge EPA's findings and complain that the differences are not as great as EPA claims. But merely because Petitioners disagree with EPA's findings does not mean EPA's action was arbitrary and capricious or unlawful. In any event, Petitioners could not be more wrong. The natural gas industry has unique and fundamentally different characteristics at each segment of the process. Bundling this multifaceted industry into a single "super" source category was a mistake that was appropriately corrected by EPA in the Final Rule.

This is clear from a careful review of each of the four major segments of the industry: production, processing, transmission, and storage.

Production Segment. Production is where crude oil and raw natural gas is extracted from wells (*i.e.*, produced). Production operations include “the wells and all related processes used in the extraction, production, recovery, lifting, stabilization, and separation or treatment of oil and/or natural gas (including condensate)” including “well drilling, completion, and recompletion processes, including all the portable non-self-propelled apparatuses associated with those operations.” 84 Fed. Reg. at 50247-48.

These unique aspects of production set it apart from other segments. For example, production is the only segment where well drilling and well completion occur. “Completion” involves installing casings in the well to stabilize the bore hole and conducting hydraulic fracturing, where high pressure fluids are injected into the well to fracture the geologic formation to allow for greater recovery of oil and gas. 40 C.F.R. § 60.5430a (definitions of “well completion” and “hydraulic fracturing”). Before a well can be put into production, those fluids must be removed from the well – an operation called “flowback.” *Id.* (definition of “flowback”).

A primary focus of EPA’s regulatory effort was to minimize air emissions associated with flowback, which is unique to the production segment. EPA, Overview of Final Amendments to Air Regulations for the Oil and Natural Gas Industry: Fact Sheet 1, <https://www.epa.gov/sites/production/files/2016->

09/documents/natural_gas_transmission_fact_sheet_2012.pdf (Apr. 17, 2012) (standards for well completion are “[a] key component of the final rules”). The solution was to require “reduced emission completions,” which involve the use of temporary recovery equipment to collect the complex liquid/gas mixture produced during flowback, separate the various components of the mixture, and collect and/or combust hydrocarbon gases. 40 C.F.R. § 60.5375a. Nothing remotely like well drilling and completion occurs at any point downstream of production sites and no other operation in the sector has the unique set of emissions control requirements tailored to match the particular aspects of these activities.

Similarly, production from an existing well typically goes down over time as the amount of hydrocarbon in the geologic formation is depleted. Production in a depleted well sometimes can be improved by conducting a “workover” of the well, which sometimes involves “refracturing” the well (i.e., conducting another hydraulic fracturing operation). *Id.* § 60.5430a (definition of “hydraulic refracturing”). Recognizing this distinct aspect of production operations, 77 Fed. Reg. at 49497, EPA included a production-specific definition of “modification” in the rule, which triggers additional regulatory requirements for existing unaffected sources. 40 C.F.R. § 60.5365a(a)(2). This unique provision has absolutely no meaning or applicability in the transportation and storage segment of the natural gas industry.

Natural Gas Processing Segment. Natural gas processing is likewise substantially distinct from the transmission and storage segments. Raw natural gas

typically moves next through low pressure gathering pipelines to natural gas processing plants, which:

separate and recover NGL [natural gas liquids, which are comprised of nonmethane light hydrocarbons such as butane] or other nonmethane gases and liquids from field gas through one or more of the following processes: Oil and condensate separation, water removal, separation of NGL, sulfur and CO₂ removal, fractionation of NGL, and other processes, such as the capture of CO₂ separated from natural gas streams for delivery outside the facility.

84 Fed. Reg. at 50248. In essence, a natural gas processing plant is a chemical plant where numerous operations are employed to produce the primary product (pipeline quality natural gas), byproducts (other light hydrocarbons), and various waste streams (water, carbon dioxide, sulfur). For the natural gas stream, it serves many of the same functions as a petroleum refinery for the crude oil stream.

Not surprisingly, Subpart OOOOa includes emissions standards tailored to the unique characteristics of natural gas processing plants. For example, a sulfur recovery standard applies to “sweetening units” (i.e., equipment that removes sulfur compounds, such as hydrogen sulfide, from raw natural gas) located at natural gas processing plants. 40 C.F.R. § 60.5405a. Such a standard is not needed for the transmission and storage segments, because those segments typically handle purified natural gas that already has had almost all of the sulfur removed in a natural gas processing plant.

Natural Gas Transmission Segment. In the natural gas transmission segment, pipeline quality natural gas is moved through pipelines from production and

processing facilities to end users, which can range from large entities such as natural gas fired power plants to “local distribution systems,” which distribute natural gas to numerous individual end-users (such as homes, schools, and businesses). According to EPA:

[p]ipelines in the natural gas transmission and storage segment can be interstate pipelines, which carry natural gas across state boundaries or intrastate pipelines, which transport the gas within a single state. Basic components of the two types of pipelines are the same, though interstate pipelines may be of a larger diameter and operated at a higher pressure.

84 Fed. Reg. at 50248.

Transmission requires two basic components – pipes and compressors. The pipes contain and convey the gas, while the compressors “pump” the gas through the pipes. Compressors are located at facilities called “compressor stations,” which are “usually placed at 40- to 100-mile intervals along the pipeline.” *Id.* Such pipelines are sometimes called “long line” operations because the integrated operation can span hundreds or even thousands of linear miles. *See* 45 Fed. Reg. 52676, 52695 (Aug. 7, 1980).

While pipes and compressors also are used in production and natural gas processing, the nature, function, and purpose of this equipment in the transmission segment are wholly different. For example, in the production segment, “low pressure, small diameter, gathering pipelines and related components [] collect and transport the oil, natural gas, and other materials and wastes from the wells to the refineries or natural gas processing plants.” 84 Fed. Reg. at 50248. In contrast, pipelines used in

interstate transmission tend to “be of a larger diameter and operated at a higher pressure.” *Id.*

The disparate character of the gas handled in the different segments results in significantly different potential emission rates to the air. 85 Fed. Reg. at 57029 (“[E]ven though there are storage vessels in the transmission and storage segment, the liquids (condensate) stored and the throughputs are such that the VOC emissions are significantly different” than in the production and processing segment.). Moreover, given that EPA has demonstrated that raw gas prior to processing typically has more and different constituents than the pipeline quality gas, *id.* at 57028, the makeup of potential emissions also will be significantly different in production and processing, versus transportation and storage. *See id.* at 57029 (“there are statistically significant differences in the emissions profiles between the production and processing segments and the transmission and storage segment”).

Natural gas transmission pipelines are akin to the gasoline distribution network that is used to transport refined petroleum fuels in the crude oil segment. As discussed more fully in Section I.A., above, gasoline distribution occupies a discrete source category and is not part of the petroleum refining or crude oil production source categories.

Natural Gas Storage Segment. Storage likewise differs significantly from the production and process segments. Natural gas is typically stored in “aboveground and underground natural gas storage facilities.” 84 Fed. Reg. at 50248. “The main

difference between underground and aboveground storage sites is that storage takes place in storage vessels constructed of non-earthen materials in aboveground storage. Underground storage of natural gas typically occurs in depleted natural gas or oil reservoirs and salt dome caverns.” *Id.* The overall operation of a natural gas pipeline must be carefully controlled to make sure that the right amount of gas at the right pressure is available for delivery when needed by customers. *Id.* (Another “purpose of this storage is for load balancing (equalizing the receipt and delivery of natural gas).” Storage facilities provide a buffer so that gas can be delivered as needed, even when the requisite amount of gas is not being supplied to the pipeline from natural gas processing plants. *Id.* (“Storage facilities hold natural gas for use during peak seasons.”). Such load balancing is uniquely characteristic of the transmission segment of the natural gas industry.

Although still a high-level overview, this summary of EPA’s findings illustrates the richness, complexity, and unique aspects of each part of the natural gas industry. It is simplistic and unrealistic to conclude that the disparate operations that make up the natural gas industry should be combined into a single “super” source category simply because all parts of the natural gas industry use pipe systems and compressors or because all parts of the industry handle gaseous products containing methane. The practical reality is that there are material differences in operations, equipment, functions, and emissions. As such, EPA’s conclusion that the natural gas transmission and storage segment should not be merged into a single “super” natural

gas source category with the production and processing segment because they are not “sufficiently related” is sensible and abundantly supported.

C. The Contours of the Source Category Are Shaped by Other Fact-Based Considerations.

The core of Petitioners’ challenge is that there is not enough difference in equipment, operations, and gas composition to justify separating the two segments. Yet, EPA has drawn other similar lines in Subparts OOOO and OOOOa that demonstrate the need for appropriate scoping of the source category.

For example, on the production end of the sector, the rule applies only to *onshore* oil and gas wells. 40 C.F.R. § 60.5365a. Offshore wells are not covered even though they produce crude oil and raw natural gas typically comparable to that produced by onshore wells, use much of the same equipment (e.g., compressors, pumps, storage vessels, separators), and engage in similar operations (e.g., well drilling, well completion, oil and gas production and initial processing). Of course, excluding offshore wells makes sense because drilling and production operations on ships and platforms in the water presents obvious and unique challenges that would warrant separate regulatory scrutiny. EPA, Oil and Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutant Reviews, 40 C.F.R. Parts 60 and 63, Response to Public Comments on Proposed Rule August 23, 2011 (76 FR 52738), at 412. (“For NSPS subpart OOOO, we have insufficient information concerning the technical feasibility of controlling emissions from affected

facilities located offshore, particularly whether the controls specified in the final rule are applicable to offshore facilities, whether sufficient space is available on offshore rigs for control equipment, and whether the types of control equipment evaluated for the final rule (e.g., to estimate cost effectiveness) would be allowed under the specific and unique safety requirements applicable to offshore rigs.”).

Similarly, the natural gas transmission and storage segment in the prior rule (i.e., the rule as it stood before the Final Rule was promulgated) ended at “distribution areas,” 40 C.F.R. § 60.6430a (July 1, 2019) (definition of “natural gas transmission”), which typically are the points at which natural gas is passed from the transmission system to the local distribution system. Local distribution systems are not covered, even though they sometimes have natural gas storage tanks, often use compressors to move gas through their systems, use piping and piping components (e.g., valves, connectors), and move pipeline quality gas that typically is indistinguishable from the gas handled in the transmission and storage segment. 84 Fed. Reg. at 50248-49. Exclusion of local distribution systems is sensible, however, because of the unique attributes of such systems that would make them difficult to effectively regulate as part of a unitary “super” natural gas source category (e.g., typically extensive piping systems that use considerably smaller components than upstream systems, numerous meters for measuring flow to individual customers). *Id.*

By Petitioners’ logic, the facial similarity in equipment, operations, and oil and gas composition should cause the exclusion of offshore production and retail

distribution to be arbitrary and objectionable. Yet, the plain facts support the need for and appropriateness of closely tailoring the scope of source categories.

II. PETITIONERS WILL NOT SUFFER IRREPARABLE HARM DURING THE PENDENCY OF THE LITIGATION.

A. Petitioners Have the Burden To Show that the Alleged Harm Is Irreparable—that Imminent, Significant Adverse Effects Exist—and Have Failed To Do So Here.

Irreparable harm has “always” been “[t]he basis of injunctive relief in the federal courts,” and as the movants, Petitioners have the burden to demonstrate such harm. *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)); *see also Younger v. Harris*, 401 U.S. 37, 46 (1971) (noting that irreparable injury is “the traditional prerequisite to obtaining an injunction”). Importantly, “[a] movant’s failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). In fact, if the Court concludes that Petitioners have not demonstrated irreparable harm, it need not even consider the remaining factors. *See CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995).

There are a number of considerations to evaluate to determine if a harm is truly “irreparable.” First, the alleged harm must be “both certain and great; it must be actual and not theoretical.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Petitioners must show that the alleged injury is so imminent that there is a “clear and present need for equitable relief.” *Id.* (quoting *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff’d*, 548 F.2d 977 (D.C. Cir. 1976)). Second, Petitioners must “substantiate the claim that irreparable injury is ‘likely’ to occur.” *Id.* (citation omitted). In other words, there must be “proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.” *Id.* Finally, Petitioners must establish causation, or that the alleged harm “will directly result from the action which the movant seeks to enjoin.” *Id.* While none of these considerations are determinative on their own, they guide the Court on whether the complained-of injury is indeed irreparable. *Id.*

B. Forgone Predicted Emissions Reductions From a Possible Future Rule for Existing Sources Do Not Constitute Irreparable Harm.

Petitioners argue that they have suffered irreparable harm because rescinding the methane standards allegedly eliminates the obligation for EPA to issue emissions guidelines for existing sources of methane under section 111(d) of the Clean Air Act. ENGO Motion at 33-37; State Motion at 21. Yet, Petitioners offer no evidence that this alleged harm is in any way “certain and great” and “actual and not theoretical.” *Wis. Gas Co.*, 758 F.2d at 674. Petitioners base their alleged irreparable harm argument on *potential* emissions reductions from a *possible* future rule that, as discussed

below, could not come into existence at the earliest for several more years. This is plainly not the “certain,” “actual,” or “imminent” harm required for a stay.

Although regulation of methane under section 111(b) of the Clean Air Act would require EPA to promulgate an emission guideline under section 111(d) for states to use in establishing emission standards for existing sources under certain circumstances, Congress did not impose a deadline by which EPA must do this (in contrast to the new source standards governed by section 111(b)). *Compare* 42 U.S.C. § 7411(d) *with* 42 U.S.C. § 7411(b). Moreover, once EPA promulgates such an emission guideline, no emission limitations apply to the existing sources at that time. Rather, states are responsible for setting the emission standards for the existing sources within their borders, using the EPA emission guideline as a reference, and they have three years to submit a plan to EPA regarding how they intend to do that. 40 C.F.R. § 60.23a(a)(1). Once EPA receives that plan from a state, EPA has one year to approve or disapprove it. *Id.* § 60.27a(b). In other words, even if EPA began to work on an emission guideline right now, any emission limitation on the existing sources would not be in place for several years.

In addition, what emission limitations, if any, the individual state rules would require is unknown. Therefore, the amount of any emission reduction that might be achieved by the states’ application of an emission guideline to their existing sources—and when such a reduction might be achieved—is nothing more than sheer speculation. States have the discretion to “take into consideration factors, such as the

remaining useful life of such source ... that make application of a less stringent standard or final compliance time significantly more reasonable.” *Id.* § 60.24a(e).

Emission limitations that might be promulgated in the future at some unknown date and that in any event could not go into effect for several more years and for which any alleged future benefit is unquantified and speculative surely does not and cannot meet the requirements for irreparable harm that merit the granting of extraordinary relief. Petitioners have not met their burden of proving “that the harm has occurred in the past and is likely to occur again” and “that the harm is certain to occur in the near future.” *Wis. Gas Co.*, 758 F.2d at 674. There is simply no need for the Final Rule to be stayed while this Court considers Petitioners’ claims.

Recognizing the alleged harm is neither imminent nor certain, the ENGO Petitioners cite to two cases in an attempt to argue that “[t]he fact that existing source regulations have not already been developed ‘does not negate the imminence of [the] harms.’”¹ See ENGO Motion at 36 (quoting *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1075 (N.D. Cal. 2018)). Both of these cases are inapposite. The first case, *California v. Bureau of Land Management*, is irrelevant. In that case, the district court addressed the burden the Bureau of Land Management (“BLM”) has to meet in order to suspend a federal regulation for further analysis. 286 F. Supp. 3d at 1058-59. There, the alleged harm arose when BLM was suspending regulations that were

¹ The State Petitioners, on the other hand, offer *no* legal basis to support their position.

already in place. Here, by contrast, the alleged irreparable harm arises from speculative reductions from wholly future state regulations—regulations that are not in place and would not be in place for several years, even if EPA proposed emission guidelines today.

The second case cited by ENGO Petitioners, *Coleman v. Paccar, Inc.*, 424 U.S. 1301 (1976) (in chambers decision by Rehnquist, J., as Circuit Justice for Ninth Circuit), is equally irrelevant and unpersuasive. *Paccar* involved a Department of Transportation regulation imposing safety standards on automobiles that the Ninth Circuit *sua sponte* stayed. *Id.* at 1301-02. Justice Rehnquist overturned the stay primarily because the Ninth Circuit had not explained why Petitioners were likely to succeed on the merits. *Id.* at 1304-06. Also, like *California*, *Paccar* arose directly from the suspension of already existing regulations. That is clearly not the issue presented here where there are no existing source regulations in place.

CONCLUSION

For the reasons stated herein, Petitioners have failed to meet the burden necessary to justify a stay of the Final Rule. The Court should deny Petitioners' motions.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Federal Rule of Appellate Procedure 32(f) and (g), I hereby certify that the foregoing document contains 5,999 words, excluding exempted portions, according to the count of Microsoft Word.

Movant-Intervenor-Respondents have filed an unopposed motion to exceed the word limit, asking for the word limit to be increased to 7,000 words. ECF No. 1863754. Assuming the Court grants that motion, this document complies with the word limit.

I further certify that the motion complies with Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Garamond font.

/s/ Allison D. Wood

Allison D. Wood

Dated: September 28, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of September 2020, I am causing the foregoing document to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

/s/ Allison D. Wood
Allison D. Wood