July 27, 2017

The Honorable Scott Pruitt, Administrator
US Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OAR-2010-0505
Submitted to www.regulations.gov

Re: Environmental Protection Agency’s (EPA’s) “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements at 82 FR 27645 (June 16, 2017)

Dear Administrator Pruitt:

The American Petroleum Institute (“API”) is pleased to submit the attached comments on the proposed rule to stay the compliance dates for certain portions of the New Source Performance Standards (“NSPS”) 40 C.F.R. Part 60 Subpart OOOOa, “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements” 82 Fed. Reg. 27645 (June 16, 2017) (“Proposed Rule”). API submits these targeted comments on the legal authorities the United States Environmental Protection Agency (“EPA” or “Agency”) possesses to issue a two-year stay of these provisions.

API members will be directly impacted by the Proposed Rule. API is a national trade association representing all aspects of America’s oil and natural gas industry. API represents over 625 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America’s energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly $2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.
API will also be submitting separate comments that present the factual and policy reasons justifying the two-year stay by the August 9th deadline. Please contact John Wagner (202-682-8529) if you have any questions regarding the comment submittal.

Sincerely,

Matthew Todd

Attachment
cc: Mandy Gunasekara, USEPA
    Elliott Zenick, USEPA
    Sarah Dunham, USEPA
    Steve Page, USEPA
    Peter Tsirigotis, USEPA
    Kevin Culligan, USEPA
    David Cozzie, USEPA
I. Introduction and Background

The Proposed Rule is related to EPA’s regulation of the oil and natural gas source category under section 111 of the Clean Air Act (“CAA” or “Act”). EPA listed the crude oil and natural gas production category in 1979 and issued NSPS pursuant to CAA § 111(b) for natural gas plants in 1985, promulgating these standards in 40 C.F.R. Part 60 Subparts KKK and LLL. See 50 Fed. Reg. 26,122 (June 24, 1985); 50 Fed. Reg. 40,158 (Oct. 1, 1985). CAA § 111(b)(1)(B) instructs EPA to review NSPS every 8 years, unless “such review is not appropriate in light of readily available information on the efficacy” of the NSPS. 42 U.S.C. § 7411(b)(1)(B). The statute only compels a review; EPA is not required to revise the NSPS unless EPA deems it is “appropriate” to do so. Id. EPA conducted this review in 2011 and issued a proposed rule to revise the NSPS. 76 Fed. Reg. 52,738, 52,740-41, 52,754 (Aug. 23, 2011). For new or modified oil and natural gas facilities, EPA proposed to copy the updated Subpart KKK and LLL regulations in new Subpart OOOO along with new standards that would cover additional new or modified oil and natural gas facilities. Id. at 52,745-46. EPA proposed to amend the titles for Subparts KKK and LLL to clarify that they will continue to apply for facilities already subject to them. Id. at 52,745. EPA issued a final revised NSPS in 2012: Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews,” 77 Fed. Reg. 49,490 (Aug. 16, 2012) (“2012 NSPS Rule”). EPA granted reconsideration of some portions of the 2012 NSPS Rule and issued


On April 18, 2017, EPA Administrator Pruitt granted reconsideration of two narrow issues in the 2016 NSPS Rule: the fugitive emission requirements for low production well sites and the process related to the alternative means of emission limitations (“AMEL”) for fugitive emission requirements. 82 Fed. Reg. at 25,731. In June, EPA granted reconsideration of two additional issues: (1) the standards for pneumatic pumps at well sites, and (2) the requirements for certification by a professional engineer. “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay,” 82 Fed. Reg. 25,730 (June 5, 2017). In this same Federal Register notice, EPA also granted a three-month stay, pursuant to CAA § 307(d)(7)(B), of the following three requirements in the 2016 NSPS Rule: (1) the fugitive emissions requirements (also referred to as leak detection and repair (“LDAR”)), (2) the standards for pneumatic pumps at well sites, and (3) the requirements for certification by a professional engineer. EPA stayed the LDAR requirements because the
reconsideration issues “determine the universe of sources that must implement the fugitive emissions requirements.” *Id.* at 25,732. As such, a stay solely as to the LDAR portions under reconsideration would “generate” “uncertainties” “regarding the application and/or implementation of the fugitive emissions requirements.” *Id.* at 25,733.

II. EPA Has Multiple Sources of Legal Authority to Extend the Compliance Deadlines.

   A. EPA Should Extend the Relevant Compliance Deadlines (Rather Than Issue a Stay), Pursuant to Its Authority Under CAA § 111.

   EPA has authority under CAA § 111(b) to extend compliance deadlines and/or establish future effective compliance dates. Section 111(b) sets a timeline for when initial NSPS must be done, when EPA must review the NSPS, and when revised NSPS are effective. Section 111(b) does not, however, instruct when compliance with NSPS must be achieved. Also, there are no time requirements for when EPA conducts a voluntary or ahead-of-schedule review of the NSPS.

   EPA has authority under the plain language of CAA § 111(b) to extend compliance deadlines. Standards of performance are effective upon promulgation. 42 U.S.C. § 7411(b)(1)(B). But the effective date of a rule can differ from the compliance dates in a rule. For example, section CAA § 112(i) specifically instructs when a rule becomes effective, and separately instructs when compliance is required. 42 U.S.C. § 7412(i). This provision shows that Congress does not consider the terms “effective date” and “compliance date” to be synonymous. *See* 42 U.S.C. § 7412(d). Section 111 specifies when a rule must be effective but, unlike Section 112, does not state when regulated sources must achieve compliance with the NSPS. This leaves EPA with authority under Section 111 to establish a reasonable compliance period after the effective date of a rule.

   The provisions EPA proposes to stay here were promulgated in the 2016 NSPS Rule, which EPA undertook *after* it completed the 2012 NSPS Rule, which satisfied the required 8-
year review of the oil and natural gas NSPS. 42 U.S.C. § 7411(b)(1)(B) (requiring EPA to review NSPS every 8 years, unless “such review is not appropriate in light of readily available information on the efficacy” of the NSPS). The next 8-year review is not required until at least 2020. Thus, extending the relevant compliance deadlines will not interfere in any way with the mandatory schedule for review and possible revision of this standard.

Alternatively, EPA may effectively extend the relevant compliance deadlines by making future-effective BSER determinations. The Act defines “standard of performance” as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1). Determining the best system of emission reduction, or BSER, is the core instruction Congress gave to EPA in section 111. In charging EPA with determining BSER, Congress delegated EPA the corresponding authority to craft appropriate compliance deadlines that correspond to BSER.

The D.C. Circuit has recognized that EPA has authority to set future effective BSER. See Lignite Energy Council v. EPA, 198 F.3d 930 (D.C. Cir. 1999); Portland Cement Association v. EPA, 486 F.2d 375 (D.C. Cir. 1973). This is a viable approach for providing more compliance time for the narrow Quad Oa reconsideration issues. For instance, the proposed rule would stay the LDAR requirements in 40 C.F.R. § 60.5397a for two years after the final rule is published in the Federal Register. Under the LDAR program, sources can delay repair or replacement of a source of fugitive emissions for specified reasons, such as technical infeasibility or safety concerns. 40 C.F.R. § 60.5397a(h)(2). This provision generally allows delays up to two years,
except for repairs or replacements for compressor stations, which must occur after the next 
compressor station shutdown. *Id.* But the shutdown of a compressor station does not necessarily 
cure issues of technical infeasibility, meaning that the delay of repair provision for compressor 
stations either requires operators to do the impossible (repair a compressor station when such 
repair is technically infeasible) or bear untold costs from leaving the compressor station out of 
operation until repair is feasible. *See also* Petition for Administrative Reconsideration by GPA Midstream, at 10-11 (discussing duplicative nature of LDAR requirements for compressor stations). Because this requirement does not satisfy BSER at the current time, a two-year delay 
is appropriate under CAA § 111 and D.C. Circuit precedent.

EPA included such future effective compliance deadlines in the original Quad O Rule. 
equipment based on availability and cost considerations); *id.* at 49,500, 49,525-26 (establishing a 
one-year phase-in period for storage vessel controls); *see also* API’s Comments, EPA-HQ-OAR-
2010-0505-4266 at 31-35 (Nov. 30, 2011). EPA took a similar approach in at least two prior 
§ 111 for coal-fired electric utility steam generating units using a two-step compliance program, 
which were later vacated on other grounds by *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 
combustion engines including delayed compliance dates).

In sum, EPA may lawfully extend compliance dates by two years for the issues under 
reconsideration and related parts of the 2016 NSPS Rule. Alternatively, EPA may effectively 
extend the compliance deadlines by making future-effective BSER determinations for the 
relevant standards. Either way, an extension is reasonable under these circumstances,
particularly as EPA re-evaluates whether these provisions should be revised through the pending reconsideration proceeding.

B. A Stay Pending Judicial Review Is Warranted Under APA § 705.

APA § 705 states that “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” 5 U.S.C. § 705. An APA § 705 stay is warranted here, as litigation is pending and justice requires EPA to stay the rule until the case is decided or settled.

Litigation is Pending: Judicial challenges to the 2012 NSPS Rule, 2014 NSPS Rule, and 2016 NSPS Rule are currently pending before the D.C. Circuit, consolidated in American Petroleum Institute v. EPA, D.C. Cir. No. 13-1108. This criterion obviously is met.

Justice Requires a Stay: As explained below in subparagraph 3, the challenges to the 2016 NSPS Rule are likely to succeed. There are significant procedural and substantive flaws with the 2016 NSPS Rule. EPA already has announced its intent to undertake a rulemaking to address these issues. Requiring compliance with the 2016 NSPS Rule in the meantime would cause substantial harm to regulated entities. They would incur significant costs in complying with standards that almost certainly will be changed or eliminated. They also would face potential enforcement liability for provisions that are unwarranted and unlawful. At the same time, immediate implementation would not produce environmental benefits that are commensurate with the costs and potential legal liabilities. Lastly, EPA’s stay is narrowly tailored to the most time-sensitive and burdensome requirements. For these reasons, justice compels EPA to stay the 2016 NSPS Rule.

1. Relief under APA § 705 is available regardless of whether the effective date for a compliance obligation has passed.
The APA speaks of “postponing” the effective date of an agency action pending judicial review.  5 U.S.C. § 705. EPA has argued in the past that the term “postpone” must be interpreted to be forward looking, such that an APA § 705 stay is available only when the relevant effective date has not yet passed. That interpretation is incorrect. The word “postpone” does not have a single, unambiguous meaning. For example, Roget’s suggests a wide range of synonyms for the word “postpone,” including delay, defer, adjourn, shelve, table, and put on hold. ¹ Most of these terms are not necessarily forward looking – e.g., a past effective date easily can be “put on hold” during the pendency of litigation. Thus, APA § 705 can reasonably be construed to authorize a stay even when the effective date of the given rule has passed.

2. APA § 705 does not require applying the four-factor preliminary injunction test.

The U.S. District Court for the District of Columbia held that an agency cannot issue a stay under APA § 705 without evaluating the four factors for a preliminary injunction. Sierra Club v. Jackson, 833 F. Supp. 2d 11 (D.D.C. 2012). This case does not bind the D.C. Circuit, however, which should hear any challenge to an EPA decision to grant an APA § 705 stay. Because the 2016 NSPS Rule is a regulation of nationwide effect, challenges to the 2016 NSPS Rule are being heard in the D.C. Circuit, which has exclusive jurisdiction. Any action EPA takes to amend the 2016 NSPS Rule likewise would be heard in the D.C. Circuit. And a challenge to an APA § 705 stay of the 2016 NSPS Rule also would be jurisdictionally limited to the D.C. Circuit because allowing any other court to adjudicate the validity of an APA § 705 stay would threaten the D.C. Circuit’s exclusive jurisdiction final rules of national scope and effect.

Telecommunications Research & Action Center v. FCC, 750 F. 2d 70, 72 (DC Cir. 1984)

“Where a statute commits final agency action to review by the Court of Appeals, the appellate court has exclusive jurisdiction to hear suits seeking relief that might affect its future statutory power of review.”). As such, the district court’s decision does not bind the court who will evaluate EPA’s action.

Further, this decision was incorrectly decided. The plain language of the APA does not require an agency to consider these factors. Irreparable injury is mentioned only for a judicial stay, not a stay granted by an agency:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. This makes logical sense. Congress could not have intended to force agencies to act the same as courts when issuing stays. A court is a neutral third party and is uniquely positioned to objectively assess the legal viability of pending claims. But the agency is not neutral because it will have issued the rule in question. Requiring the four-factor test disadvantages the agency in litigation because it would require EPA to determine that the challenger has a likelihood of success on the merits, which typically would be a finding against its own interest.

3. Even if the four-factor test applies, it is met.

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. NRDC, 555 U.S. 7, 20 (2008). “Importantly, ‘[t]he party seeking a preliminary injunction need

Likelihood of Success on the Merits: API explained some of the procedural and substantive problems with these provisions—as well as other parts of the 2016 NSPS Rule—in its petition for administrative reconsideration. See also Petition for Administrative Reconsideration by IPAA, at 5-7 (discussing disproportionate harm that LDAR requirements will have on small entities); id. at 6 (“The marginal profitability will mean that many wells will be shut in instead of making the investment to conduct LDAR surveys.”); id. at 8 (noting costs, lack of benefits, and technical infeasibility of professional engineer certification requirements). EPA acknowledged some of these problems when it granted administrative reconsideration. See Pruitt Letter; 82 Fed. Reg. 25,730 (June 5, 2017); 82 Fed. Reg. 27,645 (June 16, 2017). These contested provisions do not properly account for compliance costs, do not factor in issues of technical infeasibility, present compliance problems, and/or do not supply appreciable emissions reductions. See also EPA Opp’n Pets’ Emergency Mot., ECF No. 1679831, No. 17-1145, at 22-24 (D.C. Cir. filed June 15, 2017) (noting that EPA failed to account for implementation issues and costs for the professional engineer certification and pneumatic pump requirements); Petition
for Administrative Reconsideration by GPA Midstream, at 13 (discussing harm from being required to comply with duplicative LDAR requirements for compressor stations).

Further, the Petitioners challenging the 2016 NSPS Rule have alleged additional legal flaws with the 2016 NSPS Rule. As shown in their non-binding statements of issues, API and other Petitioners are poised to raise issues in litigation that would demonstrate that EPA’s threshold legal justification for the 2016 NSPS is flawed. See Attachment A (non-binding statement of issues filed by API and other petitioners challenging the 2016 NSPS Rule). There is a significant likelihood that, if litigation proceeds to the merits, API and the other petitioners would succeed in overturning the rule in its entirety. The fact that EPA has chosen to have a narrow, targeted stay does not diminish the legal risk to the 2016 NSPS Rule from litigation. There are procedural and substantive errors in the 2016 NSPS Rule that would likely vacate some or all of the 2016 NSPS Rule, meeting this factor.

Likelihood of Irreparable Harm to Regulated Entities: A stay of the 2016 NSPS Rule is necessary to prevent irreparable harm. Requiring compliance with these provisions will impose significant regulatory burdens and compliance costs, as API explained in its comments on the proposed Quad Oa Rule and its petition for administrative reconsideration. For instance, the delay of repair provision for compressor stations, 40 C.F.R. § 60.5397a(h)(2), requires facilities to undertake repairs that are technically infeasible or leave the compressor station shutdown until the repairs are feasible. But for some sources, extended periods of shutdown for compressor stations are effectively not possible because they will significantly disrupt operations and/or create safety issues.

Balance of the Equities: The balance of the equities clearly favors the affected facilities. The stayed requirements do not produce significant environmental benefits. As several states
have pointed out, the LDAR requirements are duplicative of state-level regulations in the states with the greatest amount of oil and natural gas activity. See North Dakota’s and Texas’ Brief as Amicus Curiae, ECF No. 1680710, No. 17-1145 (D.C. Cir. filed June 21, 2017); see also EPA Opp’n Pets’ Emergency Mot., ECF No. 1679831, No. 17-1145, at 19-21 (D.C. Cir. filed June 15, 2017) (noting issues with alternative means of emission limitation provisions in the 2016 NSPS Rule and noting that they “serve the important interest of ensuring that the NSPS complemented existing state programs and encouraged use of emerging technology”). These duplicative regulations do, however, impose costs and pose safety threats. In fact, two of the stayed requirements result in no emissions reductions and do not benefit any other party. See EPA Opp’n Pets’ Emergency Mot., ECF No. 1679831, No. 17-1145, at 22-23 (D.C. Cir. filed June 15, 2017) (noting that Petitioners objecting to EPA’s three-month stay failed “to even attempt to show that EPA’s stay of the professional engineer certification requirements or pneumatic pump requirements will result in irreparable harm”).

The Public Interest: The public’s interest also favors a stay. The public has an interest in reasonable cost effective regulations and in the safe, economic production of energy. It is not in the public interest to require facilities to comply with regulations that are legally flawed, overly costly, infeasible, and duplicative of other regulations and voluntary actions. See EPA Opp’n Pets’ Emergency Mot., ECF No. 1679831, No. 17-1145, at 7, 28 (D.C. Cir. filed June 15, 2017) (noting that methane emission reductions from three-month stay would constitute “just 0.046% of the annual methane emissions from the oil and gas industry” or 0.368% extended to a two year stay); id. at 29-31 (discussing the public’s interest in economic growth, meaningful public comment and reasonable regulations).
C. EPA’s General Rulemaking Authority Under CAA § 301(a) Authorizes a Stay of the Proposed Provisions for Two Years.

CAA § 301 grants EPA authority to issue regulations as “necessary to carry out” its obligations under the Act. Here, there is no more specific statutory provision in the Clean Air Act, nor is there any other statutory bar to EPA using its authority under CAA § 301. A two-year stay is necessary for EPA to meet the statutory standard under CAA § 111 and respect the process enshrined in CAA § 307. As such, EPA’s use of CAA § 301 here is appropriate.

CAA § 301(a)(1) is “sufficiently broad to allow the promulgation of rules that are necessary and reasonable to effect the purposes of the Act.” NRDC v. EPA, 22 F.3d 1125, 1148 (D.C. Cir. 1994) (agreeing that EPA had authority under § 301 to issue binding basic inspection and maintenance programs rules); Specialty Equipment Market Ass’n v. Ruckelshaus, 720 F.2d 124, 138 (D.C. Cir. 1983) (holding that EPA had authority under § 301 to create a reimbursement scheme for vehicle manufacturers “even though the statute does not specifically authorize such a scheme.”); Citizens to Save Spencer Cty. v. EPA, 600 F.2d 844, 873 (D.C. Cir. 1979) (upholding EPA’s use of rulemaking, on the basis of CAA § 301(a)(1), to resolve a conflict between two provisions of the Act). Provided Congress has not written a “clear impediment to the issuance” of a regulation, NRDC v. EPA, 22 F.3d 1125, 1148 (D.C. Cir. 1994), or there is other “statutory language on point,” NRDC v. EPA, 749 F.3d 1055, 1063 (D.C. Cir. 2014), EPA may look to CAA § 301 to issue regulations that are necessary for it to carry out its duties under the Act. See also North Carolina v. EPA, 531 F.3d 896, 922 (D.C. Cir.), on reh’g in part, 550 F.3d 1176 (D.C. Cir. 2008) (EPA may only use its CAA § 301 authority when the rulemaking is “necessary” to some goal under the Act, and CAA § 301 does not provide EPA with “Carte blanche authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the [EPA] wishes” (internal quotations omitted)).
All of these requirements are met here. EPA’s use of CAA § 301 is necessary for EPA to fulfill its requirements under CAA § 111. Specifically, it would undermine the statutory purpose and text of CAA § 111 for EPA to require current compliance with regulations that are duplicative of state requirements, provide little or no extra environmental protection, impose significant compliance costs and burdens on regulated entities, and/or cannot be said to constitute BSER. There is nothing in the Act that is a “clear impediment” to staying the relevant compliance dates here. *NRDC v. EPA*, 22 F.3d at 1148.

Nor is there any other statutory language in the Act that is on point. *NRDC v. EPA*, 749 F.3d at 1063. CAA § 307(d) cannot be deemed a more specific provision. The D.C. Circuit recently held that the three-month stay in CAA § 307(d) only applies to mandatory reconsideration proceedings and that EPA’s reconsideration proceedings here do not meet the criteria for mandatory reconsideration. *Clean Air Council v. EPA*, No. 17-1145 (D.C. Cir. July 3, 2017). Even assuming that that case is overturned on rehearing, the stay under CAA § 307(d) is limited to 90 days, which will not cover the period necessary for EPA to make the changes that may be required by the rule. As such, CAA § 307(d) does not apply here. APA § 705 cannot be deemed a more specific provision because it is a portion of a different statute and therefore sheds no light on EPA’s CAA rulemaking authority.

EPA’s use of CAA § 301 is not barred by *NRDC v. Reilly*, 976 F.2d 36, 40 (D.C. Cir. 1992). In that case, the D.C. Circuit was evaluating whether EPA was allowed to stay emission standards for radionuclides based on CAA § 112(d)(9). The Court held that CAA § 112(d)(9) did not authorize EPA to stay the effectiveness of the radionuclide emission standards because it set specific deadlines for when EPA must issue the regulation, which would have effectively been exceeded by the stay. EPA mentioned CAA § 301 as a possible alternative source of
authority for the stay. The Court rejected this argument, holding that CAA § 301 could not override the express rulemaking deadlines in CAA § 112.

This proposed Quad Oa stay is not governed by *NRDC v. Reilly* because EPA’s proposed two-year extension would not violate any statutory deadline. As previously explained, EPA completed the required 8-year review in 2012, and the next review is not required until at least 2020. 42 U.S.C. § 7411(b)(1)(B). The provisions EPA proposes to stay here were promulgated in the 2016 NSPS Rule, which EPA undertook *after* it completed its required 8-year review of the oil and natural gas NSPS. At the earliest, the next mandatory review is not required until 2020. By staying certain provisions of the 2016 NSPS Rule, EPA would not be circumventing this review cycle, as the Agency was found to have done in *NRDC v. Reilly*.

Lastly, dicta in *NRDC v. Reilly* suggested that CAA § 307 is the only avenue for a stay of already promulgated standards. *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992). These statements were unnecessary for the judgment, as there was a more specific provision—the deadlines in CAA § 112—that was the crux of the Court’s decision. The case did not concern whether CAA § 307 prevented use of CAA § 301, and as such, those statements are dicta and not part of the holding.