ORAL ARGUMENT: FEBURARY 19, 2021

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

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, et al. *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 19-1124 (Consolidated with Nos. 19-1159, 19-1160, and 19-1162)

REPLY MEMORANDUM IN SUPPORT OF EPA'S
MOTION FOR A 90-DAY STAY OF ORAL ARGUMENT

Only one of the three sets of Petitioners challenging the Rule at issue, American Fuel & Petrochemical Manufacturers, *et al*. ("Petroleum Petitioners"), filed an opposition (or any response) to Respondent, United States Environmental Protection Agency's ("EPA"), Motion to stay oral argument for 90 days. ("EPA Mtn." Doc. 1882301). EPA briefly responds to the points raised by Petroleum Petitioners in their opposition ("Pet. Opp." Doc. 1883485).

1. Petroleum Petitioners assert that they will suffer prejudice as a result of EPA's request for a 90-day stay because obtaining an order from the Court

vacating the Rule being challenged (the "E15 Rule") is urgent. Claiming that they will suffer injury if E15 fuel continues to be sold more easily during the summer driving season which begins on June 1, 2021, Petitioners expect (or at least are hopeful) that the Court will rule by that date if oral argument goes forward on February 19, 2021 or, under their alternative, 30 days later, on or about March 21, 2021. Pet. Opp. pp. 4-5.

Petroleum Petitioners' claim of prejudice from having to wait some extra time for a decision ignores the fact that the E15 Rule has been in effect for most of the last two summer driving seasons. 84 Fed. Reg. 26,980, 26,980/1-2 (June 10, 2019). If Petroleum Petitioners were suffering such significant economic harm (the prejudice they claim in their Motion) from the E15 Rule, surely they would have taken action to obtain a swift ruling from the Court. In fact, they were in a position to do just that, having filed their Petition for Review on June 10, 2019, the same day the E15 Rule was published in the Federal Register. Doc. 1791830. Yet, Petroleum Petitioners never asked the Court to stay the E15 Rule for that 2019 summer season or for the 2020 summer season, pending their challenge. Nor did Petitioners ask the Court for expedited review of this case.

Every petitioner that challenges any rule before this Court is purportedly injured by having the rule in place, since absent an injury they would lack standing and the Court would lack jurisdiction. Whatever continued injury (prejudice) that

Petroleum Petitioners will purportedly experience by having to wait a bit longer than they anticipated for the Court to rule, is no more than that of any interested party challenging any regulation. Yet, the Court regularly grants agency motions to stay proceedings to allow an agency to reconsider a rule that is the subject of active litigation.

Further, as EPA explained in its merits brief, the adoption of the sale and use of E15 has been slow. Although the sale of E15 has been permitted for approximately a decade, E15 accounts for only about 1% of the fuel sold at retail gas stations in the United States. EPA Brief ("EPA Br." Doc. 1863338) p. 21. This is because, among other things, there has been reluctance on the part of retailers and similarly situated parties to spend the funds necessary to build the infrastructure required to sell E15, when it could not practically be sold year-round given summer fuel volatility restrictions previously placed on E15. *Id*. at 3-4. Most of these retailers are not likely to spend the funds required to upgrade their infrastructure while this challenge remains before the Court, since vacatur of the E15 Rule would leave in place the same factor that has inhibited more widespread use of E15 over the last decade: the ability to sell it year-round.

Finally, as EPA explained, because of other constraints, even if the E15 Rule is upheld by the Court, implementation of the sale of E15 during the summer will be slowly adopted. *Id.* at 26. So again, Petroleum Petitioners will suffer no

significant prejudice from the proposed stay, nor do they provide any evidence to demonstrate that they will.

2. Citing cases for the proposition that an agency must initiate a new rulemaking in order to rescind an existing rule, Petroleum Petitioners next assert that EPA has no right or ability to unilaterally rescind the E15 Rule (Pet. Opp. pp. 4-8). These cases are, however, inapposite. EPA is not rescinding the E15 Rule. Indeed, doing so would be precisely the relief Petitioners seek from the Court: vacatur of the E15 Rule. Pet. Reply Br. (Doc. 1861149) p.14.

EPA is merely seeking a reasonable amount of time for the new Administration to consider the Rule and determine if it should take any administrative action. And it is doing so in part because it would be a significant waste of judicial resources for this Court to hear argument and proceed towards a determination of all Petitioners' challenges to the E15 Rule, if EPA ultimately decides to engage in a full reconsideration of that Rule, which may result in significant aspects of it being changed. Indeed, full reconsideration could potentially result in exactly what Petroleum Petitioners seek from the Court, rescission (vacatur) of the E15 Rule.

At bottom, Petroleum Petitioners argue that while EPA has every right to reconsider a rule it has promulgated, it may not ask the Court to stay a challenge to such rule while EPA engages in that reconsideration process. If that were the case,

stays of proceedings before this Court pending agency reconsideration would never be granted. But the Court regularly grants such stays and, as EPA explained in its Motion, it regularly does so in order to allow a new Administration to consider its position with regard to the challenged Rule. EPA Mtn. pp. 5-6.

Petroleum Petitioners attempt to circumvent this fact by arguing that while the Court does in fact grant stays pending reconsideration by an agency, here EPA has not yet decided that it will conduct a full administrative reconsideration of the E15 Rule, and that this should prohibit the granting of a stay. Pet. Opp. pp. 7-8.

Petitioners are correct that EPA asked for time for the new Administration to consider *whether* it will seek to reconsider the E15 Rule or take other administrative action. EPA notes that President Biden only took office on January 20, 2021, and new members of the Administration have either not been appointed or confirmed, or otherwise had an opportunity to review and be briefed on the E15 Rule. In this case, EPA reasonably requests a 90-day continuance to allow incoming officials to be briefed and undertake a thoughtful consideration of the E15 Rule at issue.

In any event, it is not a requirement that EPA have already decided to conduct a full reconsideration process in order for a stay to be granted. Quite to the contrary, this Court regularly grants stays of proceedings or unlimited abeyance when a Petitioner merely files an administrative petition for agency reconsideration

of a rule the agency has promulgated, i.e., before the agency determines whether or not it should grant the administrative petition and conduct a full reconsideration process. There, as here, the stay (or abeyance) conserves judicial resources and avoids having the court make determinations on issues that may become moot as a result of the reconsideration process, should EPA decide to conduct such a process.

3. Petroleum Petitioners assert that litigation counsel will not be put in a precarious position at oral argument because "*post-hoc* explanation by agency counsel" is not permitted to be put forward at oral argument. Pet. Opp. p. 8. But post-hoc explanation of the actions taken in the E15 Rule is not the concern. If the Court inquires as to whether EPA continues to take a certain position, or whether it intends to enforce a particular provision in a certain manner, answers to those questions must be based on advance discussions with EPA officials with authority to make those determinations. As noted, those officials are either not yet in place or have not yet had an opportunity to be briefed on such issues.

4. Finally, Petroleum Petitioners attempt to distinguish the cases EPA cited related just to the last Administration transition in 2017 where this Court stayed proceedings, including when oral argument was imminent, to allow officials of the new Administration time to review the rule being challenged. Pet. Opp. pp. 9-10. Petitioners state that in several of those 2017 stay or abeyance orders, the Executive Order at issue identified particular agency actions that should be stayed

pending review by the new Administration. But that is a distinction without a difference. Whether a specific rule is identified or not, officials of the new Administration still have not been appointed or otherwise had sufficient time to consider the Rule at issue in this case. That is precisely why the Executive Order issued on January 20, 2021, and the January 21, 2021 letter from EPA's acting General Counsel (EPA Mtn., Exs. A and B), requested that stays or abeyance be sought for all rules that EPA promulgated between January 20, 2017 and January 20, 2021 that were still being challenged in court.

Petroleum Petitioners further argue that "in *all* the cases EPA cites, all or almost all of the petitioners either supported or did not oppose EPA's motion to hold the case in abeyance." Pet. Opp. p. 10. In fact, in the cases cited by EPA, there was at least one brief filed in opposition to the motion for a stay. *See* EPA Mtn. pp. 5-6, providing document numbers for the opposition briefs. Indeed, the present case closely resembles those cases. Here, one party (Petroleum Petitioners) opposes the motion for a stay while the majority of parties – the other two Petitioner groups and Intervenors – have not filed any opposition to EPA's Motion.

CONCLUSION

This Court has consistently made clear that it is not unreasonable for a new Administration to be given a reasonable opportunity to review an agency action that is being challenged before the Court and to stay proceedings to allow for such

review. Accordingly, for the reasons stated herein, EPA's motion for a 90-day stay of proceedings should be granted.

Respectfully submitted,

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DATE: February 4, 2021

CERTIFICATE OF COMPLIANCE

The undersigned states that this Motion complies with the typeface style requirements of Fed. R. App. P. 27(d)(1)(E) because the Motion was prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman type, and that this Motion complies with the length requirements of Fed. R. App. P. 27(d)(2), as this Motion contains 1,648 words.

So certified this 4th day of February, 2021 by

/s/ *Perry M. Rosen*
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties, who have registered with the Court's CM/ECF system.

So certified this 4th day of February, 2021 by

/s/ *Perry M. Rosen*
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