

ORAL ARGUMENT HELD MARCH 16, 2018

DECISION ISSUED AUGUST 17, 2018

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

AIR ALLIANCE HOUSTON, <i>et al.</i> ,)	
)	
<i>Petitioners,</i>)	
)	
v.)	Case No. 17-1155
)	(consol. with No. 17-1181)
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
<i>Respondents.</i>)	
)	

**PETITIONERS’ JOINT MOTION FOR EXPEDITED ISSUANCE OF THE
COURT’S MANDATE**

On August 17, 2018, this Court issued an opinion and judgment in this case and ordered that EPA’s Delay Rule,¹ postponing the January 2017 amendments to the Risk Management Program, also known as the “Chemical Disaster Rule,”² for twenty months be vacated as unlawful and arbitrary. *Air Alliance Houston et al. v. EPA*, No. 17-1155, slip op. at 5, 31 (D.C. Cir. Aug. 17, 2018). The undersigned Petitioners and Petitioner-Intervenor (“Petitioners”)³ respectfully request, pursuant

¹ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133 (June 14, 2017) (“Delay Rule”), JA0005.

² Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594 (Jan. 13, 2017) (“Chemical Disaster Rule” or “Accident Prevention Amendments”), JA0093.

³ The undersigned petitioners include State Petitioners New York, Illinois, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, and

to D.C. Cir. Rule 41(a)(1) and Fed. R. App. P. 41(b), that this Court issue its mandate expeditiously and no later than 21 days from issuance of the judgment (*i.e.*, by September 7, 2018), for good cause as shown below.

1. The Court has issued an order withholding issuance of the mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing *en banc*, and stated that this instruction “is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.” Order of Aug. 17, 2018, DN1746107. This Court “retains discretion to direct immediate issuance of its mandate in an appropriate case, and any party may move at any time for expedited issuance of the mandate on a showing of good cause.” D.C. Cir. Handbook at 56; D.C. Cir. R. 41(a)(1); Fed. R. App. P. 41(b).
2. Delaying the mandate for the full rehearing petition period of 45 days plus 7 days, Fed. R. App. P. 40(a)(1), 41(b), would postpone the effectiveness and implementation of the Chemical Disaster Rule until October 8, 2018, at the earliest.
3. EPA’s unlawful delay has already resulted in the Chemical Disaster Rule being suspended for 14 months. Petitioners have a strong need for expedited

Washington; Community Petitioners Air Alliance Houston *et al.*; and Petitioner-Intervenor United Steelworkers.

relief as shown throughout this case.

4. Community Petitioners petitioned for review of EPA's unlawful delay on June 15, 2017, one day after EPA issued the Delay Rule. DN1679956. On June 20, 2017, the United Steelworkers moved to intervene as petitioners. DN1680462. State Petitioners filed a separate petition for review on July 24, 2017. DN1685675.
5. On June 22, 2017, Community Petitioners and Petitioner-Intervenor United Steelworkers jointly moved for a stay of EPA's Delay Rule, expedited consideration of the case, or in the alternative for summary vacatur. DN1680887. On August 2, 2017, State Petitioners provided notice that they had joined the motion. DN1686931.
6. On August 30, 2017, the Court denied Petitioners' requests, in the alternative, for a stay or summary vacatur, but granted Petitioners' request for expedition. DN1690788.
7. The parties filed their final briefs on January 31, 2018, and this Court held oral argument on March 16, 2018.
8. This Court has now determined that EPA's Delay Rule "makes a mockery of the statute" and is arbitrary and capricious. *Air Alliance Houston*, slip op. at 28, 36.
9. Because of the pressing need for the Chemical Disaster Rule, Petitioners

respectfully request that the Court expedite issuance of its mandate as described further below. The Court has already recognized the urgency of this matter in its order expediting consideration of the case and in its opinion vacating the Delay Rule. *See id.* at 8-10, 29 (“EPA ... has delayed life-saving protections.”).

10. Expedition of the mandate is warranted for the same reasons that this Court relied on in reaching its determination that Petitioners met the test for expedited review. Order of Aug. 30, 2017, DN1690788. “The Court grants expedited consideration very rarely.” D.C. Cir. Handbook at 33. The Court has identified two types of cases that warrant expedited review: (1) where the “delay will cause irreparable injury and ... the decision under review is subject to substantial challenge,” or (2) where “the public generally, or in which persons not before the Court, have an unusual interest in prompt disposition.” *Id.*
11. Petitioners and the public have a strong interest in the Court’s mandate issuing promptly, due to the serious and irreparable harm and imminent threats to public health and safety that EPA’s Delay Rule is causing, as shown in EPA’s administrative record and the record before this Court.⁴

⁴ *See, e.g., Air Alliance Houston*, slip op. at 9-10, 16-18, 29, 36; *Cnty. Petrs’ & Steelworkers’ Mot. for Stay and Expedited Consideration* at 26-32, DN1680887;

12. EPA found that 177 million Americans live in the worst-case scenario zones for chemical disasters at facilities covered by the Chemical Disaster Rule. Regulatory Impact Analysis at 94, JA1193. One in three schoolchildren go to school in vulnerable areas near such facilities. EPA-HQ-OEM-2015-0725-0172 at 35 n.64, 41, JA0526, JA0532 (JA1531).
13. EPA promulgated the Chemical Disaster Rule in response to numerous chemical incidents that “‘demonstrated a significant risk to the safety of American workers and communities.’” *Air Alliance Houston*, slip op. at 9-10 (quoting Proposed Rule, 81 Fed. Reg. 13,638, 13,644 (Mar. 14, 2016), JA0024). EPA “‘anticipate[d] that promulgation and implementation of [the Chemical Disaster Rule] would result in a reduction of the frequency and magnitude of damages from releases,’ and ‘expect[ed] that some portion of future damages would be prevented through implementation of a final rule.’” *Id.* at 10 (quoting 81 Fed. Reg. at 13,642, JA0022). EPA found that accident impacts included “‘death, injury, and property damage to workers, first responders, and local communities’” as well as “‘lost productivity, the costs of emergency response, transaction costs, property value impacts in the

Joint Reply of Cmty. Petrs & Steelworkers in Supp. of Mot. for Stay and Expedited Consideration at 16-23, DN1685188; *see also* Cmty. Petrs’ & Steelworkers’ Op. Br. at 4-6, 23-29, 46-48 & Decls., DN1715852; Cmty. Petrs’ & Steelworkers’ Reply Br. at 3-12, 23-24, DN1715853; State Petrs’ Op. Br. at 21-27, DN1715510; State Petrs’ Reply Br. at 4-12, DN1715511.

surrounding community ..., and environmental impacts.” *Id.* (quoting 81 Fed. Reg. at 13,643, JA0023).

14. Facilities should have had to comply with certain provisions of the Chemical Disaster Rule, such as incident investigation and training requirements, by March 2017. *Cnty. Petrs’ Op. Br.* at 17, DN1715852 (citing regulations). For other provisions, including requirements to coordinate with emergency responders and ensure that they are adequately prepared before a chemical emergency occurs, facilities should have had to comply by March of this year. *Air Alliance Houston*, slip op. at 11. The Delay Rule also postponed “‘substantial compliance and implementation’ efforts by regulated parties” for additional provisions with compliance dates scheduled thereafter. *Id.* at 35. As the Court noted, “[b]y delaying the effective date, EPA has delayed compliance, reduced or eliminated the lead-up time to achieve the compliance that EPA had earlier found necessary, and thus has delayed life-saving protections.” *Id.* at 29. These interim steps would begin to strengthen protection for Petitioners, their members, and other affected community members as soon as the Chemical Disaster Rule becomes effective. *Id.* at 35.
15. The harm caused by EPA’s delay is substantial and irreparable. EPA data from the rulemaking show that between 2004 and 2013 there were at least

2,291 accidental releases of RMP chemicals. RMP Facility Accident Data, 2004-2013 (Feb. 2016), EPA-HQ-OEM-2015-0725-0002 (“2004-13 Accident Data”); 82 Fed. Reg. at 4594, 4683, JA0093, JA0182. On average, a release happened every other day, and no one-month period passed without at least 8 accidents. Cmty. Petrs’ Op. Br. at 6 fig.1, DN1715852 (citing 2004-13 Accident Data).

16. These accidents killed 59 people, and caused injuries, or required hospitalization or medical treatment, for over 17,000 people, as well as exposing communities, workers, and residents to toxic chemicals, smoke and additional health threats. RIA at 87 ex.6-5, JA1186. Over 450,000 people experienced evacuations or shelter-in place orders due to chemical accidents, causing serious disruption to daily life and other harms during the studied timeframe. *Id.* at 83, JA1182.
17. Although the agency has not yet collected complete data for these years, EPA has recently released partial accident data showing that from 2014-2016 alone, at least another 458 incidents occurred, causing additional deaths, injuries, and other harm. RMP Facility Accident Data, 2014-2016 (Apr. 2018), EPA-HQ-OEM-2015-0725-0909.⁵

⁵ Available at <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0909>.

18. While the Chemical Disaster Rule has been delayed, accidental releases of RMP chemicals – including fires, explosions, and spills – have continued around the country. *See* Blue Green Alliance *et al.*, *A Disaster in the Making* (last updated Aug. 22, 2018).⁶ To Petitioners’ knowledge, EPA has not published information about the number of RMP chemical incidents during 2017-2018 or the harm such incidents have caused. However, in recent months the Chemical Safety Board has released reports on some of these incidents, including the Husky Superior Refinery Explosion and Fire (Apr. 26, 2018) and the Arkema Release and Fire (Aug. 31, 2017).⁷
19. Time is of the essence because hurricane season has begun in the Gulf, so the threat is even greater now for communities near the highly concentrated oil refineries and chemical facilities in that region.⁸ As the Chemical Safety

⁶ Available at <https://earthjustice.org/features/toxic-catastrophes-texas-national-chemical-disaster-rule>.

⁷ *See, e.g.*, CSB, Factual Investigative Update, April 26, 2018 Husky Superior Refinery Explosion and Fire (Aug. 2, 2018), https://www.csb.gov/assets/1/6/husky_factual_update.pdf; CSB, Investigation Report, Organic Peroxide Decomposition, Release, and Fire at Arkema Crosby Following Hurricane Harvey Flooding, Incident Date: Aug. 31, 2017, Report No. 2017-08-I-TX (May 24, 2018), <https://www.csb.gov/csb-releases-arkema-final-report/> (report linked at <http://www.csb.gov/file.aspx?DocumentId=6068>).

⁸ NOAA, Tropical Cyclone Climatology, last visited August 21, 2018, <https://www.nhc.noaa.gov/climo/#bac>; Environmental Integrity Project, Preparing for the Next Storm: Learning from the Man-Made Environmental Disasters that

Board Chairperson stated when issuing the Arkema Final Report:

Considering that extreme weather events are likely to increase in number and severity, the chemical industry must be prepared for worst case scenarios at their facilities. We cannot stop the storms, but working together, we can mitigate the damage and avoid a future catastrophic incident.⁹

20. Hurricane Harvey showed that communities that regularly face hurricanes and other natural disasters have a particularly strong need for the Chemical Disaster Rule to be in effect without further delay.¹⁰ EPA's Office of the Inspector General is currently investigating EPA's preparedness and response efforts to Hurricane Harvey in 2017, during which chemical fires, explosions, and toxic releases occurred.¹¹

Followed Hurricane Harvey (Aug. 16, 2018), <http://www.environmentalintegrity.org/reports/preparing-for-the-next-storm/>.

⁹ CSB Releases Arkema Final Report, May 24, 2018, <https://www.csb.gov/csb-releases-arkema-final-report>.

¹⁰ See, e.g., Environmental Integrity Project, Preparing for the Next Storm, *supra* note 8, at 2-4; Union of Concerned Scientists, Community Impact: Chemical Safety, Harvey, and Delay of the EPA Chemical Disaster Rule at 3-7 (Oct. 2017) (att. to Kothari Dec., Cmty. Petrs' Op. Br. Add. at DEC0043-47, DN1715852); Cmty. Petrs' Op. Br. at 26-27 (citing declarations); Cmty. Petrs' Reply Br. at 11-12; CSB Arkema Report, *supra* note 7 at 119-25.

¹¹ See, e.g., EPA Ofc. of Inspector General, Project Notification: EPA's Preparedness and Response Efforts to the 2017 Hurricanes in EPA Regions 2, 4, and 6 (Dec. 13, 2017), https://www.epa.gov/sites/production/files/2017-12/documents/_epaog_notificationmemo_12-14-17_hurricanes.pdf; EPA Ofc. of

21. The Court should expedite the mandate to prevent EPA from prolonging its unlawful delay and further postponing implementation of emergency coordination and other life-saving requirements of the Chemical Disaster Rule. Expediting the mandate would reduce and avoid further serious consequences for public health and safety, including harm to Petitioners and their members or residents.
22. As the Court recognized when vacating a similarly unlawful delay in *Clean Air Council v. Pruitt*, any further withholding of the mandate would “hand the agency, in all practical effect, the very delay in implementation this [Court] determined to be ‘arbitrary, capricious, [and] ... in excess of [EPA’s] statutory ... authority.’” *Clean Air Council*, No. 17-1145, Order, DN1683944 (D.C. Cir. July 13, 2017) (citation omitted). There, the Court ordered immediate issuance of the mandate but ultimately recalled the mandate for 14 days upon request from EPA. *See* Order of July 3, 2017, DN1682468 (ordering immediate issuance of mandate after judgment); Order of July 13, 2017, DN1683944 (ordering mandate be recalled for a period of 14 days from the date of this order). Ultimately, even after

Inspector General, Project Notification: EPA’s Air Monitoring Response to Hurricane Harvey (July 31, 2018),

https://www.epa.gov/sites/production/files/2018-08/documents/_epaig_notificationmemo_07-31-18_hurricaneharvey.pdf.

petitions for rehearing were filed in that case, the Court issued an expedited mandate. Order of July 31, 2017, DN1686663 (directing issuance of the mandate, DN1686664 (July 31, 2017)). Expediting the mandate here would be consistent with this and similar prior precedent.¹²

23. No petition for panel or *en banc* rehearing has been filed in this case. Although Petitioners are not aware of any plans of any party to file a rehearing petition, issuing the mandate will not affect the Court's ability to consider any such petition, if filed.
24. If any such petition is filed before the deadline, Petitioners respectfully submit that it would not provide any valid basis to delay issuance of the mandate, as there are no grounds for the Court to grant panel or *en banc* rehearing.¹³ In a well-reasoned decision based on the agency record, the

¹² See, e.g., *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1159 n.31 (D.C. Cir. 1983) (“Because of the need to expedite this case, we decline to follow our usual practice of delaying issuance of the mandate”); see also *New Jersey v. EPA*, No. 05-1097, Order (D.C. Cir. Mar. 14, 2008) (granting motion for expedited issuance of the mandate for a decision vacating EPA’s unlawful delisting rule and performance standards for coal and oil-fired power plants, *New Jersey v. EPA*, 517 F.3d 574, 582-83 (D.C. Cir. 2008) (cited at *Air Alliance Houston*, slip op. at 31)) (Exhibit 1); *NRDC v. NHTSA*, Mandate Order (2d Cir. Apr. 23, 2018) (Exhibit 2) (issuing the mandate at the same time as the judgment vacating the rule, with opinion following on June 29, 2018, 894 F.3d 95 (2d Cir. 2018)).

¹³ See Fed. R. App. P. 40; D.C. Cir. R. 40 (requiring a showing “with particularity” of “each point of law or fact that the petitioner believes the court has overlooked or misapprehended”); D.C. Cir. Handbook at 57 (“Very few petitions for rehearing are granted,” and a “petition must state with particularity the errors that the panel is

Court held that EPA violated the plain language of the Clean Air Act and that EPA's action was also arbitrary and capricious. *Air Alliance Houston*, slip op. at 24, 36. The Court's decision does not conflict with any other decision of this Court or any other Circuit Court; rather it cites and is fully consistent with prior precedent of this Court, and with a similar recent decision from the Second Circuit. *Id.* at 32 (citing *NRDC v. NHTSA*, 894 F.3d at 111–12).

25. Finally, Petitioners respectfully request that this Court issue the mandate expeditiously and no later than 21 days of the Court's judgment, by September 7, 2018. This would allow the Court to consider any response (if filed) pursuant to Fed. R. App. 27(a)(3) and D.C. Cir. R. 27, while avoiding substantial additional delay.

CONCLUSION AND RELIEF REQUESTED

Therefore, and for good cause shown, Petitioners submit that there is no basis for any further delay of the Chemical Disaster Rule's effectiveness and that

claimed to have made."); *see also* Fed. R. App. P. 35 (providing that "*en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance," such as a conflict with the Supreme Court, this Court, or another Circuit); D.C. Cir. Handbook at 58 (Petitions for rehearing *en banc* are "rarely granted" and "not favored").

because such delay causes and threatens severe and irreparable harm to Petitioners and their members or residents, expedited issuance of the mandate is warranted.

Petitioners therefore respectfully request that this Court issue the mandate expeditiously in this case, no later than 21 days from issuance of the judgment (*i.e.*, by September 7, 2018).

DATED: August 24, 2018

Respectfully submitted,

Barbara D. Underwood
*Attorney General of
New York*

/s/ Emma C. Cheuse

Emma C. Cheuse
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EARTHJUSTICE

/s/ Steven C. Wu ¹⁴(by permission)

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Fed. R. App. P. 32(g)(1) and 27(d)(2)(A), Counsel hereby certifies that **Petitioners' Joint Motion for Expedited Issuance of the Court's Mandate** contains 2,688 words as counted by the word count feature of Microsoft Word and thus complies with the 5,200 word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2016** using **size 14 Times New Roman** font.

DATED: August 24, 2018

/s/ Emma C. Cheuse
Emma C. Cheuse

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2018, I have served the foregoing **Petitioners' Joint Motion for Expedited Issuance of the Court's Mandate** on all registered counsel through the Court's electronic filing system (ECF).

/s/ Emma C. Cheuse
Emma C. Cheuse

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1097

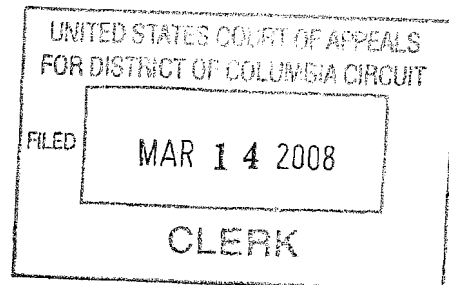
September Term, 2007

State of New Jersey, et al.,
Petitioners

v.

Environmental Protection Agency,
Respondent

Filed On:



Utility Air Regulatory Group, et al.,
Intervenors

Consolidated with 05-1104, 05-1116, 05-1118,
05-1158, 05-1159, 05-1160, 05-1162, 05-1163,
05-1164, 05-1167, 05-1174, 05-1175, 05-1176,
05-1183, 05-1189, 05-1263, 05-1267, 05-1270,
05-1271, 05-1275, 05-1277, 06-1211, 06-1220,
06-1231, 06-1287, 06-1291, 06-1293, 06-1294,

BEFORE: Rogers, Tatel, and Brown, Circuit Judges

ORDER

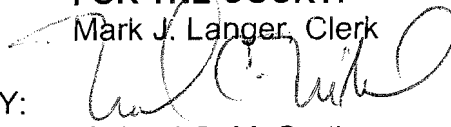
Upon consideration of the motion of Environmental and Tribal petitioners and Environmental and Healthcare intervenors for expedited issuance of the mandate, and the responses thereto, it is

ORDERED that the motion be granted. The Clerk is directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:


Michael C. McGrail
Deputy Clerk

MANDATE

United States Court of Appeals FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of April, two thousand eighteen.

Present: Ralph K. Winter,
Rosemary S. Pooler,
Barrington D. Parker,
Circuit Judges.

Natural Resources Defense Council, Sierra Club, Center for Biological Diversity, State of California, State of Maryland, State of New York, State of Pennsylvania, State of Vermont,

Petitioners,

v.

Nos. 17-2780 (L),
17-2806 (con)

National Highway Traffic Safety Administration,
Jack Danielson, in his capacity as Acting Deputy Administrator of the National Highway Traffic Safety Administration, United States Department of Transportation, Elaine Chao, in her capacity as Secretary of the United States Department of Transportation,

Respondents,

Association of Global Automakers, Alliance of Automobile Manufacturers, Inc.,

Intervenors.

Upon due consideration, it is hereby **ORDERED, ADJUDGED AND DECREED** that the petitions for review are **GRANTED**. The final rule, Civil Penalties, 82 Fed. Reg. 32,139 (July 12, 2017), is hereby **VACATED**. An opinion shall follow in due course.

The mandate shall issue forthwith.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

MANDATE ISSUED ON 04/23/2018