IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, et al.,

Plaintiffs,

and

ENVIRONMENTAL DEFENSE FUND,

Plaintiff-Intervenor

v.

ANDREW WHEELER, et al.,

Defendants.

Civil Action No. 18-cv-773 (RBW)

Hon. Reggie Walton

AMICUS CURIAE BRIEF OF THE STATE OF COLORADO IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF AMICUS CURIAE

Amicus is the State of Colorado. Colorado submits this brief under this Court's Local Rule 7(o)(i)[1] to support the State Plaintiffs and Plaintiff-Intervenor Environmental Defense Fund ("EDF") in their Motion for Summary Judgment [Document 85].

Defendants, U.S. Environmental Protection Agency ("EPA") and its Administrator, Andrew Wheeler, must issue emission guidelines to reduce methane from existing oil and gas sources under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d) ("Emission Guidelines"). EPA insists that it needs an undefined amount of time to issue the Emission Guidelines. EPA's position is not based on the actual work required and appears calculated to achieve nothing but more unlawful delay. This delay harms Colorado, in the form of lost opportunities to mitigate the oil and gas industry's contribution towards harmful climate change and the public health and environmental impacts of climate change upon Colorado's citizens, land, air, and water.

SUMMARY OF ARGUMENT

Colorado has extensive experience regulating methane emissions from oil and gas sources, both new and existing. In 2014, Colorado adopted the nation's first regulations to directly address methane emissions from the oil and gas industry. These rules formed the foundation of EPA's subsequent efforts, including the New Source Performance Standards addressing methane, 40 C.F.R. Part 60, Subpart OOOOa ("Subpart OOOOa")[2] and the 2016 Control Techniques Guidelines for the Oil and Natural Gas Industry ("Oil and Gas CTG").[3] Colorado and other states'

[1] This Court's Local Rule 7(o) states to follow F.R.A.P. 29(a)(4). Colorado has made every effort to do so except in instances where this Court's Local Rules or Judge Walton's General Order for Civil Cases dictates otherwise.

[2] *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources,* 81 Fed. Reg. 35,824 (June 3, 2016).

[3] The Oil and Gas CTG can be found at: https://www.epa.gov/sites/production/files/2016-10/documents/2016-ctg-oil-and-gas.pdf.

experience with regulating methane provide substantial information for EPA to rely on in developing its own rules. EPA should, like it has done many times before, use this data rather than starting from scratch as it claims it must do.

If this Court agrees with Plaintiffs that EPA must issue the Emission Guidelines, then the Court must set an accelerated and fixed schedule by which EPA must act. Because EPA's failure to promulgate the Emission Guidelines has continued over a period of years, EPA bears the burden to demonstrate that it cannot act quickly. During discovery, EPA produced two documents laying the groundwork for a schedule that delays the promulgation of the Emission Guidelines for either 27.5 months (if EPA issues no formal Information Collection Request) or 44.5 months (if EPA issues a formal Information Collection Request). Both of these proposed schedules fail to meet EPA's burden, and fail to recognize the significant volume of existing data available to EPA.

Simply put, while there might have been a need for a significant data collection undertaking and evaluation process in 2016, that need no longer exists. EPA has access to numerous federal, state, and industry programs upon which EPA can rely to issue emission guidelines. Since 2016, there have been regulations adopted, studies undertaken, analyses performed, and programs developed that permit EPA to act swiftly to issue the Emission Guidelines to reduce methane emissions from existing oil and gas sources. This action is essential to protect the land, air, and water of Colorado and other states, and the health of this nation's residents.

ARGUMENT

I. BACKGROUND ON OIL AND GAS EMISSIONS AND REGULATION IN COLORADO

A. Climate Change is Harmful to Colorado

Methane is a significant contributor to climate change, which harms Colorado. Colorado's environment and economy are particularly at risk from the harmful impacts of climate change. *See*

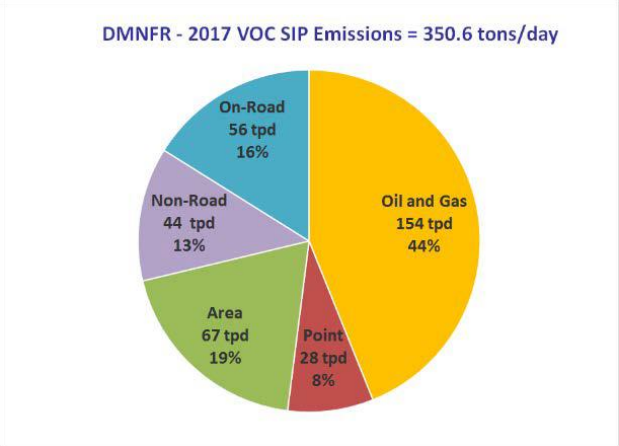
Colo. Rev. Stat. § 25-7-102(2)(b) (wherein the General Assembly recognized the harms to Colorado from climate change). For example, climate change reduces Colorado's annual snowfall and snowpack; Colorado relies on snowpack for both water for its residents and its outdoor recreation industry. Colorado also faces a double threat from climate change's increased danger of forest fires – danger from the destruction of land and property and from increased ozone values, which are themselves harmful to public health. Other examples abound, which is why Colorado has a demonstrated history of identifying sources of methane pollution and seeking reductions from those sources.

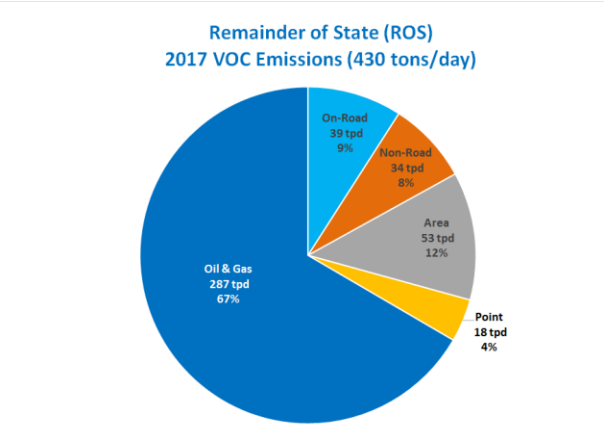
The harm experienced by Colorado is not entirely within Colorado's control to mitigate. Colorado relies on other states and EPA to address pollution in areas outside Colorado's boundaries that cause or contribute to harm in Colorado. The Emission Guidelines at issue in this case will reduce methane pollution in Colorado and nationwide.

B. The Oil and Gas Industry is a Significant Emitter in Colorado

Colorado's 2019 update to its greenhouse gas inventory identified the oil and gas industry as the largest source of methane emissions in Colorado, by a significant margin.[4] The oil and gas industry is also the largest anthropogenic contributor of volatile organic compounds ("VOC") emissions in Colorado. The figures below identify the percentage of VOC emissions contributed by sector in the state's ozone nonattainment area (the Denver Metro/North Front Range ozone nonattainment area, or "DMNFR") and in the remainder of the state.

[4] *See* Colorado 2015 Greenhouse Gas Inventory Update Including Projections to 2020 and 2030, https://drive.google.com/file/d/1TxyoktxCOLFd6CaUKZzeqsKgEIHMjdqt/view, at Exhibit ES-3, p.6.





Given the oil and gas industry's status as the largest industrial sector contributing to VOC emissions in Colorado, Colorado has consistently sought reductions in emissions from this industry in order to comply with federal law.

VOC are "ozone precursors", which means VOC react in sunlight with oxides of nitrogen (NOx) to form ozone. 80 Fed. Reg. 65,292 at 65,299 (Oct. 26, 2015).[5] Ozone is a criteria pollutant for which the EPA has issued a National Ambient Air Quality Standard. 73 Fed. Reg. 16,436 (Mar. 27, 2008). Areas that do not attain the federal standard are designated in nonattainment and must submit state implementation plans to EPA for review and approval. 42 U.S.C. §§ 7407(d), -7410, -7511a. At a certain level of nonattainment, state implementation plans must include provisions requiring the implementation of reasonably available control measures and technology to reduce emissions of ozone precursors. 42 U.S.C. § 7511a; 83 Fed. Reg. 62,998 at 63,010 (Dec. 6, 2018). Essentially, the Clean Air Act compels states with ozone nonattainment areas to identify the sources of VOC and NOx emissions within their boundaries, and to adopt regulations to reduce emissions from those sources in order to reduce ozone and attain the federal standard.

[5] Methane is also an ozone precursor, though not one of the ozone precursors for which reductions are required by the Clean Air Act or EPA regulation for purposes of the ozone nonattainment program. 81 Fed. Reg. at 35,837 (June 3, 2016).

Because of Colorado's struggles with attainment of the federal standard, and the outsized nature of the oil and gas industry's contribution to total VOC and methane emissions in the state, Colorado has a long history of regulation of the oil and gas industry, including existing sources, with a focus on both VOC and methane emissions.

C. Colorado Has Regulated the Oil and Gas Industry Since 2004, and Has Specifically Targeted Methane Since 2014

EPA identifies four "segments" that comprise the oil and gas industry: 1) the "upstream" or exploration and production segment, where companies drill for and produce oil and gas; 2) the "midstream" or processing segment, where companies move oil and gas from upstream facilities to processing plants (gas) or refineries (oil)[6]; 3) the "transmission and storage" segment, where natural gas is moved from processing plants to utilities or stored for later use; and 4) the "distribution" segment, where the finished product is distributed to consumers for use.[7] This lawsuit involves the first three segments and EPA's duty to issue the Emission Guidelines to reduce methane from existing sources in those segments.

1. History of Upstream and Midstream Regulations

Colorado adopted its first set of air quality regulations for the upstream and midstream segments of the oil and gas industry in 2004, as part of the Early Action Compact Ozone Action Plan. *See* Regulation Number 7, 5 Colo. Code Reg. §1001-9, Part F, Sec. G. These rules targeted reductions in emissions of VOC and NOx because VOC and NOx are ozone precursors, though the rules also achieved the co-benefit of methane reduction. *Id*. As EPA has recognized, for much of the upstream and midstream segments of the industry, the same activities that produce VOCs

[6] As EPA has explained, for oil, the "oil and natural gas sector" ends when the oil enters a pipeline for transfer to the petroleum refinery. For natural gas, the "oil and natural gas sector" ends upon distribution to the end user. 85 Fed. Reg. 3,492 at 3,500 (Jan. 21, 2020).

[7] *Id; see also* https://www.epa.gov/natural-gas-star-program/overview-oil-and-natural-gas-industry. These descriptions are over-simplifications.

are also the primary sources of methane emissions; thus, requirements achieving reductions in VOC will achieve reductions in methane. 81 Fed. Reg. at 35,838; 84 Fed. Reg. 50,244 at 50,259 (Sept. 24, 2019).

Colorado updated its regulations and reinforced its status as a leader in the regulation of the oil and gas industry in 2006 and 2008, again primarily as part of its ozone attainment efforts. *See* Regulation Number 7, 5 Colo. Code Reg. §1001-9, Part F, Secs. J and K. These regulations similarly focused on reductions of VOC and NOx, while achieving associated methane reductions.

In 2014, Colorado became the first state in the nation to explicitly target methane in its regulation of the oil and gas industry. *See* Regulation Number 7, 5 Colo. Code Reg. §1001-9, Part F, Sec. N.[8] In its economic analyses of its rules, Colorado recognized, as has EPA, that the emission reduction techniques adopted to reduce VOC will have the co-benefit of reducing methane, and Colorado quantified those costs and benefits.[9] *Id*. Colorado recognized that some gas streams may have higher concentrations of methane, with lower concentrations of VOC, yet could still be controlled with technologically and economically reasonable strategies. *See id.* Colorado's methane reduction strategies included regulations for hydrocarbon liquid storage tanks, pneumatic controllers, and leak detection and repair programs for new and existing sources.

[8] The Colorado Department of Public Health and Environment was the recipient of EPA's Clean Air Excellence Award (Regulatory/Policy Innovations), recognizing that these rules would "provide a lasting benefit for Colorado air quality and can serve as a model for responsible oil and gas development across the country." https://www.epa.gov/sites/production/files/2015-06/documents/clean_air_excellence_award_recipients_year_2015.pdf

[9] *See, e.g.,* Regulatory Analysis, Section 3.3.8 (February 11, 2014). This Regulatory Analysis can be found online at: https://www.edf.org/sites/default/files/content/regulatoryanalysisattachment2013-01217.pdf

In 2017, Colorado updated its oil and gas regulations, primarily to address the Oil and Gas CTG[10] issued by EPA in 2016.[11] These regulations applied to both new and existing oil and gas sources. In addition to adopting more VOC focused measures, Colorado's Air Quality Control Commission ("Commission") directed the creation of a taskforce to evaluate additional measures to reduce hydrocarbon emissions (including methane) from the oil and gas industry; this taskforce became known as the Statewide Hydrocarbon Emission Reduction team. *See* Regulation Number 7, 5 Colo. Code Reg. §1001-9, Part F, Sec. P. The Commission also directed the creation of a separate taskforce to study further reductions from pneumatic controllers, flagged by stakeholders as a potentially significant source of VOC and methane emissions; this group became known as the Pneumatic Controller Task Force. *See id.*

In December 2019, the Commission adopted another suite of VOC and methane regulations for the oil and gas industry, for both new and existing sources. The regulations lowered the threshold at which upstream and midstream equipment must use technologies and processes to reduce emissions, increased the frequency at which existing sources must inspect for leaks, and addressed significant new areas of emissions (*e.g.* truck loadout and tank liquid sampling and measurement). The Pneumatic Controller Task Force supported a significant expansion of Colorado's pneumatic controller program and was directed by the Commission in December 2019 to continue to consider further expansion in 2020. *See* Regulation Number 7, 5 Colo. Code Reg. §1001-9, Part F, Sec. S.

Regulation of the upstream and midstream segments of the industry is well understood,

[10] EPA has recently advised that it has no intention of withdrawing the Oil and Gas CTG. https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=2060-AT76

[11] Under Section 182(b) of the Clean Air Act, upon issuance of a new CTG, a moderate ozone nonattainment area must promptly adopt into its state implementation plan provisions to implement reasonably available control technology requirements at the source category addressed by the CTG. 42 U.S.C. § 7511a(b)(2)(A).

and such regulations have been implemented in Colorado, by EPA on federal and tribal lands, and in other states. Further, many of Colorado's regulations have been submitted to EPA for approval, along with their technical and economic support documents.

2. Transmission and Storage Regulations

Beginning in June 2018, the Statewide Hydrocarbon Emission Reduction team began to evaluate potential strategies through two subgroups: the transmission segment subgroup and the upstream/midstream segment subgroup. The transmission subgroup evaluated compressor station leak detection and repair and reciprocating compressor rod packing replacement strategies. In September 2018, the transmission subgroup began evaluating a flexible, voluntary performance-based emission reduction program. In April 2019, Colorado's General Assembly enacted Senate Bill 19-181,[12] directing the Commission to adopt regulations to reduce emissions, including methane and VOC, from the transmission and storage segment. *See* Colo. Rev. Stat. § 25-7-109(10). The Statewide Hydrocarbon Emission Reduction team updated its approach and began to develop a regulatory performance-based emission reduction program, proposed to the Commission in August 2019 and adopted in December 2019.

Colorado developed cost effective practices to detect and reduce emissions, relying on the extensive work already conducted by EPA and members of industry through industry's ONE Future program,[13] EPA's Methane Challenge Program,[14] and EPA's Mandatory Greenhouse Gas Reporting Rule, 40 C.F.R. Part 98. Colorado's regulation allows regulated entities to select best management practices that are tailored to their specific operations and adds a layer of

[12] S.B. 19-181, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019), available at: https://leg.colorado.gov/sites/default/files/2019a_181_signed.pdf.

[13] http://onefuture.us/.

[14] https://www.epa.gov/natural-gas-star-program/methane-challenge-program

accountability that will lead to quantifiable emissions reductions from this segment of the industry. *See* Regulation Number 7, 5 Colo. Code Reg. §1001-9, Part D, Sec. IV.

3. Colorado and EPA Have a Long History of Relying Upon Each Other's Data and Efforts in Pursuing Reductions of VOC and Methane, Including From Existing Sources

Colorado relied upon EPA programs and data to develop its rules for the transmission segment, as described above. For the majority of activities in the oil and gas industry, EPA has a demonstrated pattern of following in Colorado's footsteps, which it can replicate in issuing the Emission Guidelines now. The following table depicts how EPA (and, for additional support, the Bureau of Land Management ("BLM")) has adopted regulations similar to Colorado, and the scope and breadth of those regulations as they pertain to the development of the emission guidelines at issue.

	Colorado Regulation 7	EPA New Source Performance Standard	Oil and Gas CTG	Bureau of Land Management regulation[15]
Storage vessels (condensate, crude oil, intermediate hydrocarbon liquids, and/or produced water)	Yes	Yes	Yes	Yes
Pneumatic controllers	Yes	Yes	Yes	Yes
Pneumatic pumps	Yes	Yes	Yes	Yes
Equipment leaks at natural gas processing plants	Yes	Yes	Yes	No
Fugitive emissions – well sites and compressor stations	Yes	Yes	Yes	Yes
Well liquids unloading and/or downhole well maintenance	Yes	No	No	Yes
Transmission and storage segment	Yes	Yes	No	Yes
Applies to existing sources	Yes	No	Yes	Yes
Addresses methane (or hydrocarbon, generally) emissions	Yes	Yes	No	Yes

Further, in issuing the Oil and Gas CTG in 2016, EPA repeatedly references the cost and emissions data generated by Colorado in its 2014 rulemaking to evaluate control technologies for existing oil and gas sources.[16] Also in 2016, in the Background Technical Support Document for Subpart OOOOa, EPA delves into Colorado's analysis of the emission reductions and costs of various aspects of proposed requirements to reduce VOC and methane, suggesting that

[15] In 2016, the BLM issued its *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rule, addressing new, modified, and existing sources of methane in the oil and gas industry over which the BLM has jurisdiction. 82 Fed. Reg. 83,008 (Nov. 18, 2016). This rule was modified by the BLM in 2018, removing the majority of the requirements adopted in 2016, but leaving in place others. 83 Fed. Reg. 49,184 (Sept. 28, 2018). This chart relies upon the 2016 rule, not the 2018 rescission.

[16] Oil and Gas CTG, https://www.epa.gov/sites/production/files/2016-10/documents/2016-ctg-oil-and-gas.pdf.

Colorado's (and EPA's) requirements are even more cost-effective than they appear.[17] Then in 2018, EPA issued a memorandum entitled "Equivalency of State Fugitive Emissions Programs for Well Sites and Compressor Stations to Proposed Standards at 40 CFR Part 60, Subpart OOOOa"[18], in which it determined that Colorado's requirements for leak detection and repair were equivalent to Subpart OOOOa.

These regulatory agencies' recent history of relying on information from Colorado rulemaking demonstrates that EPA has a substantial head start in the creation of the Emission Guidelines to reduce methane from the oil and gas industry, particularly for the upstream and midstream segments of the industry. While methane reduction measures are, in a sense, more novel for the transmission and storage segment, Colorado developed its rules with universal support relying, in large part, upon data collected by EPA since 2016 pursuant to its Methane Challenge program. Further, Colorado's approach to examining the technical and economic feasibility of its regulations for the upstream, midstream and transmission and storage segments has been created with input from the industry, environmental groups, and local governments. Colorado's approach has been largely approved of and relied upon by EPA.

II. THIS COURT MUST ORDER EPA TO ACT SWIFTLY, AND EPA'S PROPOSED SCHEDULES FOR ACTION WOULD ACHIEVE ONLY FURTHER UNLAWFUL DELAY OF EPA'S DUTY TO ISSUE EMISSION GUIDELINES

A. EPA Must Act Swiftly to Remedy Its Failure to Comply With the Clean Air Act and Its Implementing Regulations

EPA issued Subpart OOOOa in 2016, imposing requirements to reduce methane from new and modified oil and gas sources and triggering its duty to issue the Emission Guidelines for

[17] https://www.regulations.gov/document?D=EPA-HQ-OAR-2010-0505-5021.

[18] https://www.epa.gov/sites/production/files/2018-09/documents/equivalency_of_state_fugitive_emissions_programs_for_well_sites_and_compressor_stations.pdf

existing sources. 42 U.S.C. § 7411(d). This Court is empowered to ensure that EPA acts swiftly when it has failed to comply with a statutory requirement. 42 U.S.C. § 7604(a).

When it promulgated Subpart OOOOa for new sources in 2016, in recognizing its duty to act without delay, EPA expressed its intent to issue an Information Collection Request to seek additional data about methane emissions from existing sources in the industry to inform the Emission Guidelines, with an outside deadline for submittal of data within six (6) months of the request.[19] On March 7, 2017, EPA withdrew the Information Collection Request prior to the deadline for submittal of responsive data. 82 Fed. Reg. 12,817 (Mar. 7, 2017). Thus, EPA essentially made the determination that additional data were not required. As a result, EPA's duty to immediately prepare and issue emission guidelines was triggered.[20] EPA has now failed to act for over three (3) years since it determined additional data were no longer required.

In *Solenex LLC v. Jewell*, this Court ordered the Secretary of the Department of the Interior to submit an "accelerated and fixed schedule," recognizing that "our Circuit Court frequently orders recalcitrant agencies to establish schedules, subject to court approval, to finish their reviews and reach final agency decisions." 156 F. Supp. 3d 83, 85 (D.D.C. 2015). In both of its proposed schedules for issuing the Emission Guidelines, EPA has allowed itself three months in which to decide whether another Information Collection Request should issue. *See* Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Memorandum"), Ex. 9 at pp.109-113. EPA can make the determination now (or, more accurately, either uphold its earlier determination or revise it with justification) and should

[19] https://www.epa.gov/sites/production/files/2016-11/documents/oil-natural-gas-icr-supporting-statement-epa-icr-2548-01.pdf

[20] In its March 2017 withdrawal, EPA suggested that it no longer had a need for the data, and that it sought to avoid the burden on responding companies. *Id.* Nowhere did EPA suggest that the Information Collection Request was withdrawn because EPA did not intend to promulgate emission guidelines (which would be inconsistent with Section 111(d) of the Clean Air Act).

submit a fixed schedule to the Court that includes a determination as to whether an Information Collection Request is necessary. *See* Plaintiffs' Memorandum, p.41.

EPA should be ordered to submit an "accelerated and fixed" schedule to this Court within thirty (30) days of a ruling that EPA must issue the Emission Guidelines.

B. EPA Has the Burden to Demonstrate That It Has Substantial Need for the Schedule It Proposes, Particularly Where the Proposed Schedule Is Drawn Out

In this case, Plaintiffs' claim was brought to challenge EPA action "unreasonably delayed" under 5 U.S.C. § 706(1), as distinguished from action "unlawfully withheld." Therefore, the factors set forth in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("*TRAC*") assist this Court in determining whether EPA has unreasonably delayed issuing the Emission Guidelines. *See* Plaintiffs' Memorandum, p.16. However, *TRAC* isn't determinative of the schedule that the Court must set to compel EPA action once it finds liability.

When EPA fails to meet an explicit statutory deadline, the presumption is that the court will order it to act immediately, taking into account concerns related to the purposes of the Congressional mandate, and discounting "the footdragging efforts of a delinquent agency." *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 53 (D.D.C. 2006) (citing *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974)). While Section 111(d) of the Clean Air Act does not contain an explicit date certain by which EPA must issue the Emission Guidelines, the language in 40 C.F.R. § 60.22a(a) requiring issuance of emission guidelines "concurrently upon or after" promulgation of new source performance standards reveals that EPA understood that it must act

under 42 U.S.C. § 7411(d) with immediacy.[21] Given the "concurrently upon or after" language in EPA's regulation, the Court should require a heftier showing from EPA that an immediate timeline cannot be met, as would be required for an "unlawfully withheld" claim.

EPA has the burden to demonstrate that its proposed schedule is reasonable, where the proposed schedule allows the agency even more time to fulfill an already long-delayed statutory requirement. *See California Communities Against Toxics v. Pruitt,* 241 F. Supp. 3d 199, 204 (D.D.C. 2017) (citing *Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979) (internal citations omitted)). EPA's burden is particularly onerous where, as here, EPA's failure to act has extended over a period of years. *See Johnson,* 444 F. Supp. 2d at 53 (holding that an agency's burden to demonstrate the impossibility of acting immediately "is especially heavy where 'the agency has failed to demonstrate any diligence whatever in discharging its statutory duty to promulgate regulations and has in fact ignored that duty for several years.'") (citing *Sierra Club v. Thomas,* 658 F. Supp. 165, 172 (N.D. Cal. 1987)).

Further, there is a three-year maximum deadline codified in 40 C.F.R. § 60.23a(a)(1), requiring state plan submissions "within three years after the notice of the availability of a final emission guideline." State plans will then, in turn, afford sources some time to implement the requirements, and will not achieve full reductions on day one. Thus, even were EPA to act today, it will still be years until the methane reduction measures that should have been in place already are required to be fully implemented.

In *NRDC v. Train*, the D.C. Circuit evaluated the propriety of a district court order setting a deadline for EPA action after a citizen suit to compel EPA to undertake a mandatory duty. 510

[21] EPA has historically issued the emission guidelines close in time to the new source performance standards. *See, e.g.,* 61 Fed. Reg. 9,905 (Mar. 12, 1996) (issuing new source performance standards and emission guidelines for municipal solid waste landfills); *see also* Plaintiffs' Memorandum, p.21, n.4.

F.2d 692 (D.C. Cir. 1974). In reviewing the deadline set by the court, the D.C. Circuit found that the order requiring action by EPA "should serve like adrenalin, to heighten the response and to stimulate the fullest use of resources." *Id*. at 712. However, the court acknowledged that EPA should be afforded the opportunity to seek modified deadlines, where necessary, to address issues of resources and unanticipated complications. *Id*. at 712-14. Thus, should the Court order an expedited schedule for EPA action, the Court would retain jurisdiction to hear extension requests from EPA should unanticipated circumstances beyond its control interfere with its compliance.

C. EPA's Proposed Schedules are Arbitrary and Appear Calculated to Achieve Only Delay

For the following reasons, Colorado requests that this Court view with healthy skepticism a schedule from EPA that includes an Information Collection Request or extends out 27.5 months or more, as EPA has suggested in the documents produced in discovery. *See* Plaintiffs' Memorandum at Ex. 9 at pp.109-113. First, EPA already has much of the data it set out to collect in 2016. Second, EPA's produced schedules include floating deadlines, which add uncertainty and delay. Last, EPA's produced schedules include significant time for review by the Office of Management and Budget ("OMB"), which is not required and not a justification for further failure to comply with a statutory mandate.

1. EPA has much of the data it said it needed when it issued in the Information Collection Request in 2016

In 2016, EPA issued an Information Collection Request, stating that "the agency needs information that is not currently available to develop standards for existing sources under section 111(d) of the Clean Air Act for existing sources and to evaluate the impact of those standards."[22]

[22] https://www.epa.gov/sites/production/files/2016-11/documents/oil-gas-final-icr-factsheet.pdf, at p.4.

Specifically, EPA called out the need to understand the following three issues: 1) what emission controls are being used in the field and how they are configured; 2) whether electricity or generating capacity is available; and 3) how often sites are staffed or visited.[23] Since 2016, when this Information Collection Request was issued, these questions have been answered by states, industry, and EPA itself. For example:

- In 2019, EPA issued an Audit Program Agreement including detailed programs for the design, operation, and maintenance of both new and existing oil and gas sources to reduce emissions[24];
- EPA has received technical justification and economic analysis for VOC reduction measures from several states, including Colorado as part of state implementation plan submittals in compliance with ozone nonattainment requirements of the Clean Air Act. These submittals include extensive information on the question of site staffing and visitation as part of the leak detection programs that must be analyzed pursuant to Section 182(b)(2) of the Clean Air Act (because such programs are recommended in the Oil and Gas CTG);
- EPA has prepared its own technical justification and economic analysis for its federal implementation plan securing VOC reduction measures from new and existing oil and gas activities in the Uintah and Ouray Indian Reservations[25];
- Multiple oil and gas producing states (and local jurisdictions) regulate existing oil

[23] *Id.* at p.5.

[24] https://www.epa.gov/sites/production/files/2019-12/documents/ogexistingownerprogramagreementtemplate.pdf

[25] EPA's proposed action can be found at: https://www.regulations.gov/document?D=EPA-R08-OAR-2015-0709-0001

and gas sources, including Colorado (both at the state level and by county, including Boulder County[26]), California, Texas, Pennsylvania, Utah, etc.;

- Plaintiff-Intervenor EDF and other interest groups and scientists have developed multiple studies looking particularly at methane emissions from the oil and gas industry, several of which have been submitted to EPA[27];
- EPA has collected significant amounts of data on methane emissions from this industry pursuant to both its Mandatory Greenhouse Gas Reporting Rule and its Methane Challenge program;
- The oil and gas industry has developed its own studies and programs studying methane emissions, including the ONE Future program.

As a result, EPA has a wealth of information at its fingertips upon which to develop the Emission Guidelines to reduce methane from existing sources in the oil and gas industry.

2. This Court should not permit a schedule that includes floating deadlines

In its proposed schedule including an Information Collection Request, EPA notes that meeting even this extended timeframe depends on the assumption that there is "no deadline extension for submitting requested information and receipt of all requested information." Plaintiffs' Memorandum, Ex.9 at p.111. Floating deadlines such as these are inappropriate and not

[26] *See* Boulder County Public Health Review of Oil and Gas Air and Water Impacts Studies (May 2018), detailing several studies from 2014 through 2018, https://assets.bouldercounty.org/wp-content/uploads/2018/07/bcph-review-of-oil-and-studies.pdf; *see also* Boulder County Public Health's *Leak Inspection and Repair at Oil and Gas Well Sites* (Nov. 5, 2019), https://assets.bouldercounty.org/wp-content/uploads/2019/11/leak-inspection-repair-oil-and-gas.pdf

[27] *E.g.,* Hmiel et al., *Preindustrial CH4 indicates greater anthropogenic fossil CH4 emissions,* Published Feb. 19, 2020; Omara, *A technical assessment of the foregone methane emissions reductions as a result of EPA's proposed reconsideration of the 2016 NSPS fugitive emissions requirements for oil and gas production sites*, Dec. 2018; https://www.edf.org/sites/default/files/methane_studies_fact_sheet.pdf

calculated to achieve compliance with EPA's statutory mandate.

3. This Court should not allow extra time for review by the OMB

In its proposed schedules, EPA allows for multiple rounds of review by the OMB, creating additional delays of between 6 and 8 months. *See* Plaintiffs' Memorandum, Ex.9 at pp.109-13.[28] OMB review is not required and should not be permitted to add to EPA's unreasonable delay. *See* Plaintiffs' Memorandum, pp.43-44; *see also Am. Lung Ass'n v. Browner*, 884 F. Supp. 345, 349 (D. Ariz. 1994) (holding that "[r]eview by the [OMB] serves no congressional purpose and is wholly discretionary. Therefore, it is not required, and the schedule shall exclude such review."); *Sierra Club v. Thomas*, 658 F. Supp. 165, 173–74 (N.D. Cal. 1987) (wherein the court found the requirements for OMB review did not justify a delay by EPA).

III. CONCLUSION

The clock is ticking, and EPA must act now to address the real and immediate harm to Colorado and other states from EPA's inaction. For the foregoing reasons, and for those additional reasons set forth in Plaintiffs' Memorandum, Colorado asks this Court to order EPA to submit an "accelerated and fixed" schedule within 30 days of this Court's determination that EPA has unreasonably delayed issuing Emission Guidelines, and for this Court to require EPA to meet a heavy burden to demonstrate that it cannot act immediately thereafter.

[28] The EPA allows for 180 days of OMB review without an Information Collection Request. The schedule providing for an Information Collection Request includes another 60 days for OMB review.

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Respectfully submitted,

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