ORAL ARGUMENT NOT YET SCHEDULED

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

CONSERVATION LAW FOUNDATION, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 13-1233; 14-1199

RESPONDENT'S OPPOSED MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR

Respondent United States Environmental Protection Agency ("EPA") hereby moves for a voluntary remand without vacatur of EPA's final decision on reconsideration of its Clean Air Act ("CAA") emission standards for hazardous air pollutants for reciprocating internal combustion engines. EPA's reconsideration decision addressed, *inter alia*, its revision of the subcategory of "emergency engines" to include reciprocating internal combustion engines that operate for up to 50 hours to support reliability of the local transmission or distribution system under certain circumstances ("the 50-hour provision"). *See* 79 Fed. Reg. 48,072

(Aug. 15, 2014); *see also* "*National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; New Source Performance Standards for Stationary Internal Combustion Engines*," 78 Fed. Reg. 6674 (Jan. 30, 2013) ("2013 Final Rule"). Counsel for all Petitioners and counsel for Intervenor for Petitioners have represented to EPA that they oppose this motion. Counsel for Intervenors for EPA have represented that they consent to this motion.[1]

BACKGROUND

This case was severed from consolidated petitions for review challenging the 2013 Final Rule. *See* Docket Nos. 13-1093, 13-1102, and 13-1104. The 2013 Final Rule revised Clean Air Act ("CAA") hazardous air pollutant emission requirements applicable to certain classes of stationary reciprocating internal combustion engines under 42 U.S.C §§ 7412(d) and 7411.

At issue in the original consolidated petitions for review was, among other things, EPA's revision of the subcategory of "emergency engines" to include reciprocating internal combustion engines that operate for up to 100 hours per year for emergency demand response under certain circumstances ("the 100-hour provision"). *See* Docket No. 13-1093, Docket Entries 1472591, 1472863,

[1] By separate motion, EPA is requesting that this Court hold the present briefing schedule in this matter in abeyance pending resolution of this motion for remand.

1473349, 1483471 (briefs of the parties). Oral argument on the original consolidated petitions was held on September 26, 2014, and the Court issued a decision partially adverse to EPA on May 1, 2015. *See Delaware Dep't of Natural Resources & Envt'l Control v. EPA*, 785 F.3d 1 (D.C. Cir. 2015) ("May 1, 2015 Decision").

The May 1, 2015 Decision concluded that the 100-hour provision was arbitrary and capricious for several record-based reasons. *See id.* at 10-19. The Court left in place the remainder of the 2013 Final Rule, and indicated that EPA could "'file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards.'" *Id.* at 19 (quoting *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001)). EPA's deadline for filing such a motion is July 15, 2015. *See* Docket Entry 1553910.

At issue in this related severed case is EPA's final decision to revise the subcategory of "emergency engines" to include reciprocating internal combustion engines that operate for up to 50 hours to support reliability of the local transmission or distribution systems under certain circumstances different from those allowed under the 100-hour provision ("the 50-hour provision"). *See* 78 Fed. Reg. at 6679-80 (2013 Final Rule); 79 Fed. Reg. 48,072 (Aug. 15, 2014) (final action on reconsideration of the 50 hour provision); 40 C.F.R. §

63.6640(f)(4); Docket No. 13-1233, Docket Entries 1543305 (Delaware's Opening Brief) and 1543351 (Industry and Environmental Petitioners' Joint Opening Brief). Petitioners filed their opening briefs in this matter prior to the May 1, 2015 Decision. After the May 1, 2015 Decision, EPA requested and the Court granted a revised briefing schedule that requires EPA to file its brief on July 13, 2015, so as to allow EPA time to review the May 1, 2015 Decision and determine what implications it has for this matter. *See* Docket Entries 1551847, 1552511.

The 100-hour provision and the 50-hour provision were supported by different rationales and records. Nonetheless, some issues in this severed case are closely related to the issues raised in the original cases. Indeed, in their joint brief, Industry and Environmental Petitioners raise several record-based challenges in this case that are very similar to those raised in the original cases. *Compare* Docket Entry 1543351, 23-24, 25-31 (arguing that EPA failed to adequately respond to comments regarding the environmental and market consequences of the 50-hour provision and two alternatives proposed by commenters) *with Delaware*, 785 F.3d at 13-16; 16-18 (concluding that EPA failed to respond to comments regarding the market consequences of the 100-hour provision and an alternative proposed by a commenter). Thus, the May 1, 2015 Decision is highly instructive for this case and has caused EPA to reevaluate whether the record supporting the 50-hour provision is sufficient. Accordingly, EPA requests that the Court grant

EPA a voluntary remand of the 50-hour provision without vacatur so that EPA can reevaluate the 50-hour provision in light of the Court's May 1, 2015 Decision.

ARGUMENT

Agency decisions are not carved in stone. Instead, an agency must consider the "wisdom of its policy on a continuing basis," for example, "in response to changed factual circumstances." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citations omitted). "[W]hen an agency action is reviewed by the courts . . . . the agency may take one of five positions," one of which is "seek[ing] a remand to reconsider its decision because of intervening events outside of the agency's control . . . ." *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1027-28 (Fed. Cir. 2001). Indeed, "[a]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts." *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (quoting *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). This Circuit "commonly grant[s]" motions for voluntary remand in order to preserve the courts' and the parties' resources. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); *see also Anchor Line Ltd. v. Fed. Maritime Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962) ("[W]hen an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the

agency"). While remand "may be refused if the agency's request is frivolous or in bad faith . . . if the agency's concern is substantial and legitimate, a remand is usually appropriate." *SKF USA, Inc.*, 254 F.3d at 1029.

Here, circumstances have changed significantly since EPA issued its final decision on reconsideration of the 50-hour provision on August 15, 2014. Specifically, since that time, the Court held oral argument and decided the consolidated challenges to the 100-hour provision. In the decision, the Court concluded that EPA's response to comments on certain issues—the 100-hour provision's effects on the reliability and efficiency of energy markets, and an alternative proposed by a commenter for limiting the applicability of the provision to certain areas of the country not served by organized capacity markets—were inadequate. *See Delaware*, 785 F.3d at 13-16, 16-18. Additionally, the Court "encourage[d] EPA to solicit input from [the Federal Energy Regulatory Commission ("FERC")]," given EPA's stated aim of supporting system reliability through the 100-hour provision. *Id.* at 18.

EPA intended the 50-hour provision to address a different need than the 100-hour provision—that of local electric reliability and distribution rather than grid reliability at the bulk power system level. EPA therefore required different conditions in order for the provision to be triggered, and provided a different rationale to support the provision. S*ee* 78 Fed. Reg. at 6679-80; Exhibit A at 7-8,

EPA-HQ-OAR-2008-0708-1549 ("Response to Comments on Reconsideration"). However, the same Industry and Environmental Petitioners challenge the 50-hour provision for reasons very similar to those for which they challenged the 100-hour provision. *See, e.g.*, Docket Entry 1543351 at 23-24; 25-31. Namely, Industry and Environmental Petitioners argue that EPA did not sufficiently respond to comments regarding the 50-hour provision's effects on the energy market. *See id.* at 23-24 (arguing that "applying the 50-Hour Exemption in densely populated areas served by regional transmission organizations . . . will perversely encourage the dispatch of polluting diesel engines at the expense of much cleaner alternatives" and that "[d]ue to these competitive dynamics, over time EPA's rule is likely to result in a mix of generation resources that is more harmful to the environment than it would otherwise be"). Industry and Environmental Petitioners also specifically identify two alternatives proposed to EPA for limiting the provision to areas most in need of the provision, and contend that EPA did not sufficiently explain its rejection of those alternatives in favor of nationwide application of the provision. *See id.* at 25-31 (arguing that "commenters urged . . . that EPA apply the exemption only in the rural areas for which it purportedly is needed" but that "there is no evidence that EPA considered those suggestions or seriously grappled with the alternatives before simply declaring that a sub-national rule would be too hard to implement").

The Court's holding in the May 1, 2015 Decision regarding EPA's obligation to respond to similar comments has caused EPA to reevaluate whether its consideration of and response to comments on the issues raised by Industry and Environmental Petitioners is sufficient. During remand of the 50-hour provision, EPA intends to further consider and respond as appropriate to comments regarding the 50-hour provision's effects on the reliability and efficiency of the energy market, and its assessment of the two alternatives identified by commenters. EPA also intends to seek input from interested parties and FERC regarding whether there exists a compromise alternative for application of the provision that would both support local reliability and address the concerns that commenters raised. Thus, although EPA does not admit error and may not ultimately reach a different conclusion than it did on initial reconsideration of the 50-hour provision, remand of the 50-hour provision will serve the interests of judicial economy by possibly mooting or significantly narrowing the issues that Petitioners have raised in this litigation. Additionally, remand will serve to improve the record to address the types of concerns raised by the Court in the May 1, 2015 Decision with respect to the 100-hour provision. To the extent that any interested party is not satisfied with any final action on remand, that party may obtain review of that agency action in this Court in accordance with CAA section 307(b), 42 U.S.C. § 7607(b).

Remand without vacatur is the most appropriate procedural mechanism that

will allow EPA to complete the remand process. In determining whether to remand without vacating the agency's decision, the court considers "the seriousness of the . . . deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (declining to vacate an inadequately supported rule because the agency could adequately explain its rationale on remand and vacatur would have disruptive consequences for the industry). Indeed, this Court has allowed rules to remain in place on remand even where they have been found to be arbitrary, capricious, or otherwise contrary to law. *See North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

Here, there has been no adjudication concluding that there are deficiencies with respect to the 50-hour provision. The record-based deficiencies the Court identified with respect to the 100-hour provision do not compel any conclusion that the separate 50-hour provision is contrary to law. Thus, vacatur is not warranted here. *See, e.g., NRDC v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (granting vacatur when a "wholesale revision on remand" was needed).

Furthermore, vacatur of the 50-hour provision pending remand would have considerable disruptive consequences for rural electric cooperatives, businesses, and others that rely on emergency engines during periods of exceptionally heavy

stress within a region or sub-region when electricity from regional power generators is not available. Indeed, during the reconsideration process, many parties commented that the 50-hour provision was critical to allow emergency engines to operate to support the reliability of the local transmission and distribution system and that the 100-hour provision did not adequately address local reliability issues. *See* Exhibit A at 2-4, Response to Comments on Reconsideration. Commenters stated that use of emergency engines in such circumstances is "often critical to the safe and reliable operation of local electric systems, which in turn support larger regional systems," and that the 50-hour provision provides "flexibility for local system operators to quickly deal with emergency reliability issues to avoid sudden local power outages that may damage customer and utility-owned equipment, threatening critical infrastructure and public health." Exhibit B at 6-7, EPA-HQ-OAR-2008-0708-1527 (Comment submitted by Julia M. Blankenship, Director, Energy Policy and Sustainability, American Municipal Power, Inc.). Commenters also explained that preventing failures at the local transmission and distribution level helps avoid cascading effects that could result in bulk power or region-wide disruptions or blackouts. *See* Exhibit C at 4, EPA-HQ-OAR-2008-0708-1501 at Attachment 4 (Email to Courtney Higgins from Melanie King, USEPA on January 4, 2013). In light of the

potential for serious adverse impacts on local system reliability, vacatur during remand is not appropriate here.

Finally, it is EPA's responsibility in the first instance to set a timetable with respect to reevaluation of the 50-hour provision. *See Int'l Union, United Mine Workers of Am. v. Dep't of Labor*, 554 F.3d 150, 155 (D.C. Cir. 2009) (declining to impose a schedule on remand); *North Carolina*, 550 F.3d at 1178. The Agency intends to conclude reconsideration within a reasonable period of time. The appropriate remedy, however, for any unreasonable agency delay in issuing a final decision is mandamus. *See North Carolina*, 550 F.3d at 1178; *NRDC v. EPA*, 489 F.3d 1364, 1375 (D.C. Cir. 2007). Thus, while Petitioners may ask the Court to impose a deadline for EPA's action on remand, no such deadline is warranted.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court remand the 50-hour provision to the Agency for further consideration without vacatur and without setting a timetable for such consideration.

DATED: June 30, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of RESPONDENT'S MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR via Notice of Docket Activity by the Court's CM/ECF system, on June 30, 2015, on counsel of record:

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