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

No. 17-1157

NATURAL RESOURCES DEFENSE COUNCIL, CLEAN AIR COUNCIL, CLEAN WISCONSIN, and CONSERVATION LAW FOUNDATION,

Petitioners,

v.

E. SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

MOTION FOR SUMMARY VACATUR

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August 4, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners Natural Resources Defense Council, Clean Air Council, Clean Wisconsin, and Conservation Law Foundation certify as follows:

(A) Parties and Amici

Petitioners: Natural Resources Defense Council, Clean Air Council, Clean Wisconsin, and Conservation Law Foundation.

Respondents: E. Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency.

Movant-Intervenors: National Waste & Recycling Association, Solid Waste Association of North America, Waste Management, Inc., Waste Management Disposal Services of Pennsylvania, Inc., and Republic Services, Inc.

(B) Rulings Under Review

Petitioners seek review of the final action of Respondents published in the Federal Register at 82 Fed. Reg. 24,878 (May 31, 2017) and titled "Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills."

(C) Related Cases

Petitioners are aware of the following cases related to this matter that are currently pending in this Court:

(1) *Nat'l Waste & Recycling Ass'n, et al. v. EPA*, D.C. Cir. No. 16-1371, consolidated with D.C. Cir. No. 16-1374. These cases, which are currently held in abeyance, challenge the EPA regulation published at 81 Fed. Reg. 59,276 and titled "Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills." That regulation has been stayed by EPA in the challenged action.

(2) *Nat'l Waste & Recycling Ass'n, et al. v. EPA*, D.C. Cir. No. 16-1372. This case, which is currently held in abeyance, challenges the EPA regulation published at 81 Fed. Reg. 59,332 and titled "Standards of Performance for Municipal Solid Waste Landfills." That regulation has been stayed by EPA in the challenged action.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Petitioners Natural Resources Defense Council, Clean Air Council, Clean Wisconsin, and Conservation Law Foundation make the following disclosures:

Natural Resources Defense Council

Non-Governmental Corporate Party to this Action: Natural Resources Defense Council ("NRDC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: NRDC, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

Clean Air Council

Non-Governmental Corporate Party to this Action: Clean Air Council.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Clean Air Council is a non-profit corporation organized and existing under the laws of the Commonwealth of Pennsylvania. For 50 years, Clean Air Council has fought to improve air quality across Pennsylvania and the Mid-Atlantic Region and to protect everyone's right to a healthy environment.

Clean Wisconsin

Non-Governmental Corporate Party to this Action: Clean Wisconsin.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Clean Wisconsin, created in 1970 as Wisconsin's Environmental Decade, is a nonprofit membership corporation organized and existing under the laws of Wisconsin, whose mission is to protect Wisconsin's air, water, and special places by being an effective voice in the legislature, state and federal agencies, and the courts.

Conservation Law Foundation

Non-Governmental Corporate Party to this Action: Conservation Law Foundation.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Conservation Law Foundation, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, is a non-profit organization dedicated to improving the quality of the human environment in New England and the region's endangered natural resources.

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Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY OF ABBREVIATIONS

EPA	Environmental Protection Agency
NESHAP	National Emission Standards for Hazardous Air Pollutants

Pursuant to Federal Rule of Appellate Procedure 27 and D.C. Circuit Rule 27, Petitioners respectfully move for summary disposition and vacatur of the Environmental Protection Agency's ("EPA") administrative stay of regulations to limit emissions of landfill gas (including methane, smog-forming pollutants, and hazardous air pollutants) from municipal solid waste landfills. 82 Fed. Reg. 24,878 (May 31, 2017) (Attach. A).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is a carbon copy of the recently-decided *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir. 2017).[1] The Administrator's action here suffers from the same flaws as the administrative stay vacated by this Court in *Clean Air Council*. The stay is premised on the supposed need for a reconsideration proceeding to cure notice failures in a prior rulemaking. But, like in *Clean Air Council*, no such notice failure occurred in that rulemaking. In the absence of a notice failure, reconsideration is not required, and the Administrator lacks authority to stay these Landfill Rules. *See Clean Air Council*, slip op. at 23. This unlawful stay must similarly be vacated.

The administrative stay suspends implementation of two 2016 EPA rules issued under section 111 of the Clean Air Act: (1) emission guidelines for existing municipal solid waste landfills, and (2) standards of performance for new and modified municipal solid waste landfills. Emission Guidelines, 81 Fed. Reg. 59,276 (Aug. 29,

[1] Order, ECF 1682468 (July 3, 2017) (granting summary vacatur); Order, ECF 1686663 (July 31, 2017) (issuing mandate en banc).

2016) (Attach. B); New Source Performance Standards, 81 Fed. Reg. 59,332 (Aug. 29, 2016) (Attach. C) (collectively "Landfill Rules"). The Landfill Rules updated regulations issued twenty years earlier. In the 2016 rulemakings, EPA concluded that the updated Landfill Rules will significantly reduce emissions of landfill gas, a mixture produced by the decomposition of waste that includes methane, carbon dioxide, hazardous air pollutants, and volatile organic compounds that contribute to smog. 81 Fed. Reg. at 59,276 and 59,332. The 2016 Landfill Rules cover more landfills by lowering the emissions threshold above which a landfill must install and operate landfill gas collection and control systems. *Id.* The additional pollution reductions will "improve air quality and reduce the potential for public health and welfare effects associated with exposure to landfill gas emissions." 81 Fed. Reg. at 59,276.

Ignoring the benefits of these air pollution reductions, on May 31, 2017, EPA Administrator Scott Pruitt announced a stay of the Landfill Rules in their entirety for 90 days, without any showing that the statutory requirements for a stay under Clean Air Act section 307(d)(7)(B) were met. 82 Fed. Reg. at 24,878-79. The Administrator premised the stays on his decision to reconsider the rules in order to cure supposed notice defects in the prior rulemakings. *Id.* But just as in *Clean Air Council*, there were no such notice defects, and thus there is no basis for mandatory reconsideration proceedings and no authority to issue a stay. The Administrator may issue a stay only when he is *required* to open a reconsideration proceeding: when petitioners have raised objections that (a) were impracticable to raise during the public comment period (or

arose after that period) and (b) are of central relevance to the outcome of the rule. *Clean Air Council*, slip. op. at 13; 42 U.S.C. § 7607(d)(7)(B). Because the issues identified by the Administrator as the predicate for reconsideration simply do not meet these requirements, the Landfill Rules cannot be stayed or otherwise taken out of effect until EPA completes a notice and comment rulemaking and provides a reasoned and lawful basis to modify or replace them. *Clean Air Council*, slip op. at 11-12; *see* 42 U.S.C. § 7607(d)(1)-(6).

EPA's stay is a final agency action under 42 U.S.C. § 7607(b)(1), properly subject to review by this Court. *See Clean Air Council*, slip. op. at 6. This case is appropriate for summary disposition because its posture is identical to that in *Clean Air Council.* Because the objections on which reconsideration was granted do not meet the requirements of section 307(d)(7)(B), this stay is unlawful and should be vacated as "arbitrary, capricious," and "in excess of statutory . . . authority." 42 U.S.C. § 7607(d)(9)(A), (C).

PROCEDURAL HISTORY

In 1996, EPA issued standards of performance and emission guidelines to curb emissions of landfill gas (including methane, smog-forming pollutants, and hazardous air pollutants) from new and existing landfills. The original rules applied to landfills

that emitted at least 50 metric tons of non-methane organic compounds[2] per year. *See* 61 Fed. Reg. 9,905, 9,912 (Mar. 12, 1996) (Attach. D). In 2014 and 2015, EPA proposed to update the performance standards and emission guidelines to cover additional, lower-emitting landfills by lowering the threshold at which controls are required to 34 metric tons of non-methane organic compounds per year. 79 Fed. Reg. 41,796, 41,811 (July 17, 2014) (Attach. E); 80 Fed. Reg. 52,100, 52,102 (Aug. 27, 2015) (Attach. F); 80 Fed. Reg. 52,162 (Aug. 27, 2015) (Attach. G). After receiving comments on the proposals, EPA issued the final Landfill Rules, both of which were effective October 28, 2016. 81 Fed. Reg. at 59,276 and 59,332.

Several waste industry groups[3] submitted a petition seeking reconsideration, new rulemaking, and an administrative stay of the Landfill Rules. Nat'l Waste & Recycling Ass'n *et al.*, Petition for Rulemaking, Reconsideration, and Administrative Stay (Oct. 27, 2016) [hereinafter "Industry Pet."] (Attach. H). The same parties re-

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[2] While the Landfill Rules regulate "landfill gas," which includes both methane and non-methane emissions, the Rules used the volume of non-methane organic compounds as a surrogate for the purpose of determining whether a landfill is subject to control requirements. 81 Fed. Reg. at 59,336.

[3] National Waste & Recycling Association, Solid Waste Association of North America, Republic Services, Inc., Waste Management, Inc., and Waste Management Disposal Services of Pennsylvania, Inc. The same parties also challenged the Landfill Rules in this Court. *Nat'l Waste & Recycling Assoc. v. EPA*, No. 16-1371 (D.C. Cir. filed Oct. 27, 2016). Petitioners here are among the environmental and public health organizations that were granted leave to intervene in support of EPA in that case.

submitted the same petition on January 30, 2017 "in recognition of the recent change in leadership at EPA." Attach. I. The petition requested reconsideration of certain aspects of the Landfill Rules that the petitioners *claimed* to be eligible under Clean Air Act section 307(d)(7)(B). Industry Pet. at 26-27 (Attach. H). The petition also identified other issues that the petitioners acknowledged were *ineligible* for reconsideration; for these the petition requests that EPA "initiate rulemaking to address certain aspects of EPA's Final Rules that were raised in comments at proposal." *Id.* at 4-5. The petition thus conceded that the latter set of issues does not qualify for mandatory reconsideration. *Id.* A cursory examination of *all* the issues subsequently relied on by Administrator Pruitt shows that they could have been—and in fact were—raised in the original comment period.

On May 5, 2017, Administrator Pruitt sent the industry groups a letter granting reconsideration of six of the issues[4] in the petition, without offering any explanation of why the Administrator concluded that those issues qualified for reconsideration under section 307(d)(7)(B). Attach. J. Nonetheless, the letter assured petitioners that "EPA intends to exercise its authority under CAA section 307(d)(7)(B) to issue a 90-day stay of the effectiveness" of both Landfill Rules in their entirety. *Id.* at 2.

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[4] 1) The use of a "Tier 4" surface emissions monitoring-based alternative; 2) the annual liquids reporting requirement; 3) the procedures and timeline for undertaking corrective action to address an exceedance; 4) overlapping applicability between the Landfill Rules and other regulations; 5) the definition of cover penetration; and 6) landfill design plan approval.

The Administrator's letter to the industry groups became public only on May 22, 2017, when the notice of administrative stay was signed and posted on the agency's website, and subsequently published. *See* 82 Fed. Reg. at 24,878-79. The Federal Register notice granted reconsideration on the same six issues listed in the letter. *Id.* The notice offered only the barest assertion of a notice failure in the underlying rulemaking for only one of those issues—the use of so-called "Tier 4" surface emissions monitoring to demonstrate that a landfill's emissions are below the 34-ton applicability threshold. *Id.* at 24,879. For the other five issues, the notice offered no explanation at all of how they met the requirements of section 307(d)(7)(B). *Id.*

Environmental and public health organizations, including Petitioners, twice demanded in writing that EPA withdraw this unlawful stay. Attachs. K, L. Administrator Pruitt declined to do so in a July 11, 2017, letter, which stated that he intended to "look broadly at the entire 2016 [Landfill Rules] during this reconsideration proceeding." Attach. M. The Administrator has submitted two proposals to extend the stay of the Landfill Rules to the Office of Management and Budget for review. Attachs. N, O. These pending proposals—like EPA's analogous proposals to extend the stay vacated in *Clean Air Council*, *see* slip op. at 5—suggest that the 90-day stay is only the first step toward a long-term suspension of the Landfill Rules.

STANDING

Compliance with the Landfill Rules will reduce air pollution exposure for Petitioners' members, and many others across the country, who live in close proximity to affected landfills. Petitioners have associational standing based on the harm to their members caused by Respondents' action suspending implementation of the Landfill Rules. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[5]

As waste decomposes, landfills emit harmful air pollution. These emissions include volatile organic compounds that contribute to ground-level ozone smog and particulate matter, which are associated with serious public health effects including asthma attacks, bronchitis, and heart attacks. 81 Fed. Reg. at 59,281. Landfills also emit numerous hazardous air pollutants, including cancer-causing pollutants. *Id.* These emissions threaten the health and welfare of communities near landfills. By 2025, the Landfill Rules are expected to reduce emissions of non-methane organic compounds by almost 2,100 metric tons per year. 81 Fed. Reg. at 59,280 and 59,335.

In addition to pollutants that cause localized health harms, landfills are also the country's "third largest source of human-related methane emissions," a potent greenhouse gas with 28 to 36 times more heat-trapping capacity over a 100-year period than carbon dioxide. 81 Fed. Reg. at 59,336. By 2025, the Landfill Rules are

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[5] *See also* Declaration of Gina Trujillo ¶¶ 4-7 (Attach. P); Declaration of Joseph O. Minott ¶¶ 3-5 (Attach. Q); Declaration of Kathryn A. Nekola ¶¶ 3-6 (Attach. R); Declaration of Sara Molyneaux ¶¶ 2-4 (Attach. S).

projected to reduce methane emissions by over 320,000 metric tons per year, in addition to over 300,000 metric tons of carbon dioxide emissions per year. 81 Fed. Reg. at 59,280 and 59,335. Combined, these reductions total approximately 8.5 million metric tons of carbon dioxide equivalent, roughly equal to one year's worth of emissions from 1.8 million passenger vehicles.[6]

The administrative stay delays the Landfill Rules' public health and climate benefits by suspending compliance obligations for the length of the current stay, and potentially for much longer if proposals to extend the stay are adopted (*see supra* at 6). Petitioners' members who live, work, and recreate near landfills covered by the Landfill Rules are exposed to landfill emissions and face increased risk of the associated health effects; the stay deprives them of the public health protections promised by the Landfill Rules. *See, e.g.*, Declaration of Craig Gooding ¶¶ 4-8 (Attach. T); Declaration of Susan Almy ¶¶ 10-13 (Attach. U); Nekola Decl. ¶¶ 19-21 (Attach. R). In addition, the health and well-being of Petitioners' members, and property and natural resources that they use, own, and enjoy, are presently being harmed by or are at risk of harm from climate change to which landfill greenhouse gas emissions contribute. *See, e.g.*, Declaration of Douglas I. Foy ¶¶ 17-20 (Attach. V); Gooding

[6] *See* U.S. EPA, Greenhouse Gas Equivalencies Calculator (updated Jan. 24, 2017), https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator.

Decl. ¶¶ 9-10 (Attach. T); Minott Decl. ¶¶ 18-22 (Attach. Q); Nekola Decl. ¶¶ 17-18 (Attach. R).

Delayed implementation of the Landfill Rules will diminish or negate the rules' public health and climate-protection benefits and exacerbate the threats to Petitioners' members' health and well-being and their use and enjoyment of their property and natural resources. This is sufficient to establish injury for standing purposes. *Sierra Club v. EPA*, 129 F.3d 137, 139 (D.C. Cir. 1997) (organization had standing to challenge delay in implementation of pollution-control measures that would benefit its members); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–85 (2000) (disrupted enjoyment of natural resources and decreased property values due to pollution concerns are injuries in fact). EPA's action is the cause of this injury to Petitioners' members; their injury is redressable by a decision of this Court vacating EPA's stay and reinstating the Landfill Rules.

ARGUMENT

I. EPA's administrative stay is unlawful.

An administrative stay under section 307(d)(7)(B) is permitted only when reconsideration is required because of a notice failure in the prior rulemaking. *Clean Air Council*, slip op. at 10. For five of the six issues on which he granted reconsideration, the Administrator failed to articulate any rationale at all for why reconsideration was required. The Administrator offered a minimal explanation for only one issue, but that explanation patently fails to meet the statutory criteria.

A. Administrative stays are unlawful absent mandatory reconsideration.

That EPA may undertake a new rulemaking to revise an existing regulation, in accordance with the procedures required by the Clean Air Act, is unchallenged. *See* 42 U.S.C. § 7607(d)(1)-(6). What the Administrator may not do is summarily stay an existing regulation while contemplating revisions to it. *Clean Air Council*, slip op. at 11-12; *see also Nat'l Family Planning & Reproductive Health Assoc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) ("an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked").

A temporary stay is permissible only in the context of a mandatory reconsideration proceeding under Clean Air Act section 307(d)(7)(B). *Clean Air Council*, slip op. at 13. Section 307(d)(7)(B) specifies the limited circumstances under which reconsideration is required:

> If the person raising an objection can demonstrate to the Administrator that it was *impracticable to raise such objection within such time* or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) *and if such objection is of central relevance to the outcome of the rule*, the Administrator shall convene a proceeding for reconsideration of the rule . . . . Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

42 U.S.C. § 7607(d)(7)(B) (emphasis added). Accordingly, reconsideration is mandatory, and a three-month stay permissible, only when both criteria are met: an

objection that was "impracticable to raise" and that is of "central relevance" to the rule. *Clean Air Council*, slip op. at 13.

The impracticability of raising an objection turns on whether the final rule is a "logical outgrowth" of the proposal—that is, where the proposed rule provided sufficient notice that stakeholders should have raised the objection during the public comment period. *North Carolina v. EPA*, 531 F.3d 896, 928–29, *modified in part on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008) (reconsideration petitioner "fail[ed] to demonstrate a statutory ground that would require reconsideration" where final agency action was a "logical outgrowth" and petitioner had "not demonstrated that it was impracticable to raise such objection within the comment period"); *see also CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1081 (D.C. Cir. 2009) ("a final rule represents a logical outgrowth where the [proposal] expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change.").

All of the issues on which Administrator Pruitt granted reconsideration were adequately noticed in the proposed rules, and therefore objections were not impracticable to raise—and in fact *were* raised—during the period for public comment.

B. The stay notice fails to justify reconsideration for five of the six issues where it was granted.

In his grant of reconsideration and stay, the Administrator failed to provide any rationale whatsoever for why five of the six issues on which he granted

reconsideration meet the requirements of section 307(d)(7)(B). 82 Fed. Reg. at 24,878-79. A court "must judge the propriety of such action solely by the grounds invoked by the agency." *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947). For five of the issues, the notice provides nothing but the unsupported statement that the statutory criteria were met. 82 Fed. Reg. at 24,878-79. This total lack of explanation fails the minimum requirements for reasoned decision-making, where the agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted). Because Administrator Pruitt provided no explanation for why reconsideration of these five issues is mandatory, a stay based on reconsideration of those issues is arbitrary, capricious, and unlawful. 42 U.S.C. § 7607(d)(9)(A).

C. Reconsideration of the surface emissions monitoring issue is not mandatory.

The one issue for which the Administrator did minimally articulate his rationale—the availability of using "Tier 4" surface emissions monitoring to demonstrate that a landfill's emissions are below the 34-ton threshold—fails to meet the requirements for reconsideration under section 307(d)(7)(B). The Administrator claims to have found two notice defects with respect to the Tier 4 monitoring option: (1) he asserts that certain wind speed restrictions were not proposed, and (2) he

asserts that industry was not on notice that the option would be available only to lower-emitting landfills. 82 Fed. Reg. at 24,879. Neither assertion is correct.

A brief explanation of the function of Tier 4 monitoring will set the context. The Landfill Rules require landfills to install a gas collection and control system if their non-methane organic compound emissions are above 34 metric tons per year. 81 Fed. Reg. at 59,278 and 59,333-34. Under the 1996 rules, whether a landfill met the previously applicable 50-ton threshold was determined using three "tiers" of emissions modelling. 61 Fed. Reg. at 9,907. The 2016 Landfill Rules added a "Tier 4" option for landfills whose modelled emissions are determined to fall between 34 and 50 metric tons per year using the three tiers of emissions modeling methods. For these landfills, the Rules add the option to use surface emissions monitoring to demonstrate that their actual emissions rate is below the threshold, and therefore that the landfill need not install controls. 81 Fed. Reg. at 59,334.

The Administrator's stay notice claimed that certain conditions on the use of Tier 4 monitoring—"limits on wind speed, the use of barriers" and "restricting the use of Tier 4 [monitoring] to landfills with ...emission rates between 34 and 50" tons per year—"were not included in the proposal." 82 Fed. Reg. at 24,879. The Administrator's claim is plainly erroneous.

1. Wind restrictions

The Landfill Rules established wind restrictions to assure that Tier 4 emissions monitoring would yield representative results. Because surface emissions

measurements can be distorted in windy conditions, the Landfill Rules require that a wind barrier must be used during Tier 4 monitoring when the average wind speed exceeds four miles per hour, or gusts are above 10 miles per hour. 81 Fed. Reg. at 59,287 and 59,344. Tier 4 measurements cannot be conducted if the average wind speed exceeds 25 miles per hour. *Id.*

EPA first gave notice of these issues in the 2014 advance notice of proposed rulemaking that preceded the proposed rulemaking. The advance notice indicated concern with how "air movement can affect whether the monitor is accurately reading the methane concentration" and solicited comment on whether surface emissions monitoring should be allowed during periods of elevated wind speed. 79 Fed. Reg. 41,771, 41,789 (July 17, 2014) (Attach. W). Due to the concern that "conducting surface emissions monitoring during windy periods may not yield readings that are representative of the emissions," in the 2014 proposed rule for new sources EPA again "requested public comment on surface monitoring procedures...such as...allowing sampling only when wind is below a certain speed." 79 Fed. Reg. at 41,822. EPA again solicited public comment on this issue in the 2015 proposed rule and considered "not allowing surface emissions monitoring when the average wind speed exceeds 5 [miles per hour]." 80 Fed. Reg. at 52,135-36. Industry stakeholders submitted comments in response to each of these requests. *See, e.g.*, Waste Management, Comments on Supplemental Proposal, at 15-16 (Oct. 26, 2015) (Attach. X).

These facts show that the Administrator's current contention that the issue of wind restrictions on the use of surface emissions monitoring is plainly wrong. Reconsideration is not required where the Agency clearly requested comment on the specific issue, and stakeholders commented on the issue, as they did here. *Clean Air Council*, slip. op. at 14.

2. Limitation to Under-50-Ton Landfills

The Administrator's stay notice claims that stakeholders were deprived of the opportunity to comment on the final Landfill Rules' decision to limit the Tier 4 monitoring option to landfills with modelled emissions in the 34 to 50 metric ton range. 82 Fed. Reg. at 24,879. This is both plainly erroneous and of no real-world impact.

The proposed rules included the Tier 4 monitoring option for all landfills with modelled emissions above 34 metric tons per year. The proposals requested "input on all aspects of implementing a new Tier 4 option." 79 Fed. Reg. at 41,791 and 41,824; *see also* 80 Fed. Reg. at 52,127-29. The 2015 proposal (80 Fed. Reg. at 52,137) also specifically asked for comment on how to harmonize these standards with another existing standard, the 2003 National Emission Standards for Hazardous Air Pollutants (NESHAP) for landfills established under section 112 of the Act. 40 C.F.R. § 63.1955. The 2003 NESHAP requirements were identical to those of the original 1996 New Source Performance Standards and Emission Guidelines. They all applied to landfills

with emissions exceeding 50 metric tons per year, and they required the same emission controls. *See* 81 Fed. Reg. at 59,334.

There is no question that industry commenters were aware of the NESHAP and its relationship to the section 111 Landfill Rules at issue in this rulemaking. In fact, Waste Management and others commented on the issue, urging consistency between the Landfill Rules and the NESHAP.[7] In response, the final Landfill Rules limited the Tier 4 option to landfills in the 34 to 50 ton range specifically to avoid any conflict with the NESHAP. 81 Fed. Reg. at 59,279 and 59,334. Because commenters recognized and actually commented upon the very issue that Administrator Pruitt identified, and because the agency response is a clearly logical outgrowth of the proposal and comments, there is no factual support for his claim that affected parties were not on notice of that issue during the original rulemakings. *See Clean Air Council*, slip op. at 23; *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 512 F.3d 696, 699-700 (D.C. Cir. 2008) (no notice violation when comments demonstrate actual notice).

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[7] *See* Waste Management 2015 Comments at 45 (citing EPA's description of the interrelationship between the proposed rules and the NESHAP and expressing concerns regarding inconsistency) (Attach. X); Waste Management, Comments on Advanced Notice of Proposed Rulemaking, at 11-12 (Sept. 15, 2014) (Attach. Y) (describing potential overlap in requirements between the performance standards and the Subpart AAAA NESHAP); *see also* Republic Services, Comments on Proposed Rulemaking, at 31 (Oct. 26, 2015) (Attach. Z) (recommending "a coordinated rule with the NESHAP Subpart AAAA and NSPS/emission guidelines to ensure a consistent approach").

Finally, Tier 4 is of limited relevance to the suite of landfill regulations. Restricting the use of Tier 4 monitoring to under-50-ton landfills has no practical effect on above-50-ton landfills—even if EPA's NSPS and emission guideline rules under section 111 allowed a landfill with modelled emissions above 50 tons to use Tier 4 and measure actual emissions, that landfill would still have to install the same controls under the section 112 NESHAP regardless of the result of the Tier 4 monitoring. Because the original section 111 standards applied to above-50-ton landfills for more than 20 years without a Tier 4 option, it is not credible to claim that Tier 4 "go[es] to the heart of the decisionmaking process," as required for a valid reconsideration. *Air Pollution Control Dist. of Jefferson Cnty. v. EPA*, 739 F.2d 1071, 1079 (6th Cir. 1984).

For these reasons, the Administrator's claim that there was a notice failure requiring reconsideration is patently meritless. Further, limiting the Tier 4 option to lower-emitting landfills is not of central relevance because it had no real-world impact on higher-emitting landfills already subject to the same requirements under the NESHAP regulations.

D. None of the remaining issues meet the requirements for mandatory reconsideration.

As noted, the Administrator gave no explanation why the five other identified issues merited reconsideration, and thus a stay based on reconsideration of those

issues is arbitrary, capricious, and unlawful. Nonetheless, a brief summary explains how any such claim would fail.

Annual Liquids Reporting. The proposed rules requested comment on whether to impose different requirements on wet landfills or landfills that add liquid to facilitate waste decomposition. 79 Fed. Reg. at 41,784 and 41,808. Industry stakeholders commented that EPA did not have enough data to justify different compliance regimes for wet landfills. Waste Management 2014 Comments at 11-12 (Attach. Y); Waste Management 2015 Comments at 43-44 (Attach. X); Republic Services 2015 Comments at 31 (Attach. Z). In response, EPA agreed that it lacked the necessary data to impose different requirements for wet landfills at this time. The final Rules' requirement that landfills annually report the quantities of added or recirculated liquids is an obvious logical outgrowth of the proposal and the comments concerning the need for more data. 81 Fed. Reg. at 59,295-96 and 59,350-51.

Corrective Action Timeline Procedures. EPA specifically requested comment on the appropriateness of a schedule for landfill owners to submit an alternative corrective action timeline after a landfill exceeds emission limits. 79 Fed. Reg. at 41,793 and 41,820; 80 Fed. Reg. at 52,126-27. In response, an industry commenter recommended a "root cause analysis and corrective action procedure" as "particularly appropriate for landfills." Republic Services 2015 Comments at 13. The final Landfill Rules adopted requirements nearly identical to that recommendation—they imposed minimal analytical requirements to determine the cause of the exceedance and how to remedy

the problem, and required submission of that analysis and timeline to the Administrator for approval only if the remedy will take longer than 120 days. 81 Fed. Reg. at 59,293-94 and 59,348-50. These requirements are a logical outgrowth of the proposals, as informed by numerous comments. *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998).

Overlapping Applicability; Definition of Cover Penetration; Design Plan Approval. As industry stakeholders themselves acknowledged, the remaining three issues do not meet the criteria for reconsideration because they "were raised in comments at proposal." Industry Pet. at 4 (Attach. H). As industry concedes, these issues do not require reconsideration, and therefore are ineligible bases for a stay, because they were noticed in the proposal and the agency received comment on them. Like the others, these three issues plainly fail to meet the criteria for mandatory reconsideration.

CONCLUSION

Because the Administrator identified no issue where reconsideration was required under section 307(d)(7)(B), his stay of the Landfill Rules was arbitrary, capricious, and contrary to law. The Court should grant the motion for summary disposition on the merits and vacate EPA's unlawful administrative stay.

Dated: August 4, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Federal Rules of Appellate Procedure 32(g)(1) and 27(d)(2)(A), that the foregoing Motion for Summary Vacatur contains 4,629 words, and thus complies with the 5,200 word limit.

This document complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond 14-point font.

Dated: August 4, 2017

/s/ Melissa J. Lynch
Melissa J. Lynch

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2017, I have served the foregoing Motion for Summary Vacatur on all registered counsel through the court's electronic filing (ECF) system.

Dated: August 4, 2017

/s/ *Melissa J. Lynch*
Melissa J. Lynch