EARTHJUSTICE

May 8, 2020

Andrew Wheeler
Administrator
Environmental Protection Agency
1101A EPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

BY FIRST CLASS MAIL AND EMAIL

Dear Administrator Wheeler:

This is a petition under Clean Air Act ("CAA" or "the Act") § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). The party submitting this petition is Sierra Club, 2101 Webster St., Ste. 1300, Oakland CA 94612, (415) 977-5500. Sierra Club requests that you reconsider certain aspects of the final action taken at 85 Fed. Reg. 13,524 (March 9, 2020), and titled "National Emission Standards for Hazardous Air Pollutants: Stationary Combustion Turbines Residual Risk and Technology Review" ("Final RTR").

I. BACKGROUND.

A. Stay of Emission Standards.

Shortly after EPA promulgated its original § 112 emission standards for stationary combustion turbines in March 2004, EPA promulgated a stay of these standards for lean premix gas-fired turbines and diffusion flame gas-fired turbines constructed after January 14, 2003. 69 Fed. Reg. 51,184, 51,185 (Aug. 18, 2004) ("2004 Stay"). EPA's "basis" for this stay was its stated intent to delist these two "subcategories" of stationary combustion turbines. *Id.* EPA claimed that, given the possible delisting, it would be "inappropriate and contrary to statutory intent" to require the operators of these units to comply with the Clean Air Act and reduce their emissions of hazardous air pollutants before the agency made a final decision on delisting. *Id.*

That stay was unlawful for at least two reasons. First, EPA lacks authority to stay Clean Air Act emission standards except for a period "not to exceed three

months" pending reconsideration proceedings under 42 U.S.C. § 7607(d)(7)(B). EPA's 2004 Stay was not a stay pending reconsideration proceedings and, in any event, far exceeded three months. Second, because EPA lacks statutory authority to delist subcategories of sources, EPA's stated basis for the stay – that it intended to delist subcategories of the stationary combustion turbines category – contravened the Clean Air Act.

In 2007, the D.C. Circuit confirmed that EPA lacks statutory authority to delist subcategories of sources. *NRDC v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007). The Court's decision completely eliminated EPA's stated rationale for the stay. Because EPA lacks statutory authority to delist subcategories, there was no longer – even arguably – any basis for leaving in place a stay so that EPA could take such action. EPA should have eliminated the stay immediately. Instead, EPA chose to leave the stay in place for another 13 years, unlawfully and deliberately exposing the people EPA was created to protect to uncontrolled emissions of the hazardous air pollutants § 112 of the Clean Air Act was enacted to protect them against.

In its 2019 proposed residual risk and technology rule for stationary combustion turbines, EPA belatedly recognized that the D.C. Circuit had eliminated the basis for the 2004 Stay twelve years earlier in the *NRDC* decision. 84 Fed. Reg. 15,046, 15,067 (Apr. 12, 2019) ("Proposed RTR"). It proposed to remove the stay. *Id.* EPA received comments supporting this proposal and explaining that the 2004 Stay must be removed because it is flatly unlawful and because EPA no longer has even a pretext for leaving it in place. EPA-HQ-OAR-2017-0688-0103, Comments of California Communities Against Toxics, *et al.* ("Comments"), at 67-68.

In the Final RTR, EPA reverses course. Instead of eliminating the 2004 Stay, as it proposed, EPA now states it is "not finalizing the proposed removal of the stay of the effectiveness of the standards for new lean premix and diffusion flame gas-fired turbines at this time." 85 Fed. Reg. at 13,527. EPA claims it "received numerous comments on the proposed stay indicating that 180 days is not sufficient time for owners and operators to conduct all of the activities that are needed for their turbines to come into compliance with the standards, which include the design, procurement, and installation of emission controls and parametric monitoring equipment that can fit within existing sites (as compared to new facilities where the controls are incorporated into the facility design), performance testing, and implementation of procedures for monitoring, recordkeeping, and reporting" and that "[m]ore time is needed to review these comments on the removal of the stay." *Id.* EPA also argues that it has now received a petition to

delist the entire stationary combustion turbines category and believes "it would be reasonable to delay taking final action on the stay until we have made a determination regarding the source category delisting petition, so that turbine owners and operators do not make expenditures on emission controls and performance testing that will not be required if the source category is delisted." *Id.* Finally, EPA argues it "has no legal obligation to lift the stay in this RTR rulemaking." *Id.*

B. Failure To Set Limits For Unregulated Hazardous Air Pollutants.

EPA's emission standards for stationary combustion turbines lack limits for many of the hazardous air pollutants that stationary combustion turbines emit, including at a minimum metals (such as arsenic, cadmium, chromium, lead, and mercury) and acid gases (such as hydrogen chloride). EPA-HQ-OAR-2017-0688-0131, Residual Risk Assessment for the Stationary Combustion Turbines Source Category in Support of the 2020 Risk and Technology Review Final Rule, at 35 (Table 3.1-1). *See* Comments at 70-74. As explained in the Comments, EPA has a clear statutory obligation to set limits for each of the hazardous air pollutants that stationary combustion turbines emit and, because EPA's standards for stationary combustion turbines lack limits on many of these pollutants, the agency must add these limits when it promulgates the RTR. Comments at 70-73. In its proposed RTR, however, EPA simply ignored that its emission standards for stationary combustion turbines lack limits for many of the hazardous air pollutants that stationary combustion turbines emit, and it failed to propose limits for these pollutants. *Id.* at 73.

In the Response to Comments document accompanying the final RTR, EPA now refuses to set limits for the unregulated hazardous air pollutants. EPA-HQ-OAR-2017-0688-0139, National Emission Standards for Hazardous Air Pollutants from Stationary Combustion Turbines (40 CFR part 63, subpart YYYY) Residual Risk and Technology Review, Final Amendments ("RTC") at 60-61. EPA claims that "[n]othing in CAA section 112(d)(6) directs the Agency, as part of or in conjunction with the mandatory 8-year technology review, to develop new emission standards to address HAP or emission points for which standards were not previously promulgated." RTC at 61. EPA further claims that, "[a]s shown by the statutory text and the structure of CAA section 112, CAA section 112(d)(6) does not impose upon the Agency any obligation to promulgate emission standards for previously unregulated emissions." *Id.*

II. GROUNDS FOR OBJECTION.

A. EPA's New Stay Is Unlawful.

Previously, EPA stayed its standards so that it could consider delisting a portion of the stationary combustion turbines category, an action EPA now admits would be unlawful. 84 Fed. Reg. at 15,067. Now, EPA issues a stay for entirely different reasons: (1) that it wishes to consider comments urging it to give industry more time to comply; and (2) that it wishes to consider a petition to delist the entire stationary combustion turbines source category. 85 Fed. Reg. at 13,527.

EPA presumes that after leaving a blatantly unlawful stay in place for more than fifteen years, and after admitting it has known since 2007 that it had no basis to retain that stay, it can now issue a new and equally unlawful stay. EPA further presumes it can do so without ever identifying any statutory authority for its action. EPA's presumption is contemptuous of the Clean Air Act, the courts which have now repeatedly addressed and rejected EPA's attempts to abuse its limited stay authority, and the people who are being deprived of Clean Air Act protections against emissions of listed hazardous air pollutants by the agency's unlawful actions.

As explained in the Comments, EPA lacks statutory authority to stay Clean Air Act emission standards except for a period "not to exceed three months" pending reconsideration proceedings. Comments at 68 (quoting 42 U.S.C. § 7607(d)(7)(B)). Just as EPA lacked statutory authority to stay its standards while considering a partial delisting, it lacks authority to stay its standards while considering comments and/or a new petition for full delisting. *See, e.g.*, *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) ("[I]t is 'axiomatic' that 'administrative agencies may act only pursuant to authority delegated to them by Congress.'""); *NRDC v. Reilly*, 976 F.2d 36, 41 (holding that a "general grant of rulemaking power . . . [cannot] trump the specific provisions of the act"); *NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (rejecting the contention that the Department of Energy had "inherent power" to suspend a duly promulgated rule where no statute conferred such authority and contrasting the Energy Policy and Conservation Act with the reconsideration provision in the Clean Air Act at 42 U.S.C. § 7607(d)(7)(B)); *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1061 (D.C. Cir. 2018) (finding 20-month stay of final Clean Air Act rule during reconsideration to be unlawful and arbitrary).

Further, EPA does not even purport to identify any statutory authority for its stay. It simply advances the wholly irrelevant claims that it wishes to consider comments about whether industry needs more time to comply after the unlawful stay is lifted and that it wishes to consider a petition to delist the entire stationary combustion turbine category. 85 Fed. Reg. at 13,527. EPA does not have statutory authority to stay standards for these reasons, nor does it claim to.

EPA appears to believe that it does not have to identify any statutory authority for its stay. The agency attempts to portray its issuance of a new stay as, instead, a decision to merely leave in place its prior stay. *Id.* Although EPA acknowledges that it has no valid basis for that stay – and has known that it has no valid basis for that stay at least since the *NRDC* decision in 2007 – the agency claims it has no obligation to correct even blatant legal defects in the rule in its RTR rulemaking. *Id.*

EPA's assumption is wrong for at least two reasons. First, the stay EPA has issued in its RTR is a new stay. EPA does not claim, and cannot possibly claim, that it is still staying the standards to consider a 2004 petition to delist part of the stationary combustion turbines category. EPA acknowledges that such partial delisting would be flatly unlawful. 85 Fed. Reg. at 13,527. EPA's consideration of the 2004 petition is therefore at an end, as must be any stay pending that consideration. EPA is now issuing a different stay, for completely different reasons. If EPA did not know it before, the agency is certainly aware now that it has only such authority to issue stays as it is granted by statute and that it must identify the statutory authority for any stay it wishes to issue. EPA has no statutory authority for its new stay, and it cannot identify any.

Second, even assuming that EPA is merely retaining its existing stay – an assumption that cannot be reconciled with EPA's stated basis for the stay – EPA is wrong that the Clean Air Act does not require it to fix legal defects when it promulgates RTRs. Section 112(d)(6) requires EPA to review its § 112 rules every eight years and revise them "as necessary." 42 U.S.C. § 7412(d)(6). It is "necessary" that EPA's Clean Air Act rules comply with the Clean Air Act. As The D.C. Circuit recently confirmed, "[t]he section 112(d)(6) requirement that EPA, when it undertakes its eight-year review, revise emission standards 'as necessary' means that EPA must conform them to the basic requisites of 'emission standards' under section 112, including by setting controls on previously unaddressed hazardous air pollutants." *Louisiana Environmental Action Network v. EPA*, 955 F.3d 1088, 1098 (D.C. Cir. 2020) (emphasis added).

Clean Air Act § 112(d)(10) unambiguously provides "emission standards or other regulations promulgated under this subsection shall be effective upon promulgation." 42 U.S.C. § 7412(d)(10). Because of EPA's stay, its emission standards are not "effective" with respect to sources in the stationary combustion turbines category. *Id.* Further, § 112(i)(3)(A) provides "[a]fter the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation except, in the case of an existing source, the Administrator shall establish a compliance date or dates for each category or subcategory of existing sources, which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard, except as provided in subparagraph (B) and paragraphs (4) through (8)." 42 U.S.C. § 7412(i)(3)(A). EPA's stay allows persons to operate stationary combustion turbines in violation of its emission standards.

The requirements that § 112 rules be effective upon promulgation and that sources may not operate in violation of them are "basic requisites of 'emission standards' under section 112." *Louisiana Environmental Action Network*, 955 F.3d at 1098. Contrary to EPA's claim, § 112(d)(6) does require it to conform its emission standards for stationary combustion turbines with these requirements by eliminating the unlawful stay.

B. EPA's Refusal To Set Limits For Unregulated Hazardous Air Pollutants Is Unlawful.

Contrary to EPA's new claims, § 112(d)(6) unambiguously requires it to add limits for any hazardous air pollutants that are emitted by a source category but for which the agency has not set limits. *Louisiana Environmental Action Network*, 955 F.3d at 1096 ("We read the statutory text to require EPA during its section 112(d)(6) review to establish any missing limits."). As the D.C. Circuit explained:

> the core demand of section 112 is that EPA promulgate emission standards for every source category addressing all listed hazardous air pollutants. And Congress established deadlines to make clear that time is of the essence. We conclude that when EPA reviews an existing standard that fails to address many of the listed air toxics the source category emits, adding limits for those overlooked toxics is a "necessary" revision under section 112(d)(6).

Id. at 1097. Under the plain meaning of the Clean Air Act, EPA's refusal to set limits for the unregulated hazardous emissions from stationary combustion turbines is unlawful.

III. RECONSIDERATION REQUIRED.

Both EPA's stay and EPA's arguments for issuing it (or, in the alternative, for retaining and extending the 2004 Stay) are newly minted in the agency's Final RTR. Accordingly it was "impracticable" to raise objections to them during the public comment period on the Proposed RTR. 42 U.S.C. § 7607(d)(7)(B). The objections raised above go directly to EPA's authority to issue the stay (or in the alternative to retain and extend the 2004 Stay) and EPA's rationale for doing so. They are therefore of "central relevance." *Id.* Accordingly, EPA must convene proceedings to reconsider them and provide the public an opportunity to comment on them. *Id.*

Similarly, EPA's refusal to set limits for the unregulated hazardous air pollutants emitted by stationary combustion turbines and the agency's rationale for that refusal both appear for the first time in the RTC accompanying the Final RTR. Accordingly, it was "impracticable" to raise objections to them during the public comment period on the Proposed RTR. *Id.* Because the objections raised above go directly to the lawfulness of EPA's emission standards and the RTR, they are of "central relevance." *Id.* Accordingly, EPA must convene proceedings to reconsider them and provide the public an opportunity to comment on them.

Sierra Club submits this reconsideration as a precaution. Although EPA's failure to allow for public comment on the stay and its rationale for the stay and on its refusal to set limits for unregulated hazardous air pollutants and its rationale for that refusal require the agency to convene reconsideration proceedings, Sierra Club reserves the right to seek immediate judicial review of both the stay and EPA's refusal to set limits for the unregulated hazardous air pollutants without having to wait for EPA's decision on reconsideration.

Sincerely,

_____/S/_____
James S. Pew
Earthjustice
Attorney for Sierra Club