On Monday, the D.C. Circuit dealt a setback to Scott Pruitt's deregulation efforts in *Clean Air Council v. EPA*. The case involved a tricky procedural issue. But the substance was simple: EPA, under Pruitt, had abused a reconsideration procedure under the Clean Air Act to stay a regulation for 90 days, when it had no power to do so. Indeed, its stated reason for doing so was purely pretextual.

The regulation in question involved control of methane emissions for new and modified oil and gas facilities. The rule had become final toward the end of the Obama Administration. Industry advocates filed a petition for reconsideration. It's important to understand the nature of the procedure in question. Under section 307 of the statute, parties seeking judicial review of a rule can only raise issues that were brought before EPA during the rulemaking process. If they want to raise an issue that couldn't have been raised earlier – say because of newly discovered facts – they can file a petition for reconsideration before the agency. The agency can issue a stay of such a regulation for ninety days, which is what EPA did to portions of the methane rule.

Pruitt's EPA identified several issues that — according to it (and the industry) — could not have been raised during the original proceeding. The reason supposedly was that these were surprise features of the final rule, which industry could not have commented on earlier because they were unforeseeable.

The excuses were the kinds of things that might sound o.k. on TV but couldn't stand up in court. Why? Because industry had not only foreseen them, but *commented on them*, in the original rulemaking. As the court said:

> "The administrative record thus makes clear that industry groups had ample opportunity to comment on all four issues on which EPA granted reconsideration, and indeed, that in several instances the agency incorporated those comments directly into the final rule."

Thus, it was clear that EPA was abusing the section 307 procedure to do something else, something it lacked the power to do: postponing the effectiveness of the methane rule without going through the rulemaking process.

The trickier question was whether the court had jurisdiction to hear this issue. Normally, a court has to wait until a final decision is reached before it can review any of the issues that arose earlier in the rulemaking. EPA argued that the stay was just such an unreviewable issue, and one judge on the D.C. Circuit agreed. The other two judges rather briskly dismissed the issue, finding the stay reviewable because it changed the "legal rights and obligations" of the industry. It also had the effect of extinguishing (at least temporarily) the ability of third parties to bring citizen suits against companies violating the rule. From the point of view of industry, the stay they requested might have been all gain and no pain, as the dissent argued, but not so from the perspective of the public.

As the dissent pointed out, the result of the court's ruling was that it was able to review whether the agency had a proper basis for initiating a reconsideration proceeding, even though *that* decision would not otherwise have been reviewable.

But this is not really so unusual. Interim rulings in litigation are generally unreviewable, but they can be brought up for review when they're connected with a preliminary injunction or stay.

Moreover, as this case itself made clear, what EPA really wanted was unreviewable discretion to suspend any regulation for 90 days whenever it wanted to, regardless of how long the regulation had been in effect, provided only that someone file a petition asking it do so. Moreover, the agency also claimed an inherent power to suspend rules at well, even outside of section 307, and without citing any delegation of power from Congress to take such an action.

The agency might have had a better chance of avoiding judicial review if it had been operating in good faith. But it clearly had not done so. Instead, it was transparently abusing its authority under section 307 as a shortcut to suspending the rule for as long as it took to repeal it. What was involved, then, was not merely a technical issue of the court's jurisdiction, but the EPA's compliance with the rule of law.

What will the government do next? It seems unlikely that rehearing by the full D.C. Circuit would help it. It could ask the Supreme Court to review the D.C.court's decision. But this is unlikely to be helpful since the Court wouldn't hear the case until sometime next fall, long after EPA's stay expired. Alternatively it could ask the Supreme Court to stay the D.C. circuit's decision. But this is a fairly routine case, and if the Court granted a stay here, it would be encouraging stay requests by the dozens annually. Yet, if the government does nothing, the majority opinion will become binding law in the D.C. Circuit. As a practical matter the ruling would have nationwide effect, because the D.C. Circuit hears nearly all cases involving rulemakings under the Clean Air Act.

In any event, the D.C. Circuit has clearly sent a message to Scott Pruitt, if not the entire

Trump Administration. The Administration is going to be held to the normal requirements of the Administrative Procedure Act, and it had better be prepared to justify its actions in terms that can hold up to scrutiny. Unlike Fox and Friends, where Pruitt excels, the courts are not a forum in which superficial talking points are be enough to carry the day.