ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DENKA PERFORMANCE ELASTOMER LLC,	)	
Petitioner,	)	
v.	)	**No. 24-1135**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL REGAN, Administrator, United States Environmental Protection Agency,	)	
Respondents.	)	

PETITION FOR PANEL REHEARING AND REHEARING EN BANC ON ORDER DENYING EMERGENCY MOTION FOR STAY PENDING REVIEW

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RULE 28 CERTIFICATE OF PARTIES AND RELATED CASES

Pursuant to D.C. Circuit Rule 28, Petitioner Denka Performance Elastomer LLC ("DPE") certifies as follows:

A. Parties and Amici

Petitioner: Denka Performance Elastomer LLC.

Respondents: United States Environmental Protection Agency and Michael S. Regan, as Administrator for the United States Environmental Protection Agency.

Respondent-Intervenors: Concerned Citizens of St. John, Rise St. James Louisiana, Louisiana Environmental Action Network, Texas Environmental Justice Advocacy Services, Air Alliance Houston, California Communities Against Toxics, Environmental Defense Fund, Environmental Integrity Project, and Sierra Club.

Amici: None as of the time of filing of this Petition.

B. Rule Under Review

DPE has petitioned the Court to review EPA's final rule entitled "New Source Performance Standards for the Synthetic Organic Chemical Manufacturing Industry and National Emission Standards for Hazardous Air Pollutants for the Synthetic Organic Chemical Manufacturing Industry and Group I & II Polymers and Resins Industry," published in the Federal Register at 89 Fed. Reg. 42,932 on May 16, 2024.

C. Related Cases

There are no related cases pending in this Court. However, there is a related case pending in the United States District Court for the Eastern District of Louisiana captioned *United States v. Denka Performance Elastomer LLC*, No. 2:23-cv-00735 (E.D. La.) ("Section 303 Litigation"). In the Section 303 Litigation, filed on February 28, 2023, under EPA's emergency authority under Section 303 of the Clean Air Act, EPA alleges that the Facility's chloroprene emissions are causing an "imminent and substantial endangerment," and EPA seeks an injunction requiring DPE to shut down the Facility immediately and not resume production until DPE can demonstrate its ability to maintain chloroprene concentrations below 0.2 $\mu g/m^3$ or 0.3 $\mu g/m^3$ depending on the monitoring method. In the Section 303 Litigation, the district court has indicated its intent to assess the validity of the scientific evidence underlying EPA's claims at trial. *United States v. Denka Performance Elastomer LLC*, No. 2:23-cv-00735 (E.D. La.), R. Doc. 90 at 18 ("Although the Court has dismissed Denka's claims under the APA, Denka may still challenge the science behind the United States' Section 303 action.").

On February 12, 2024, after having demanded expedited litigation on the alleged "emergency" for nearly a year, EPA moved for an indefinite continuance of the March 2024 trial date in the Section 303 Litigation. To justify the continuance, EPA pointed to the then-expected issuance of the Rule by March 29, 2024. On

February 16, 2024, the district court granted EPA's unopposed continuance in the Section 303 Litigation, directing the parties to advise the court when the Final Rule is published after which the Court would set a status conference to discuss a new trial date. *United States v. Denka Performance Elastomer LLC*, No. 2:23-cv-00735 (E.D. La.), R. Doc. 169.

On May 28, 2024, the parties filed with the district court a joint notice of publication of the Final Rule. The district court has set a status conference for July 17, 2024.

Date: July 5, 2024

/s/ David A. Super
David A. Super

Counsel for Petitioner
Denka Performance Elastomer LLC

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Petitioner Denka Performance Elastomer LLC ("DPE") files the following statement:

DPE is a privately owned limited liability company formed under the laws of the State of Delaware, headquartered in LaPlace, Louisiana, and authorized to do business in the State of Louisiana. DPE owns and operates a manufacturing facility in LaPlace, Louisiana that produces Neoprene by utilizing chloroprene, a chemical regulated under the EPA final rule at issue in this appeal. DPE's membership interests are held by Denka USA LLC (whose ultimate parent is Denka Company Limited) and Diana Elastomers, Inc. (whose ultimate parent is Mitsui & Co., Ltd). Denka Company Limited and Mitsui & Co. Ltd. are each Japanese companies listed on the Tokyo Stock Exchange.

Date: July 5, 2024

/s/ David A. Super
David A. Super

Counsel for Petitioner
Denka Performance Elastomer LLC

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I. INTRODUCTION AND RULE 35(b) STATEMENT

In light of the United States Supreme Court's June 27 decision to grant a stay pending review in *Ohio v. EPA*, 603 U.S. ----, ---- S.Ct. ----, 2024 WL 3187768 (June 27, 2024), Denka Performance Elastomer LLC ("DPE") respectfully seeks Panel rehearing and rehearing en banc of this Court's Order of June 26 denying DPE's Emergency Motion for Stay Pending Review ("Stay Motion") (Doc. #2061788) in this action.

Panel rehearing and an en banc determination are warranted because the Panel's order denying the stay motion conflicts with the Supreme Court's analysis in *Ohio*, and reconsideration by the Panel or consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions. In addition, this Petition raises a question of exceptional importance regarding the proper standard for deciding a stay pending review of an agency rule.

DPE's Stay Motion sought a stay of the 90-day compliance deadline set forth in a rule ("Rule") (Stay Motion Ex. A) promulgated by the Environmental Protection Agency ("EPA") under the Clean Air Act ("CAA"). In *Ohio*, the Supreme Court granted a stay pending review of another CAA rule issued by EPA, after this Court had denied a motion for a stay pending review of the same rule in that case.

In *Ohio*, by granting a stay motion that this Court had previously denied, the Supreme Court made it clear that this Court had not properly applied the factors that

are relevant for determining whether a stay pending review is justified.[1] In granting the stay in *Ohio*, the Supreme Court issued a written opinion to explain the proper application of the stay factors, which is the first time the Supreme Court has issued an opinion to explain its reasoning for issuing a stay pending review of an agency rule. In *Ohio*, the Court made it clear that, in a case where there are strong arguments about the harms and equities on both sides, the determination of whether to grant a stay pending review "turns on the merits and the question who is likely to prevail at the end of this litigation." 2024 WL 3187768, at *7. The Supreme Court also emphasized that, in determining whether a petitioner is likely to prevail on the merits, a court must focus on whether an agency has provided a "satisfactory explanation" for its action that is "reasonable and reasonably explained" and shown that there is a "rational connection between the facts found and the choice made.'" *Id.* at *7-8 (quoting cases). These principles are highly relevant to DPE's Stay Motion and, DPE submits, warrant rehearing of the Court's denial of that Motion.

From DPE's perspective, the stakes here could not be higher: The Rule requires DPE to shut down in 90 days if it cannot make major capital investments to

[1] As far as DPE has been able to determine, this Court has not granted a stay pending review of any EPA rule since 2011. *See* Order No. 11-1302 (D.C. Circuit, Dec. 30, 2011). Since 2016, however, the Supreme Court has granted motions for stays pending review of two EPA rules under the CAA after this Court had denied them. In addition to the Supreme Court's decision in *Ohio*, the Court also granted a stay pending review of EPA's "Clean Power Plan" on February 9, 2016. *See West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016) (Order).

install new emission control equipment by then—which EPA acknowledges is impossible. Thus, without relief from the 90-day deadline, the DPE Facility will be shut down, likely permanently, costing the livelihoods of roughly 250 employees and their families. Moreover, EPA has seen fit to direct these catastrophic consequences solely upon DPE, despite expressly finding that other facilities subject to the Rule—*which all have two years to comply with virtually identical requirements*—pose *greater* risk than the DPE's Facility. In so doing, EPA has violated the same principles of administrative law that the Supreme Court emphasized in *Ohio*, because it utterly failed to provide even a plausible explanation for treating DPE differently than many other similarly situated parties, much less "a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Id.*, at *7 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). Thus, in light of *Ohio*, DPE respectfully requests that the Panel reconsider its denial of DPE's Stay Motion and prevent EPA from closing down DPE's Facility before DPE can get its day in court.[2]

[2] On April 19, 2024, DPE submitted to the Louisiana Department of Environmental Quality ("LDEQ") a request to extend the compliance period to two years. On June 27, 2024, LDEQ granted DPE's Extension Request. However, EPA has taken the position that "[a]ny purported compliance extension granted by a state to Denka would be ineffectual." EPA Opp. (Doc. #2059123) at 7-8, n.2. Thus, while DPE disputes EPA's position on the validity of the LDEQ extension request, that extension has no bearing on the need for a stay from this Court.

II. ARGUMENT

A. In *Ohio,* The Supreme Court Held That, In A Case Such As This One, The Determination Of Whether To Grant A Stay "turns on the merits and the question who is likely to prevail at the end of this litigation."

In *Ohio*, several states and industry groups are challenging EPA's "Good Neighbor Rule," which requires power plants and other industrial sources in 23 states to reduce their emissions to ensure that they do not cause air quality problems in other "downwind states." *Ohio*, 2024 WL 3187768, at *4-5. After submitting their petitions for review, the petitioners in *Ohio* moved for a stay pending review from this Court, but the Court denied the stay, issuing the standard one-sentence explanation (as it did in the instant case) that the petitioners have "not satisfied the stringent requirements for a stay pending court review." *See, e.g.*, *Utah v. EPA*, No. 23-1157 (D.C. Cir.), Doc. #2021268. The petitioners in *Ohio* then sought a stay from the Supreme Court, which granted the stay and explained its reasoning for doing so.

The Supreme Court confirmed that, in deciding whether to issue a stay, it applies the same "sound principles" as other federal courts:

> (1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies.

Ohio, 2024 WL 3187768, at *6 (citing *Nken* v. *Holder*, 556 U.S. 418, 434 (2009)). After summarizing the parties' arguments about the harms and equities, the Court

concluded that "both sides have strong arguments with respect to the latter three *Nken* factors." *Id.* at *7. It went on to say that "[b]ecause each side has strong arguments about the harms they face and equities involved, our resolution of these stay requests ultimately turns on the merits and the question who is likely to prevail at the end of this litigation. *Id.* (citing *Nken*, 556 U.S. at 434; *Labrador v. Poe*, ---- U.S. ----, 144 S.Ct. 921, 930-31 (2024)).

B. Based On The Same Administrative Law Principles At Issue In This Case, The Supreme Court Found That The *Ohio* Petitioners Are Likely To Prevail On The Argument That EPA's Good Neighbor Rule Is Arbitrary And Capricious.

Turning to the likelihood of success analysis, the Court considered the same fundamental administrative law principles and cases that DPE discussed in its Stay Motion and concluded the *Ohio* petitioners are likely to prevail on the argument that the Good Neighbor Rule is arbitrary and capricious. *Id.* at *7-8. The Supreme Court started its analysis by emphasizing that "[a]n agency action qualifies as 'arbitrary' or 'capricious' if it is not 'reasonable and reasonably explained.'" *Id.* at *7 (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)). The Court then confirmed that, to justify a rule, an agency must provide in the administrative record "a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Id.* (quoting *Motor Vehicle Mfrs. Assn.,* 463 U.S. at 43). The Court further observed that "an agency cannot simply ignore 'an important aspect of the problem.'" *Id.*

After pointing out EPA's failure to explain a key provision in the Good Neighbor Rule, the Supreme Court found that the petitioners "are likely to prevail on their argument that EPA's final rule was not 'reasonably explained,'" *id.* at *8 (quoting *Prometheus Radio Project*, 592 U.S. at 423), that "the agency failed to supply 'a satisfactory explanation for its action[,]'" *id.* (quoting *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43), and that EPA "instead ignored 'an important aspect of the problem' before it." *Id.* Each of those conclusions applies with equal or greater force here.

C. For The Same Reason Petitioners In *Ohio* Are Likely To Prevail On The Merits, It Is Highly Likely That DPE Will Prevail On The Argument That The 90-Day Deadline For DPE Is Arbitrary And Capricious.

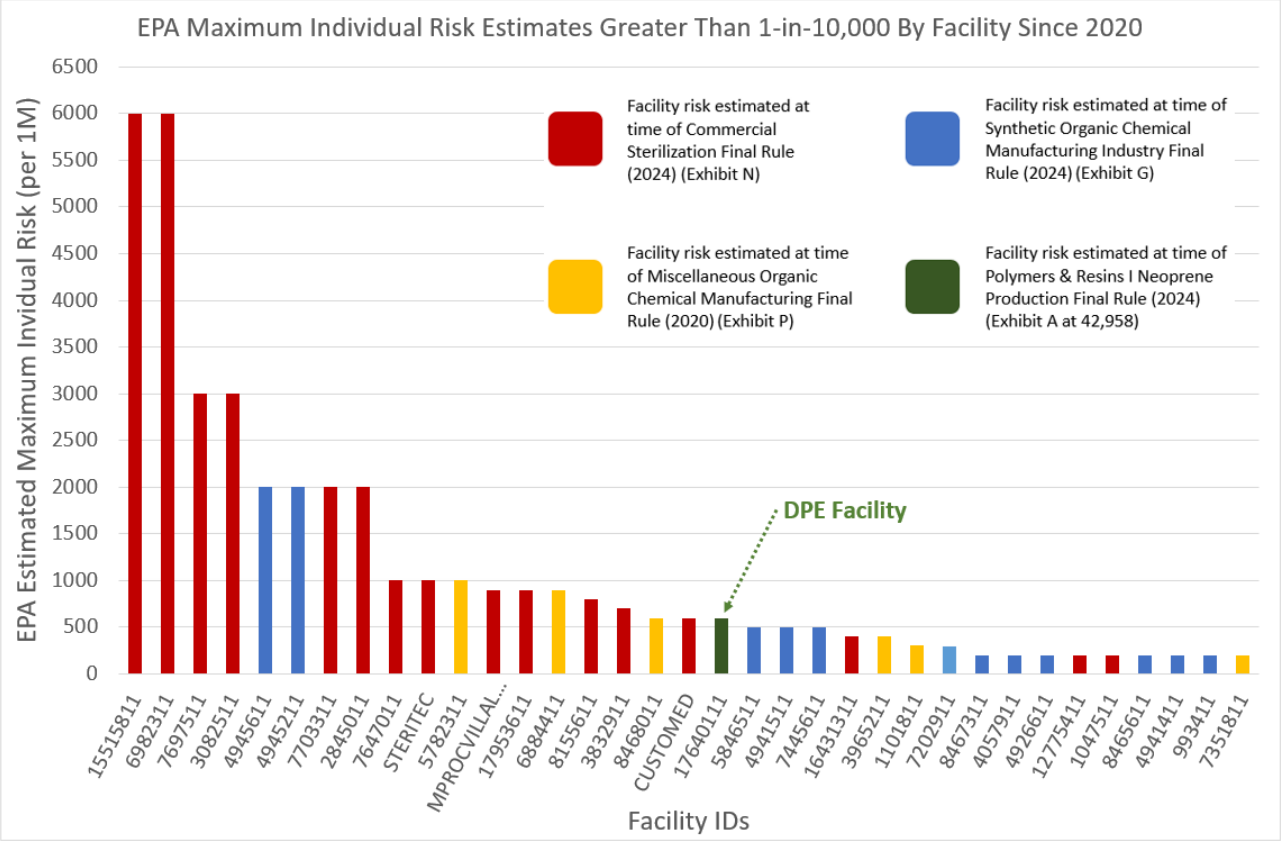
It is hard to imagine a regulatory requirement that is more arbitrary and capricious than the 90-day deadline that DPE asks this Court to stay. EPA has given DPE only 90 days to come into compliance when it has given all other similarly situated facilities two years to do the same. The Court has repeatedly said that agencies must treat like cases alike unless they provide a reasoned explanation based on substantial evidence in the record to justify the disparate treatment. *See* Stay Motion at 9-10, 17-18 (citing multiple cases, including *Steger v. Def. Investigative Serv. Dep't of Def.*, 717 F.2d 1402, 1406 (D.C. Cir. 1983) (An agency "cannot, despite its considerable discretion, treat similar situations dissimilarly, and, indeed, can be said to be at its most arbitrary when it does so.")).

EPA does not dispute that it has treated DPE differently from all other similarly situated parties. Thus, the question before this Court is precisely the same as the question in *Ohio*—whether EPA has provided a "satisfactory explanation" for its action that is "reasonable and reasonably explained" and shown that there is a "rational connection between the facts found and the choice made.'" *Ohio*, 2024 WL 3187768, at *7 (quoting *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43).

In *Ohio*, the decision turned on whether EPA had provided such an explanation for a "severability provision" that it had included in the rule at issue. Here, this Court's decision turns on whether EPA has provided such an explanation for its disparate treatment of DPE. As this Court has explained, "[w]here an agency applies different standards to similarly situated entities and fails to support this disparate treatment with *a reasoned explanation and substantial evidence in the record*, its action is arbitrary and capricious and cannot be upheld." *Burlington Northern & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (citation omitted) (emphasis added).

EPA has admitted that it has "singled out" DPE to require it to meet the undisputedly impossible task of complying with the Rule's requirements in only 90 days, when every other facility subject to the Rule, including those posing greater risks, have been given two years. *See* Stay Motion at 14-18. EPA has never done this in the nearly 35-year history of the current version of Section 112. *Id.*; Reply at

4-5, 8-10. Indeed, in just the past four years, in rules issued under the same statutory authority, EPA has provided two-year compliance deadlines in rulemaking to at least sixteen facilities (including several covered by this Rule) with risk levels higher (and in many cases substantially higher) than EPA alleges for DPE's Facility. *See* Stay Motion at 15-18.



Here, EPA's only purported "explanation" for the disparate treatment of DPE is one sentence in the 136-page Preamble to the Rule referring to a purported "finding" of "imminent and substantial endangerment" that EPA made in an enforcement action (the still-pending "Section 303 Litigation" discussed above as a

related case) against DPE.[3] EPA inexplicably claims to have made this undocumented "finding" two months *before* it issued the Proposed Rule, in which EPA proposed to give DPE (like every other facility) two years to implement the Rule's requirements, completely undermining any notion of an alleged "imminent endangerment." Stay Motion at 5, 15-16. As discussed in the Stay Motion—and left completely unrebutted in EPA's Opposition—the record suggests that EPA's only reason for cutting the compliance period from two years to 90 days was to address an argument that DPE made, after the Proposed Rule was issued, in summary judgment briefing. *See* Stay Motion at 3-4.

The administrative record contains no documentation of—let alone analysis or evidence supporting—EPA's purported "finding" of "imminent and substantial

[3] Under the CAA, EPA can impose a 90-day deadline for facilities causing an "imminent endangerment," but EPA has never before alleged (let alone found) that a miniscule increase in lifetime cancer risk is an "imminent endangerment," and here does so only for DPE, not for other facilities undisputedly posing a higher cancer risk. After the Supreme Court's recent decision in *Loper Bright*, the question of whether emissions from DPE's Facility constitute an "imminent endangerment" is a question that requires the Court to exercise its independent judgment to answer. *Loper Bright Enterprises v. Raimondo*, 603 U.S. ----, ---- S.Ct. ----, 2024 WL 3208360 (June 28, 2024) ("[C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."). DPE is confident that, under the CAA, a 0.0017 percent increase in lifetime cancer risk does not present an "imminent endangerment." Because emissions from DPE's Facility, like emissions from the other sixteen facilities with higher estimated risk levels, do not constitute an "imminent endangerment," setting different compliance deadlines without reasoned explanation is a fundamentally arbitrary and capricious action.

endangerment." Stay Motion at 7-8, 11-14; Reply at 10-12. There is no factual *evidence* whatsoever in the administrative record to support EPA's disparate treatment of DPE. *Id.*; EPA Opp. at 14, n.4 (EPA asserting "the *existence* of [the] endangerment action" is enough) (emphasis added).

In the Opposition brief, EPA's litigation counsel tried to expand on EPA's single sentence from the Rule by asserting that "EPA investigated, and, on the Agency's behalf, the United States commenced a civil action alleging that Denka's chloroprene emissions present an imminent and substantial endangerment." EPA Opp. at 11. But even litigation counsel failed to point to a single document substantiating EPA's purported "finding" or "investigation" *anywhere*, let alone in the administrative rulemaking record. EPA's failure to point to *anything* in the administrative record to support its purported "finding" leaves DPE and this Court with no ability to confirm its existence, let alone scrutinize it. EPA's failure of explanation violates the fundamental requirements of *Ohio* and this Court's precedent. *Ohio*, 2024 WL 3187768, at *7 (the administrative record must contain "'a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'") (quoting *Motor Vehicles Mfrs. Assn.*, 463 U.S. at 52); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983) ("The final rule must be based entirely on material that has 'been placed in the docket as of the date of . . . promulgation,' and the material in

the docket is the exclusive record for judicial review.") (citing 42 U.S.C. § 7607(d)(6)(C), (7)(A)). At the very least, EPA was required to explain *somewhere* in the administrative record what facts and circumstances make the DPE Facility somehow different from the sixteen facilities posing higher risks that still received two-year compliance deadlines. Stay Motion at 15-16 (discussing chart).

In its Opposition, EPA argued that it "reasonably required [DPE] to submit an extension request" to be sure that DPE would take additional steps to "protect the public from imminent endangerment" during the two-year compliance period. EPA Opp. at 10-14. But in every rulemaking like this one, EPA has provided compliance periods longer than 90 days (typically two years) without requiring any facility to take additional steps during the compliance period to protect the public from imminent endangerment, even in rules where the regulated facilities posed cancer risks much higher than those allegedly posed by DPE's Facility—and just as "imminent."

Here, EPA's disparate treatment of DPE is obvious: In a 136-page preamble, the Rule offers not a single word to explain *why DPE's facility poses an imminent endangerment* while facilities posing up to ten-times higher (and equally non-imminent) risk than the DPE Facility do not. The absence of reasoned explanation for that disparate treatment renders the 90-day deadline arbitrary and capricious.

D. DPE Has "Strong Arguments" On Irreparable Harm: It Is Undisputed That, Without A Stay, DPE Will Be Forced To Shut Down In October 2024.

As noted above, the Supreme Court explained in *Ohio* that, when "each side has strong arguments about the harms they face and equities involved, our resolution of these stay requests ultimately turns on the merits question who is likely to prevail at the end of this litigation." *Ohio*, 2024 WL 3187768, at *7. Certainly, the same must be true when the party seeking a stay faces irreparable harm that is much greater than the harm claimed by the other side.

Here, the impending irreparable harm facing the DPE Facility and its roughly 250 employees is certain and undisputed. EPA does not dispute that it is impossible for DPE to comply with the 90-day compliance deadline without shutting down. *See* Stay Motion Ex. F ¶¶ 4-37 (*unrebutted* testimony that Rule's requirements cannot be implemented in 90 days and will require at least two years); Stay Motion Ex. S ¶ 8 (same); Stay Motion at 9-11. In the Proposed Rule, which contained substantially similar requirements as the Rule, EPA explicitly acknowledged that "[t]he proposed provisions will require additional time to plan, purchase, and install equipment for … chloroprene control" and therefore "propos[ed] a compliance date of 2 years after the publication date of the final rule." Stay Motion Ex. B at 25,178. The Rule says nothing to the contrary.

If DPE's Facility is forced to shut down in 90 days, it will likely never reopen because it will have no revenue to fund pollution controls or operations on which they can be tested; and it will lose customers, suppliers, and workers with the necessary skills and experience to operate the Facility. Stay Motion Ex. F ¶¶ 4-44 (unrebutted declaration); Stay Motion Ex. S ¶ 22 (unrebutted declaration). These facts are undisputed.

In *Ohio*, the Court pointed to unrecoverable compliance costs as supporting the petitioners' "strong arguments" on irreparable harm. *Ohio*, 2024 WL 3187768, at 11. Here, the harm is far worse than in *Ohio* because it is existential. Without relief from the 90-day deadline, DPE will be forced to shut down the Facility in October and likely never reopen, threatening "the very existence of [the DPE Facility's] business." *Wis. Gas. Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). That is plainly irreparable harm.

In contrast to DPE's irreparable harm, the harm that EPA attributes to chloroprene emissions from DPE's Facility is relatively small. EPA estimates that, for a hypothetical person who remains continuously just outside the Facility's fenceline all day, every day for 70 years breathing the Facility's chloroprene emissions, that person's lifetime risk of cancer would be increased by 6-in-10,000 or 0.06 percent due to exposure to chloroprene. *See* Stay Motion Ex. A at 42,956-58 (Table 2). To put that risk in perspective, according to the U.S. Center for Disease

Control, an average American has a 40.5 percent chance of getting cancer in his or her lifetime.[4] Assuming that EPA's claims about chloroprene's risk are true, this means that, for the above-described (and totally implausible) hypothetical person who remains planted outside the Facility's fenceline and breathes chloroprene emissions *continuously every day for 70 years*, that person's lifetime risk of cancer would be increased from 40.5 percent to 40.56 percent. [5]

If this Court were to grant a stay and DPE were to prevail on the merits of its claim against the 90-day deadline, DPE's compliance period would be extended by less than two years—or less than 1/35th of a 70-year period. Granting the stay requested by DPE would, at most, increase that hypothetical person's alleged risk by less than 1/35th of this amount, or 0.0017 percent. Thus, EPA's own risk calculus invites the Court to weigh the slightest of increased risk to a counterfactual population that remains planted outside the Facility's fenceline and breathes

[4] *See* https://www.cancer.gov/about-cancer/understanding/statistics#:~:text=Approximately%2040.5%25%20of%20men%20and,on%202017%E2%80%932019%20data.

[5] EPA claims that children are especially susceptible to this type of cancer risk, but this is already accounted for in EPA's risk estimates. Stay Motion Ex. A at 43,058-59. Thus, EPA estimates that an infant continuously exposed to emissions from the Facility, including chloroprene emissions, during the first two years of life—and for the next 68 years—would face an increase of 0.06 percent in his or her risk of getting cancer in their lifetime. Notably, EPA's claim that children are more susceptible to chloroprene is the same for certain chemicals from other facilities regulated by the Rule, including those with higher estimated risk levels, yet EPA has given those facilities a two-year compliance period. Reply at 22.

chloroprene emissions continuously every day for 70 years against the certainty of shutting down the Nation's only Neoprene plant by October 2024.

Except for allegations that EPA now makes against DPE, EPA has never claimed, in any rule or enforcement action, that such a risk must be abated immediately. Until now, despite the fact that EPA often deals with such cancer risks in many of its regulatory programs, it has never claimed that such a risk represents an imminent endangerment, much less an "imminent and substantial endangerment." Stay Motion at 14-18. Indeed, based on EPA's estimates of cancer risk, there are many people living around other industrial facilities that face a higher risk (and in some cases, a much higher risk) of cancer than anyone living near DPE's Facility. Stay Motion Ex. B at 25,106. And this does not include cancer risk from "mobile sources" (cars, trucks, buses) or other non-industrial sources or other environmental factors. In sum, there is no evidence of any harm that might be caused by a stay that would justify the *certainty* of shutting down the Facility and jeopardizing the livelihoods of more than 250 employees and their families.

But even assuming, for the sake of argument, that EPA did present "strong arguments" on potential harm caused by the Facility during a stay that might be as great as the irreparable harm to DPE in the absence of a stay, *Ohio* now requires that the analysis of whether to grant the stay should shift to the likelihood of success prong. *Ohio*, 2024 WL 3187768, at *7. As discussed above and set forth fully in

the Stay Motion and Reply, DPE has shown a strong likelihood of success on the merits. In fact, it is hard to imagine a more clear-cut case of arbitrary and capricious agency action.

III. REQUEST FOR RELIEF

DPE respectfully requests that the Panel, or the Court en banc, rehear the denial of the Stay Motion and grant DPE a stay pending review of the 90-day compliance deadline.

Date: July 5, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 3,900 words.

I further certify, pursuant to Fed. R. App. P. 27(d)(1)(E), that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

Date: July 5, 2024

/s/ David A. Super
David A. Super

Counsel for Petitioner
Denka Performance Elastomer LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I have caused a true and correct copy of the foregoing *Petition for Panel Rehearing and Rehearing En Banc on Order Denying Emergency Motion for Stay Pending Review* to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send a notice of filing to all registered users.

Date: July 5, 2024

/s/ David A. Super
David A. Super

Counsel for Petitioner
Denka Performance Elastomer LLC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-1135 **September Term, 2023**

EPA-89FR42932

Filed On: June 26, 2024

Denka Performance Elastomer LLC,

Petitioner

v.

Environmental Protection Agency and
Michael Regan, Administrator, United States
Environmental Protection Agency,

Respondents

Air Alliance Houston, et al.,
Intervenors

BEFORE: Katsas, Rao, and Childs, Circuit Judges

O R D E R

Upon consideration of the motion for a stay pending review, the oppositions thereto, and the reply, it is

ORDERED that the motion for a stay be denied. Petitioner has not satisfied the stringent requirements for a stay pending court review. See Nken v. Holder, 556 U.S. 418, 434 (2009); D.C. Circuit Handbook of Practice and Internal Procedures 32–33 (2020).

The Clerk is directed to enter a briefing schedule.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Selena R. Gancasz
Deputy Clerk