UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

PETITION FOR REVIEW AND COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Denka Performance Elastomer LLC ("DPE") (Petitioner). 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 a Clean Air Act rule promulgated by EPA that is relevant to this action. 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.
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Date: July 10, 2024

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Exhibit C	Declaration of Michelle Helfrich in Support of Petitioner's Emergency Motion for Stay Pending Review (July 8, 2024)
Exhibit D	Relevant portions of EPA, *New Source Performance Standards for the Synthetic Organic Chemical Manufacturing Industry and National Emissions Standards for Hazardous Air Pollutants for the Synthetic Organic Chemical Manufacturing Industry and Group I & II Polymers and Resins Industry*, 88 Fed. Reg. 25,080 (Apr. 25, 2023)
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NATURE OF THE ACTION

1. The Environmental Protection Agency ("EPA") and its Administrator have embarked on a politically motivated, unscientific crusade to shut down Petitioner Denka Performance Elastomer LLC's ("DPE") Neoprene manufacturing facility in LaPlace, Louisiana (the "Facility"). After thwarted attempts to stretch its enforcement and emergency powers to achieve such aims, EPA contrived an unprecedented approach to rulemaking to, yet again, single out and threaten the continued existence of DPE's Facility.

2. On June 27, 2024, Louisiana's Department of Environmental Quality ("LDEQ") extended a lifeline to DPE—a two-year extension of time to comply with EPA's new rule, described below—but EPA has determined that the State's action is "ineffectual" so that EPA may hold its enforcement hammer over DPE and force the DPE Facility out of existence. EPA's determination that the LDEQ extension is "ineffectual" ignores fundamental principles of cooperative federalism, particularly Louisiana's delegated, lawful, and long-held authority to govern air emissions and public health in the State.

3. On May 16, 2024, EPA promulgated a final rule under the Clean Air Act ("CAA") ("Final Rule") that requires the DPE Facility to design, purchase, and install equipment and implement a series of stringent emission control requirements in mere months—by October 15, 2024—which EPA readily acknowledges is an

impossible task. EPA, *New Source Performance Standards for the Synthetic Organic Chemical Manufacturing Industry and National Emissions Standards for Hazardous Air Pollutants for the Synthetic Organic Chemical Manufacturing Industry and Group I & II Polymers and Resins Industry*, 89 Fed. Reg. 42,932, 43,236-37 (May 16, 2024) (attached hereto as Exhibit A) (63.481(o)-(p)); *id.* at 42,955.

4. Without any judicial relief, it is undisputed that DPE would be forced to shut down the Facility by October 15, likely permanently, thereby destroying DPE's business, jeopardizing the livelihoods of the Facility's roughly 250 employees and their families, disrupting the State and local economy, and cutting off any source of revenue that would be necessary to achieve compliance with the new requirements. DPE is challenging the Final Rule in a pending action in the D.C. Circuit. On June 26, 2024, the D.C. Circuit denied an emergency motion to stay the compliance deadline set forth in the Final Rule—October 15, 2024. On July 5, 2024, DPE filed a petition for rehearing and rehearing en banc of the D.C. Circuit's order denying the stay, which is pending.

5. Meanwhile, the day after the D.C. Circuit's decision, LDEQ exercised its lawful authority to grant DPE a reasonable extension of time, until July 15, 2026, to attempt to comply with the requirements of the Final Rule ("LDEQ Extension").

6. DPE had applied to LDEQ for the extension on April 19, 2024. In its motion seeking a stay from the D.C. Circuit, DPE expressly referred to the fact that it was seeking the LDEQ Extension. In response to DPE's stay motion, EPA definitively stated its position that the LDEQ Extension is "ineffectual." *Respondents' Opposition to Motion to Stay Final Rule* at 7-8 n.2, *DPE v. EPA*, No. 24-1135 (D.C. Cir. filed June 11, 2024) (Doc. #2059123) (Exhibit J). That statement of EPA's final position was signed by the Department of Justice and the EPA Office of General Counsel on behalf of EPA and the Administrator. *Id.* After the LDEQ Extension was issued, EPA further cemented its position by failing to respond to DPE's formal request seeking to confirm the validity of the LDEQ Extension.

7. Given EPA's multi-year objective to shut down the DPE Facility, EPA's position that the LDEQ Extension is not valid, coupled with the Agency's expansive civil and criminal enforcement powers, means that DPE will be forced to shut down the Facility, likely permanently, on or before October 15, 2024 (a process that must begin in mid-August), unless DPE obtains certainty regarding the validity of the LDEQ Extension.

8. EPA's position on the validity of the LDEQ Extension is wrong, for multiple reasons. LDEQ has authority to grant extensions via two sources of authority*:* (i) an express delegation of authority pursuant to Subpart E in the Section 112 regulations, 40 C.F.R. Part 63, Subpart E, *and* (ii) an automatic

delegation of authority pursuant to an approved CAA permit program. Both of those sources of authority were operative on June 27, 2024, when LDEQ granted the LDEQ Extension, and remain operative today. In the Final Rule, EPA amended a provision—Section 63.507(c)(6)—to state that the authority to implement a specific extension approval provision cannot be expressly delegated to states. However, EPA failed to take any of the necessary actions to *actually withdraw* LDEQ's express or automatic authority to issue extensions. As a matter of common sense, EPA would not have even attempted to revoke authority that LDEQ did not already possess. Nonetheless, EPA's amendment failed to achieve EPA's objective of negating LDEQ's authority to grant the LDEQ Extension to DPE.

9. Even assuming the Final Rule's validity (an issue before the D.C. Circuit and not challenged in this action), EPA's amendment does not constrain LDEQ's authority to grant extensions for multiple reasons. First, Louisiana maintains its automatic permitting authority. Second, LDEQ issued the LDEQ Extension *before* EPA's amendment is even effective. Third, EPA failed to amend the operative regulations governing express delegations of authority. And fourth, EPA failed to address other applicable extension approval provisions that have been expressly delegated to LDEQ. In sum, EPA's amendment simply does not legally foreclose LDEQ from issuing extensions.

10. In this action, DPE seeks a declaratory judgment to confirm the validity of the LDEQ Extension so as to resolve the massive uncertainty clouding the continuing existence of the DPE Facility. This Court has exclusive jurisdiction under the CAA, 42 U.S.C. § 7607(b)(1) (restricting jurisdiction to review final EPA actions which are "locally or regionally applicable" to the United States Court of Appeals for the appropriate circuit), and authority to issue such a judgment based on the Declaratory Judgment Act. *See* 28 U.S.C. § 2201 ("In a case of actual controversy within its jurisdiction, . . . any court of the United States. . . may declare the rights and other legal relations of any interested party seeking such declaration. . . ."). Concurrently with this Petition, DPE seeks an emergency stay to preserve the status quo, meaning EPA would be precluded from taking action in contravention of the validity of the LDEQ Extension pending resolution of this Petition.

11. From DPE's perspective, the stakes here could not be higher. The harm to the DPE Facility is existential: The Final Rule requires DPE to meet a comprehensive slate of capital-intensive emission control requirements by October 15, 2024—which EPA acknowledges is impossible. DPE faces mounting uncertainty, including statutory and contractual obligations, leading up to October 15, 2024. DPE is entitled to know, as soon as possible, whether continued operation of the Facility beyond October 15, 2024, will constitute compliance with the Final Rule as a result of the LDEQ Extension, or whether such operations would

trigger action by EPA to impose its civil and criminal enforcement powers. EPA has unabashedly sought to force a shutdown of the DPE Facility and made clear that it intends to use all tools available to achieve that outcome. But it is equally clear that LDEQ has exercised its lawful authority to grant DPE an extension of time to comply with the Rule. DPE is entitled to know whether it can rely upon the LDEQ Extension.

PARTIES

12. The DPE Facility produces Neoprene, which requires the use of an intermediate product, chloroprene. Neoprene is a popular synthetic rubber that is used in a wide array of products, including cars, adhesives, medical devices, wetsuits, and other applications. The Facility, the only Neoprene manufacturing facility in the United States, employs roughly 250 employees and roughly 75-100 resident contractors. The Facility's workforce is a highly specialized one with unique experience and training, particularly with regard to controlling the polymerization reaction to address risks to safety.

13. Respondent EPA is the federal agency charged with promulgating National Emission Standards for Hazardous Air Pollutants ("NESHAPs") under the CAA, codified as 42 U.S.C. § 7412.

14. Respondent Michael Regan is the Administrator of EPA. Administrator Regan is responsible for supervising the activities of EPA, including

the actions at issue in this action. He is being sued in this action in his official capacity.

JURISDICTION AND VENUE

15. This Court has original jurisdiction over this action pursuant to Section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), because this action challenges a final action of the Administrator under Chapter 85 of the CAA, 42 U.S.C. Chapter 85.

16. This Court also has authority under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), and Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to decide this action and award relief because the action presents an actual case or controversy within the Court's original jurisdiction.

17. Because the effect of EPA's action is a locally or regionally applicable action, solely impacting the DPE Facility in Louisiana, this Court is the appropriate venue pursuant to 42 U.S.C. § 7607(b)(1).

18. This action is timely, as it was filed within sixty days of the Administrator's action. *See* 42 U.S.C. § 7607(b)(1).

BACKGROUND

I. The Final Rule.

19. On May 16, 2024, EPA published the Final Rule. Exhibit A. The Final Rule becomes effective 60 days after publication, which is July 15, 2024.

20. Pursuant to Section 112 of the CAA, the Final Rule promulgates amendments to the NESHAP that apply to hundreds of chemical facilities, including DPE.

21. The Final Rule requires DPE to comply with certain capital- and time-intensive requirements within 90 days after the effective date of the Final Rule, which is October 15, 2024. *See* 40 C.F.R. § 63.481(o) and 63.481(p)(2) (the "90-Day Requirements"). The 90-Day Requirements are all targeted at reducing chloroprene emissions from the Facility. It is undisputed that the 90-day deadline is impossible for DPE to meet and will require the Facility to shut down, likely permanently. Declaration of Christopher Meyers, P.E. ¶¶ 4-44 (attached hereto as Exhibit B); Declaration of Michelle Helfrich ¶ 2 (attached hereto as Exhibit C). EPA has never disputed these critical facts.

22. In the April 2023 proposed rule preceding the Final Rule ("Proposed Rule"), EPA had proposed that the DPE Facility (along with 200 other facilities subject to the rule) have at least a two-year deadline by which to complete the applicable requirements. In so doing, EPA expressly recognized in the Proposed Rule that the DPE Facility "will require additional time to plan, purchase, and install equipment for . . . chloroprene control." 88 Fed. Reg. 25,080, 25,178 (April 25, 2023) (attached hereto as Exhibit D). However, in the Final Rule, solely for the DPE Facility, EPA switched the two-year compliance period to only 90 days, which

would force the DPE Facility to comply with the Final Rule's requirements—or else shut down—by October 15, 2024, instead of being allowed two years to comply. Exhibit A at 43,236-37 (63.481(o)-(p)); *id.* at 42,955.

23. In the Final Rule, EPA provided no explanation for the switch from two years to 90 days, other than to cite the existence of litigation that EPA filed against DPE in February 2023. EPA filed that unprecedented litigation in the U.S. District Court for the Eastern District of Louisiana pursuant to EPA's emergency authority under Section 303 of the CAA. *U.S. v. DPE, et al.*, Doc. No. 2:23-cv-00735 (E.D. La. filed Feb. 28, 2023) ("Section 303 Litigation"). In the Section 303 Litigation, EPA *alleges* that the DPE Facility is causing an "imminent and substantial endangerment" because its emissions result in off-site, ambient air concentrations of chloroprene greater than 0.2 μg/m^3—a level EPA *alleges* is needed to ensure that the lifetime cancer risk for a person located continuously at the Facility's fenceline *all day, every day for 70 years* is no higher than 1-in-10,000. DPE vigorously opposes EPA's unproven allegations and the Section 303 Litigation remains unadjudicated.[1]

24. In the Final Rule, buried in a footnote, EPA also describes an amendment to Section 63.507 to state that "[a]pproval of an extension request under

[1] In February 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, which the district court subsequently granted. To justify the continuance, EPA pointed to the then-expected issuance of the Final Rule by March 29, 2024.

§ 63.6(i)(4)(ii)" *cannot* be delegated, despite more than 20 years of precedent to the contrary. Final Rule at 43,261 (Exhibit A) (40 C.F.R. § 63.507(c)(6)). Section 63.6(i)(4)(ii) is one of multiple provisions in EPA's regulations that provides the authority to grant extensions or "waivers" pursuant to Section 112(f) of the CAA.

25. EPA's amendment purports to revoke an express delegation of authority to LDEQ in one set of regulatory provisions by now stating in an entirely *different* set of regulatory provisions that no such delegation may be made. Yet EPA took no action to actually withdraw LDEQ's expressly delegated authority. EPA's single amendment in the Final Rule—even assuming that the Final Rule is valid (an issue before the D.C. Circuit)—simply does not foreclose LDEQ from granting extensions, as a matter of law.[2]

II. Regulatory Framework For Approving Extensions.

26. Section 112(f)(4)(B) of the CAA provides that the Administrator of the EPA may grant an extension (or "waiver") permitting sources up to two years to comply with a standard if the Administrator finds (1) "that such period is necessary

[2] While the issue is not before this Court, in the Proposed Rule, EPA did not mention, let alone meaningfully discuss, any intent to revoke LDEQ's delegation of authority for approvals of requests under 40 C.F.R. § 63.6(i)(4)(ii). Nor is there any such explanation in the Final Rule for EPA's cursory statement purporting to revoke LDEQ's delegated authority. There is also no precedent for EPA's selective attempt to revoke Louisiana's authority. In fact, in the roughly 34 years since the 1990 CAA Amendments, EPA has never imposed a 90-day deadline under Section 112 rule for similar requirements, let alone done so without providing notice that it would attempt to revoke a state's authority to grant extensions of such a deadline.

for the installation of controls" and (2) "that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment." 42 U.S.C. § 7412(f)(4)(B). 40 C.F.R. § 63.6(i)(4)(ii) then provides:

> The owner or operator of an existing source . . . may request that [EPA] grant an extension allowing the source up to 2 years after the standard's effective date to comply with the standard. The Administrator may grant such an extension if he/she finds that such additional period is necessary for the installation of controls and that steps will be taken during the period of the extension to assure that the health of persons will be protected from imminent endangerment. . . .

40 C.F.R. § 63.6(i)(4)(ii).

27. Section 63.6(i) sets forth clear and distinct authorities for *requesting* and *approving* compliance extensions. Sections 63.6(i)(4) through (i)(7) "concern *requests for an extension* of compliance with a relevant standard under this part. . . ." 40 C.F.R. § 63.6(i)(3) (emphasis added). These *request* provisions include 40 C.F.R. § 63.6(i)(4)(ii), the authority that EPA purported to revoke in the Final Rule. However, separately, Sections 63.6(i)(9) through (i)(14) "concern *approval of an extension* of compliance requested under paragraphs (i)(4) through (i)(6) of this section. . . ." 40 C.F.R. § 63.6(i)(8) (emphasis added). These *approval* provisions include Section 63.6(i)(9), which states:

> Based on the information provided in any request made under paragraphs (i)(4) through (i)(6) of this section, or other information, the Administrator (or *the State with an approved permit program) may grant an extension of compliance with an emission standard*, as specified in paragraphs (i)(4) and (i)(5) of this section.

40 C.F.R. § 63.6.(i)(9) (emphasis added).

28. The "[EPA] Administrator (or the State with an approved permit program) may terminate an extension of compliance [early] if any specification [in the extension request] is not met." 40 C.F.R. § 63.6(i)(14). There are no other grounds for terminating a compliance extension.

III. LDEQ Authority To Grant Extensions.

29. LDEQ maintains authority to grant extensions via *two sources of authority:* (i) its express delegation of certain provisions pursuant to Part 63, Subpart E *and* (ii) its automatic authority pursuant to its approved CAA permit program.

A. Expressly delegated authority pursuant to Part 63, Subpart E.

30. Section 112(l) of the CAA allows EPA to expressly delegate the implementation of Section 112 standards to the states. 42 U.S.C. § 7412(l). 40 C.F.R. Part 63, Subpart E contains the regulatory framework for such express delegations. *See* 40 C.F.R. Part 63, Subpart E. On March 26, 2004, EPA expressly delegated to Louisiana the authority to implement Section 112 standards, including the authority to grant compliance extensions via 40 C.F.R. § 63.6(i)(9) and 40 C.F.R. § 63.6(i)(4)(ii). 69 Fed. Reg. 15,687 (Mar. 26, 2004) (attached hereto as Exhibit E). Thus, for more than 20 years, Louisiana has governed the State's air emissions pursuant to this expressly delegated authority.

31. Subpart E includes a table listing the specific Section 112 standards that have been delegated to Louisiana. 40 C.F.R. § 63.99(a)(19)(i). This table confirms that the extension approval provisions—40 C.F.R. § 63.6(i)(9) and 40 C.F.R. § 63.6(i)(4)(ii)—have been delegated to LDEQ. The table also identifies provisions that *cannot* be delegated to LDEQ. Pertinent here, the authorities to approve of extensions under Section 63.6(i) are *not* listed as authorities that cannot be delegated.

32. Subpart E specifies that provisions amended after July 1, 2013, are not delegated to Louisiana. 40 C.F.R. § 63.99(a)(19)(i). The extension approval provisions in 40 C.F.R. § 63.6(i) have not been amended since April 5, 2002. 67 Fed. Reg. 16,582, 16,599 (attached hereto as Exhibit F). Accordingly, the provisions in 40 C.F.R. § 63.6(i) are and remain delegated to Louisiana.

B. Automatic authority pursuant to approved permitting program.

33. Separate from the express delegation via Subpart E discussed above, state agencies also have automatic authority to grant Section 112 compliance extensions if they have an approved permitting program. 40 C.F.R. § 63.6(i)(1) ("Until an extension of compliance has been granted by the Administrator *(or a State with an approved permit program)* under this paragraph, the owner or operator of an affected source subject to the requirements of this section shall comply with all applicable requirements of this part.") (emphasis added); 40 C.F.R. § 63.6(i)(9) ("the

Administrator (*or the State with an approved permit program*) may grant an extension of compliance. 40 C.F.R. § 63.6(i)(9)") (emphasis added)).

34. EPA has confirmed in formal guidance that state agencies have this "automatic" extension approval authority based on an approved permitting program and do not require a separate express delegation from EPA. Specifically, on July 10, 1998, EPA's Director of the Office of Air Quality and Standards published a memorandum confirming that the authority to grant compliance extensions "does not require delegation through subpart E and, instead, is automatically granted to States as part of their part 70 operating permits program approval." EPA, Memorandum from John S. Seitz re *Delegation of 40 CFR Part 63 General Provisions Authorities to State and Local Air Pollution Control Agencies* at 1 (July 10, 1998) ("Seitz Memorandum") (attached hereto as Exhibit G).

35. The Seitz Memorandum further confirms EPA's "interpretation that the State would not need to have been delegated a particular source category or have issued a part 70 operating permit for a particular source to grant that source a compliance extension." *Id.* at 1.

36. Pertinent here, EPA approved the Louisiana Operating Permits program on September 12, 1995. 60 Fed. Reg. 47,296 (Sept. 12, 1995) (attached hereto as Exhibit H). Thus, as confirmed by EPA in the Seitz Memorandum, Louisiana has held and continues to hold automatic authority to issue Section 112

compliance extensions based on Louisiana's approved permitting authority. EPA itself has made clear that Louisiana does not require further delegated authority from EPA in order to grant a compliance extension.

IV. DPE's Extension Request And LDEQ's Approval.

37. On April 19, 2024, faced with the Final Rule's impossible-to-meet 90-day implementation period, DPE submitted to LDEQ an extension request for the DPE Facility, seeking an extension of the 90-Day Requirements to at least two years ("Extension Request"). *See* Letter from Mr. Jeffrey R. Holmstead to Secretary Aurelia S. Giacometto and Mr. Bryan Johnston, *Denka Performance Elastomer, LLC – Request For Extension of Compliance Periods Set Forth In Final Rule In EPA Docket EPA-HQ-OAR-2022-0730* (April 19, 2024) (attached hereto as Exhibit I). DPE sought an extension based on LDEQ's authority both under LDEQ's air permitting authority and its delegated authority under 40 C.F.R. Part 63. In the Extension Request, DPE explained that good cause exists for the extension because a period of at least two years is necessary for DPE to comply with the 90-Day Requirements and the Facility does not present an "imminent endangerment." DPE's Extension Request was well known to EPA, given that it was published by LDEQ on the State's public database and DPE expressly referred to the pending Extension Request in its stay motion filed with the D.C. Circuit, which prompted EPA to take the position that such an extension would be "ineffectual."

Respondents' Opposition to Motion to Stay Final Rule at 7-8 n.2, *DPE v. EPA*, No. 24-1135 (D.C. Cir. filed June 11, 2024) (Doc. #2059123) (attached hereto as Exhibit J).

38. On June 27, 2024, LDEQ granted DPE's Extension Request, finding, in part: "LDEQ finds that additional time is needed for Denka to install controls . . . . LDEQ also finds that steps will be taken during the period of the extension to assure that the health of persons will be protected from imminent endangerment." Letter from Aamanda Vincent, LDEQ, to Jeffrey R. Holmstead, DPE, re *Extension of Compliance* (June 27, 2024) at 2 (attached hereto as Exhibit K). The LDEQ Extension provides DPE until July 15, 2026, to comply with the 90-Day Requirements, subject to DPE satisfying specified conditions regarding additional emissions controls, monitoring of ambient air, and periodic reporting to LDEQ. *Id.*

V. EPA's Amendment Of Section 63.507 And Rejection Of LDEQ Extension.

39. In the Final Rule published on May 16, 2024, EPA included an amendment of 40 C.F.R. § 63.507(c) to provide that the "[a]pproval of an extension request under § 63.6(i)(4)(ii)" cannot be delegated to state agencies. Final Rule at 43,261 (Exhibit A). Subsequently, on June 11, 2024, in a pleading filed in the D.C. Circuit and signed by the Department of Justice and EPA's Office of General Counsel on behalf of EPA and its Administrator, EPA declared that any extension

granted by LDEQ to DPE would be "ineffectual." Exhibit J at 7-8, n.2. Specifically, EPA stated:

> Denka states that it has requested a compliance extension from a Louisiana state agency. . . . Any purported compliance extension granted by a state to Denka would be ineffectual.

Id. In taking that final position, EPA provided no explanation as to why any such state-issued extension would be "ineffectual."

VI. EPA's Confirmation Of Its Final Position.

40. On June 28, 2024, DPE submitted a request to EPA seeking confirmation of EPA's position on the alleged non-validity of the LDEQ Extension and a statement of the legal basis for EPA's position. *See* Letter from Mr. Jeffrey R. Holmstead to Administrator Michael S. Regan (June 28, 2024) (attached hereto as Exhibit L). DPE specifically explained that "DPE will be subjected to substantial and mounting legal uncertainty on October 15, 2024, the compliance deadline in place before the LDEQ Extension was granted." *Id.* at 2. The letter also expressly stated that "[i]f EPA intends to treat the LDEQ Extension as 'ineffectual,' and enforce the October 15, 2024, compliance deadline, then DPE intends to avail itself of legal recourse to resolve the consequent uncertainty before allowing 'the Agency to drop the hammer' and impose virtually unlimited legal liability on DPE." *Id.* (citing *Sackett v. EPA*, 566 U.S. 120, 127 (2012)). Given that the DPE Facility's future hangs in the balance and the clock is ticking, DPE's letter also expressly

informed EPA that DPE would treat EPA's failure to respond by July 8, 2024 as a confirmation that EPA would continue to treat the LDEQ Extension is "ineffectual."

41. On July 8, 2024, litigation counsel for EPA informed DPE by email that a timely response to DPE's June 28 letter was not possible. Thus, despite DPE's urgent invitation to EPA to modify its final position, EPA has taken no action to dissuade DPE from believing that the Agency's enforcement sword is poised to strike a death blow to the company.

LEGAL PRINCIPLES

42. DPE properly brings this declaratory-judgment action to resolve a real, concrete, and substantial dispute between the parties that threatens the existence of the DPE Facility and strongly implicates federal-state relations under the CAA. Each of the following points is true: LDEQ has formally and lawfully issued the LDEQ Extension, DPE undisputedly will have to shut down its Facility (likely permanently) if the LDEQ Extension is not valid, and EPA has definitively stated its position that the LDEQ Extension is "ineffectual." EPA's manifest goal to shut down the DPE Facility is crystal clear from EPA's unprecedented Section 303 Litigation, EPA's "surprise switcheroo" of compliance deadline in the Final Rule, EPA's contrived and unsuccessful attempt to revoke LDEQ's extension authority, and, most recently, EPA's determination as to the non-validity of the LDEQ Extension. DPE is now faced with the "Hobson's choice" of shutting down the

Facility by October 15, 2024, or, in reliance on the LDEQ Extension, continuing to operate but with the fear of civil and criminal enforcement action by EPA.

43. The law is settled that, "where threatened action by *government* is concerned, [courts] do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). "The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." *Id.* at 129 (citations omitted). In these circumstances, a plaintiff's decision to abstain from an action to eliminate liability for an allegedly unlawful activity does not "preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced." *Id.* "The dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution—is 'a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.'" *Id.* (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967)). A declaratory-judgment action is recognized as proper, as an alternative to taking the arguably unlawful action, given a "genuine threat of enforcement." *Id.*

44. In the Final Rule, EPA amended Section 63.507(c) to state that the "[a]pproval of an extension request under § 63.6(i)(4)(ii)" cannot be delegated to state agencies. Final Rule at 43,261 (Exhibit A). EPA apparently believes this

amendment "retain[s] authority to grant or deny request for extensions" and does not delegate such authority to LDEQ. *Id.* at 42,955, n.33. Presumably on that basis, EPA has definitively taken the position that the LDEQ Extension is "ineffectual." However, EPA has not revoked the express delegation or automatic authority that LDEQ has maintained for decades. EPA's amendment does not divest LDEQ of its authority to grant extensions.

45. Even assuming the validity of EPA's Final Rule (which DPE does not challenge here), EPA's position that the LDEQ Extension is invalid is incorrect for multiple reasons.

46. First, LDEQ had automatic authority to grant DPE the LDEQ Extension based on LDEQ's approved permit program and EPA has not even attempted to modify such automatic authority through its amendment to Section 63.507. Section 63.507 *only* concerns express delegations pursuant to Subpart E, which is an entirely *separate* source of extension approval authority from the authority derived from a state's approved permit program. Thus, EPA's amendment—even if otherwise applicable or effective—does not prevent LDEQ from granting extensions based on its approved permit program. EPA's own guidance confirms that granting a Section 112 compliance extension "does *not require delegation through Subpart E* and, instead, is automatically granted to the States as part of their part 70 operating permits program approval. . . ." Seitz Memorandum at 1 (Exhibit G) (emphasis

added). EPA approved the Louisiana Operating Permits program on September 12, 1995. 60 Fed. Reg. 47,296 (Exhibit H). As such, EPA's amendment to Section 63.507 is irrelevant to whether LDEQ can issue an extension pursuant to the automatic authority derived from its approved permit program. Section 63.507 does not address such authority and, accordingly, does not impact the validity of the LDEQ Extension.

47. Second, on its face, the Final Rule does not become effective until *July 15*, 2024. Thus, it has no impact on the LDEQ Extension that was granted on *June 27*, 2024. Even assuming that the Final Rule's amendment to 40 C.F.R. § 63.507(c) otherwise applied to LDEQ's authority to grant extensions—and, as explained herein, it plainly does not—the amended Section 63.507(c) is not effective until July 15, 2024, and therefore does not legally foreclose any actions before that date. EPA's attempt to revoke Louisiana's authority to grant extensions *after the effective date* unequivocally recognizes that Louisiana *does* have such expressly delegated authority *before the effective date*, including on June 27, 2024, when the LDEQ Extension was granted. Further, even assuming the Final Rule's amendment otherwise applied to the LDEQ's authority to grant extensions, the LDEQ Extension would not terminate on or after July 15, 2024, unless DPE fails to meet a condition of the extension *and* LDEQ elects to terminate the extension. *See* 40 C.F.R. § 63.6(i)(14) (the "Administrator (or the State with an approved permit program)

may terminate an extension of compliance at an earlier date than specified if any specification [in the extension request] is not met.").

48. Third, EPA's amendment to Section 63.507(c)(6) is ineffective because it also does not actually revoke LDEQ's expressly delegated authority pursuant to Subpart E. LDEQ continues to have authority pursuant to Subpart E to grant extensions. 40 C.F.R. § 63.99(a)(19)(i) (table showing Subpart A has been delegated to Louisiana). Subpart E authority is modified by amending Subpart E, which EPA last did on February 24, 2015. 80 Fed. Reg. 9,613 (attached hereto as Exhibit M). In that notice, EPA identified several authorities which are not delegated to LDEQ, none of which include the extension provisions in Section 63.6(i). *Id.* at 9,615. Likewise, the table in Subpart E that governs the provisions delegated to Louisiana confirms that the extension provisions under Section 63.6(i) are *not* carved out from Louisiana's delegation.

49. It is astonishing that EPA attempts to revoke the express delegation of LDEQ's extension authority without amending a single provision in Subpart E—*the subpart governing that delegation of authority*. Instead, in a completely different set of regulations, the Final Rule amends Section 63.507(c)(6)—a provision intended only to cross-reference Subpart E and clarify what authorities pursuant to Subpart E can and cannot be delegated *as a matter of law* for any subpart. 68 Fed. Reg. 37,334 ("there are separate parts of each section 112 requirement that we cannot delegate to

you.") (attached hereto as Exhibit N). However, given that there has been no amendment to Subpart E, Louisiana's expressly delegated extension authority remains intact. Such authority was plainly sufficient to issue the LDEQ Extension. The notion that LDEQ's extension authority "cannot" be delegated is contradicted by the fact that EPA *has* delegated such authority to LDEQ *for decades* and *continues to delegate* such authority for every other set of Section 112 standards in the country.

50. Like Section 63.507, there are dozens of provisions in EPA's regulations that identify what standards and authorities "cannot" be delegated to states. EPA has not taken the position that extension approval authority *cannot* be delegated in *any other* such provision. Indeed, in every other set of Section 112 standards, such authority *can* be delegated, including for other standards amended in the Final Rule. *See, e.g.,* Final Rule at 43,212 (Exhibit A) (amending Section 63.153 without including language in 63.507(c)(6)); *id.* at 43,228 (amending Section 63.183 without including language in 63.507(c)(6)); *id.* at 43,274 (amending 63.529 without including language in 63.507(c)(6)). If approval authority for requests under Section 63.6(i)(4)(ii) cannot be delegated to state agencies, then how did EPA allow such authority to continue to be delegated in other standards at the *very same time* and in the *very same rule*? Likewise, such authority *has* been expressly delegated to LDEQ as a matter of law and implemented for more than

20 years. There can be no serious contention that the extension provisions in Section 63.6(i) *cannot* be delegated to LDEQ as a matter of law.

51. EPA simply cannot revoke the authorities delegated to LDEQ without amending the "Delegated Federal Authorities" set forth in Subpart E, 40 C.F.R. § 63.99. Such an amendment would have proved problematic for EPA because the Proposed Rule did not propose to amend Subpart E. Instead of having a separate rulemaking subject to notice-and-comment, EPA amended a provision that—while not included in the Proposed Rule—at least was located in a subpart covered by the Proposed Rule. If DPE is able to continue to exist long enough to have its day in court, DPE intends to challenge EPA's amendment to Section 63.507(c)(6) to prevent the amendment from being promulgated as part of its challenge to the Final Rule. But, for purposes of this action, even assuming the amendment is valid, it has utterly no bearing on LDEQ's delegated authority in Subpart E, which still stands and is what authorizes LDEQ to grant extensions pursuant to Section 63.6(i).

52. Finally, any contention that the "[a]pproval of an extension request under § 63.6(i)(4)(ii)" cannot be delegated to state agencies fails to grapple with another approval authority in Section 63.6(i)(9). Final Rule at 43,261 (Exhibit A). Section 63.6(i) sets forth clear and distinct authorities for *requesting* and *approving* compliance extensions. 40 C.F.R. § 63.6(i). Sections 63.6(i)(4) through (i)(7) "concern *requests for an extension* of compliance. . . ." 40 C.F.R. § 63.6(i)(3)

(emphasis added). Included in these *request* provisions is Section 63.6(i)(4)(ii), which addresses compliance extensions under Section 112(f) of the CAA. Separately, Sections 63.6(i)(9) through (i)(14) "concern *approval of an extension* of compliance requested under paragraphs (i)(4) through (i)(6) of this section. . . ." 40 C.F.R. § 63.6(i)(8) (emphasis added). Included in these *approval* provisions is Section 63.6(i)(9), which states:

> Based on the information provided in any request made under paragraphs (i)(4) through (i)(6) of this section, or other information, the Administrator (or *the State with an approved permit program) may grant an extension of compliance with an emission standard*, as specified in paragraphs (i)(4) and (i)(5) of this section.

40 C.F.R. § 63.6.(i)(9) (emphasis added). Accordingly, EPA's amendment to Section 63.507 does not reference 40 C.F.R. § 63.6.(i)(9), which is one legal basis authorizing LDEQ to grant extension requests. Nor does the plain language of 40 C.F.R. § 63.507(c)(6) purport to prohibit DPE from submitting an extension request to LDEQ. Thus, even if EPA's revocation of authority were otherwise proper, it simply does not impact LDEQ's authority under Section 63.6(i)(9).

CLAIM ONE
REQUEST FOR DECLARATORY RELIEF

53. DPE incorporates by reference all preceding allegations above as if set forth herein.

54. The Declaratory Judgment Act provides that in a case of actual controversy within its jurisdiction, any court of the United States may declare the

rights and other legal relations of any interested party seeking such declaration. 28 U.S.C. § 2201.

55. The Declaratory Judgment Act also provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

56. In light of EPA's conclusion that the LDEQ Extension is ineffectual, DPE seeks a declaratory judgment that the LDEQ Extension is valid and enforceable.

57. There is an actual and justiciable controversy between DPE and EPA regarding the validity of the LDEQ Extension and EPA's purported revocation of LDEQ's authority to grant compliance extensions under 40 C.F.R. § 63.6(i)(4)(ii).

58. This actual and justiciable controversy will continue because DPE cannot comply with the 90-Day Requirements by October 15, 2024, the compliance deadline that was in place before the LDEQ Extension was granted and that would continue unless the LDEQ Extension is confirmed as valid.

59. A judicial declaration of the parties' respective rights and obligations with respect to the validity of the LDEQ Extension is necessary and appropriate because of the ongoing nature of DPE's obligations with the Final Rule.

60. DPE has no adequate remedy at law to address the allegations set forth herein.

CLAIM TWO
REQUEST FOR INJUNCTIVE RELIEF

61. DPE incorporates by reference all preceding allegations above as if set forth herein.

62. EPA's conclusion that the LDEQ Extension is ineffectual is arbitrary and capricious and otherwise not in accordance with law in violation of 42 U.S.C. § 7607(d)(9)(A).

63. DPE seeks injunctive relief preventing EPA from denying the validity of the LDEQ Extension.

PRAYER FOR RELIEF

WHEREFORE, DPE respectfully prays for judgment:

a. Granting this Petition for Review and Complaint for Declaratory and Injunctive Relief;

b. Declaring that the LDEQ Extension is valid and enforceable;

c. Enjoining EPA from denying the validity of the LDEQ Extension and taking action in contravention of the validity of the LDEQ Extension;

d. Awarding attorneys' fees and the costs of this litigation; and

e. Awarding DPE all other relief as the Court deems just and proper.

Date: July 10, 2022

Respectfully submitted,

/s/ David A. Super

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 27(d)(1)(E), that this document 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 document has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

Date: July 10, 2024

/s/ David A. Super
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July 2024, pursuant to Federal Rules of Appellate Procedure 15(c) and 25(d), and 40 C.F.R. § 23.12(a), I electronically filed the foregoing *Petition for Review and Complaint for Declaratory and Injunctive Relief* with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, with copies of the foregoing served on the following recipients.

By Hand Delivery:

Correspondence Control Unit
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Date: July 10, 2024

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