

ORAL ARGUMENT NOT YET SCHEDULED

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

State of West Virginia, et al.,

Petitioners,

v.

United States Environmental Protection Agency,
et al.

Respondents.

No. 15-1363
(and consolidated cases)

**MOTION TO ESTABLISH CONSOLIDATED BRIEFING SCHEDULE
ENCOMPASSING ALL MOTIONS FOR STAY OF AGENCY RULE AND
REQUEST FOR DESIGNATION OF LIAISON COUNSEL**

Respondents United States Environmental Protection Agency and Gina McCarthy, Administrator (collectively “EPA”), following consultations with all Petitioners, and parties who have moved or expressed an intent to intervene on behalf of Respondent, hereby move for the establishment of a consolidated briefing schedule that would govern all motions for stay of the Rule under review, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (“The Clean Power Plan”), including both the four motions that have already been filed and such additional stay motions that EPA anticipates are likely to be filed. Specifically, EPA requests:

(1) that the Court direct that motions for stay of the Rule in these consolidated cases be filed by no later than November 5, 2015;

(2) that EPA's consolidated response to all such motions be due four weeks later, i.e., December 3, 2015, with EPA having a briefing limit of 80 pages plus an additional 15 pages for each new motion that is filed beyond the four that have already been filed;

(3) that Movant-Intervenors' responses to all such motions be due by December 8, 2015, with intervenors having a collective briefing limit of 60 pages, and

(4) that Petitioners' replies be due no later than December 23, 2015.

EPA further requests that any stay motions that are filed after November 5, 2015 in new cases challenging the Rule be held in abeyance pending a ruling on earlier-filed stay motions, and that the Court provide that such later-filed motions will be considered only after the Court resolves the pending motions and only if the additional motions raise issues that have not been resolved by the earlier motions. Finally, EPA additionally requests that the Court direct Petitioners to appoint one or more liaison counsel for Petitioners, who will facilitate case management and the parties' consultations regarding procedural matters.

Respondents have consulted with all parties about the substance of the briefing format and schedule. Stay Movants and Petitioners Oklahoma and North Dakota have informed Respondents that they do not oppose the briefing schedule requested herein but take no position on the page limits requested by Respondents and Respondent-Intervenors. These petitioners have further informed Respondents that

they have not yet reviewed Respondents' motion and state that they reserve the right to file a prompt response upon review. Stay Movants have authorized Respondents to represent that Stay Movants will inform the Clerk of the Court promptly if they do not intend to file a response. Petitioners in Case Nos. 15-1379 and 15-1386 have authorized EPA to represent that they do not oppose this motion. Petitioner in Case No. 15-1383 has authorized Respondent to represent that it takes no position on this motion. Movant Respondent-Intervenors have advised EPA that they do not oppose this motion.

The purpose of this motion is to avoid the chaotic and duplicative briefing of stay motions that has sometimes occurred in recent cases involving review of significant EPA Clean Air Act rules. EPA appreciates the efforts of Petitioners in this case to file consolidated stay motions, and recognizes that the existing stay motions represent many of the parties with an interest in challenging the Rule. However, given the broad interest in the Rule, additional stay motions may be filed. In the interest of ensuring an orderly process, and recognizing that the existing stay motions do represent a broad cross-section of the interested petitioners, EPA requests that the Court impose a reasonable time limit on the filing of further stay motions, and further provide that stay motions filed after that deadline will be considered only after the Court resolves the motions filed before that deadline, and only if the additional motions raise substantial issues that have not been resolved by the earlier motions.

BACKGROUND

Petitioners in this case challenge EPA's Clean Power Plan, which was promulgated pursuant to section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d). Section 111(d) authorizes EPA to promulgate "emission guidelines" for states to use in establishing standards of performance for existing sources through a process that requires state rulemaking action followed by review and approval of state plans by EPA. Id. If a state elects not to submit a plan or does not submit an approvable plan, EPA then has the authority to promulgate a federal plan implementing standards of performance for existing sources within that state. Id. § 7411(d)(2).

The Rule at issue here establishes section 111(d) emission guidelines for states to follow in developing state plans to limit carbon dioxide ("CO₂") emissions from existing fossil fuel-fired power plants. The Rule's emission guidelines include emission performance rates to be achieved by two subcategories of electricity generating sources: steam units (which are primarily coal-fired) and combustion turbines (which are primarily natural gas-fired).

The Rule was signed by the EPA Administrator on August 3, 2015, and made available on EPA's web site. The Rule was published in the Federal Register on October 23, 2015. 80 Fed. Reg. 64,662. Pursuant to the judicial review provision of the Clean Air Act, any petitions for review of the final rule must be filed within 60 days of publication, i.e., by December 22, 2015.

As of this date, EPA is aware of 20 petitions for review of the Rule that have been filed. EPA anticipates that additional petitions for review may be filed within the 60-day filing period.

ARGUMENT

I. ESTABLISHING A SCHEDULE FOR SUBMITTING AND BRIEFING STAY MOTIONS WILL FACILITATE MANAGEMENT AND RESOLUTION OF THE CASE.

As noted above, the purpose of this motion is to avoid the chaotic, redundant, and resource-intensive briefing of stay motions that has occurred in a number of recent cases involving significant Clean Air Act rules. For example, in EME Homer City Generation v. EPA (Case Nos. 11-1302 et al.), a case which likewise concerned emissions from power plants, there were 19 separate stay motions filed over a period of two and a half months, until the Court prohibited the filing of further motions without leave. Such extended and disorderly motions practice places excessive burdens on both EPA and the Court and delays the process of reaching the merits for an ultimate decision.

To avoid such an inefficient process, EPA requests that the Court establish a deadline for the submission of stay motions and establish reasonable dates and page limits for the submission of consolidated responses to the stay motions by EPA and intervenors. These measures would streamline the process of stay briefing,

significantly reduce redundancy in the briefing, and facilitate moving the case to merits briefing and ultimate resolution.

Specifically, EPA requests that the Court establish a deadline of November 5, 2015, for the filing of any motion to stay the Rule by any party that has filed a petition for review or motion to intervene by that date.¹ That deadline is reasonable because the Rule has been publicly available since it was signed on August 3, 2015. That fact enabled various petitioners to file four stay motions on the same day the Rule was published in the Federal Register. And the filing of those stay motions means the Court already has before it the arguments of a broad cross-section of interested parties.

EPA also requests that it be allowed to file a single consolidated response to all stay motions by December 4, 2015, or four weeks after the requested deadline for stay motions.² EPA believes the requested response period is reasonable in light of the volume of stay briefing and the range of issues that must be addressed. EPA further requests that the page limit for its consolidated opposition be 80 pages, plus an additional 15 pages for each new motion that is filed beyond the four that have

¹ Movant-intervenors for Petitioners whose motions have not been ruled on by that date should lodge stay motions by the deadline. Non stay-movant Petitioners who wish to file responses in support of the pending stay motions should likewise file responses by the deadline.

² The state petitioner stay-movants included within their stay motion a request for expedited consideration of their petition for review, and EPA proposes to respond to this aspect of the States' motion within its consolidated response.

already been filed. The four motions filed to date constitute 80 pages of briefing and nearly a thousand pages of declarations and exhibits. EPA believes that the requested page length for its opposition is necessary to allow EPA to adequately respond to the existing motions, as well as any motions filed by the deadline.

EPA further requests that movant-intervenor respondents be directed to file responses by December 8, 2015.³ This date would enable intervenors to avoid repetition of EPA's brief. EPA additionally proposes, on behalf of movant-intervenors, that intervenors have a collective briefing limit of 60 pages (to be allocated among the various groups of intervenors, which represent distinct interests, as they see fit) plus 15 pages for each additional stay motion that is filed. In support of this page request, EPA notes that numerous additional groups -- beyond the non-profit environmental organizations and clean energy trade associations who have already moved to intervene -- have expressed their intent to file timely motions to intervene on behalf of EPA. These additional expected movant-intervenors include various states and municipalities, and electric generation companies that own facilities subject to the Rule. The requested page allocation for intervenors is appropriate because it would allow each of the various distinct groups of intervenors (e.g., states

³ If motions to intervene have not been ruled on by this date, Respondent-intervenors should lodge their responses to the stay motions by the deadline.

and municipalities, environmental organizations, trade associations, and regulated energy companies) an adequate opportunity to be heard.

EPA requests that replies be filed no later than 15 days after intervenors' brief is filed, or by December 23, 2015. Stay movants and Petitioner in Case No. 15-1386 have requested that the page limit for replies collectively be one-half the combined length of Respondents' and Respondent-Intervenors' briefs. Respondents take no position on this request.

Should a new party that files a timely petition for review after November 5, 2015 seek to file a stay motion after the deadlines suggested above, EPA proposes that the Court hold any such later-filed motions in abeyance pending its decision on the earlier-filed stay motions, based on the consolidated stay briefing suggested above. Doing so would account for the likelihood that the later-filed stay motions will raise issues that overlap with those raised in the earlier-filed motions, which would be resolved by the Court's decision on the earlier-filed motions. To the extent the Court believes it is appropriate to consider additional stay motions following its decision on the earlier filed-motions, EPA suggests that the Court require the later-moving parties to identify any new issues that are raised in their motions that were not raised in the first round of stay motions, and to establish a consolidated briefing format limited to those issues.

II. REQUEST FOR APPOINTMENT OF LIAISON COUNSEL

Twenty petitions for review challenging the Rule have already been filed and it is anticipated that numerous additional petitions will be filed within the 60-day period under 42 U.S.C. § 7607(b)(1). To assist in the orderly management of this complex multi-party litigation, and for the benefit of the Court and Respondents' counsel, EPA requests that the Court direct Petitioners to designate one or more administrative liaison counsel (*see* D.C. Circuit Handbook and Internal Procedures at 24), with such counsel to be tasked with: (1) maintaining and distributing to co-counsel and opposing counsel an up-to-date service list, (2) serving as the primary point of contact for Respondents and the court on scheduling issues and matters of procedure, and (3) coordinating the preparation of joint submissions to the court. EPA understands that Petitioners may wish to designate separate liaison counsel to represent different types of petitioners or interests (e.g., state petitioners, utility petitioners, mining industry petitioners) and has no objection to this approach.

CONCLUSION

A reasonable consolidated process and schedule for submitting and briefing motions for stay is required to avoid chaotic and duplicative briefing and most effectively move the case toward merits briefing. Accordingly, the Court should grant this motion and establish the requested format and schedule for briefing of stay

motions. The Court should additionally facilitate case management by directing Petitioners to designate one or more liaison counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing MOTION TO ESTABLISH BRIEFING SCHEDULE FOR MOTIONS FOR STAY was electronically filed today with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system. I further certify that a copy of the foregoing document was today served electronically through the court's CM/ECF system on all registered counsel for Petitioners and Intervenors.

/s/ Eric G. Hostetler
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Dated: October 28, 2015