ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN LUNG ASSOC., et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 19-1140 (and consolidated cases)

OPPOSITION TO EPA'S MOTION TO EXPEDITE

The undersigned petitioners in *State of New York, et al. v. EPA* (case no. 19-1165) and in *City and County of Denver v. EPA* (case no. 19-1177) (State and Municipal Petitioners) respectfully submit their opposition to EPA's motion to expedite this appeal (Doc. 1803976). EPA has not satisfied this Court's standard for expedition, and granting EPA's motion would prejudice State and Municipal Petitioners' interest in the fair and efficient review of this important case.

EPA filed its motion to expedite August 28, more than a week before the deadline for filing petitions under section 307(b) of the Act, 42 U.S.C. § 7607(b). Shortly before filing its motion, the agency engaged in a pro forma attempt to confer with petitioners on a briefing schedule, sending its proposed schedule

minutes after filing its voluminous certified index to the record and requesting a response on its proposed motion and schedule by the next business day. At least nine petitions for review have been filed since that time.[1] The deadline for filing motions to intervene in the case will not expire for several weeks. *See* FRAP 15(d); Circuit Rule 15(b).

In its motion, EPA proposes that the Court adopt a briefing schedule now—prior to knowing all the parties in the case and the parties' views on the appropriate number of briefs or word allocation—because the agency would prefer, for reasons it fails to articulate, that the "case be scheduled for oral argument in April of 2020." EPA Motion at 6. Because EPA has not met this Court's standard to expedite the case, the motion should be denied.

BACKGROUND

This litigation involves consolidated challenges to an EPA action consisting of "three separate and distinct rulemakings:" (1) a repeal of the Clean Power Plan, (2) emission guidelines replacing the Clean Power Plan's emission guidelines, and

[1] These petitions include those filed by Chesapeake Bay Foundation (case no. 19-1173), Robinson Enterprises, Inc., *et al.* (case no. 19-1175), Westmoreland Mining Holdings, LLC (case no. 19-1176), the City and County of Denver (case no. 19-1177), North America Coal Co. (case no. 19-1179), Biogenic CO_2 Coalition (case no. 19-1185), Advanced Energy Economy (case no. 19-1186), American Wind Energy Assoc., *et al.* (case no. 19-1187) and Consolidated Edison, Inc., *et al.* (case no. not yet assigned). Additional petitions may have been filed on September 6, the last day of the statutory review period, but not yet docketed in the Court's system.

(3) revisions to EPA's regulations governing state plans under section 111(d) of the Act. 84 Fed. Reg. 32,520 (July 8, 2019); *see also* EPA Motion at 2.

The Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), required for the first time under the Act that existing coal and natural gas power plants limit their emissions of carbon dioxide, which accounts for the bulk of the greenhouse gases that EPA has found endangers public health and welfare. *Id.* at 64,689. Pursuant to section 111(d) of the Act, EPA issued emission guidelines that reflected application of the best system of emission reduction that had been adequately demonstrated. *Id*. at 64,666-67. EPA estimated at the time that the Clean Power Plan would reduce carbon dioxide by 415 million short tons annually in 2030 compared to a no regulation scenario, *id.* at 64,924, the equivalent of carbon pollution emitted yearly by about 80 million passenger cars.

A group of states and industry parties sued EPA over the Clean Power Plan, *West Virginia v. EPA* (case no. 15-1363). After the Supreme Court stayed the rule in February 2016 pending merits review by this Court, the case was briefed and then argued before an *en banc* panel of this Court in September 2016. Following a change in presidential administrations, EPA—with the support of the *West Virginia* petitioners—repeatedly moved this Court to refrain from issuing a merits decision while the agency decided whether to rescind and/or replace the Clean Power Plan. Over the opposition of State and Municipal Respondent-Intervenors (many of

whom are State and Municipal Petitioners), the *West Virginia* case has been held in abeyance since April 2017. After EPA issued the Rule, the *West Virginia* petitioners, with EPA's support, moved to dismiss the case as moot.[2] That motion is currently pending.

The Rule repeals the Clean Power Plan on the grounds that EPA now believes that its prior determination of the best system of emission reduction is expressly prohibited by the Act. *See* 84 Fed. Reg. at 32,523. The Rule's emission guidelines are based on EPA's new determination that the best system of emission reduction consists solely of minor efficiency improvements at coal-fired power plants. *See id.* at 32,536. According to EPA, when the Rule is implemented in 2030, it will reduce carbon dioxide emissions by 11 million short tons compared to a no regulation scenario, a less than one percentage difference. *See id.* at 32,561. The third component of the Rule, revisions to the section 111(d) implementing regulations, greatly lengthens the time for states to develop and submit state plans and for EPA to review those plans. *See id.* at 32,565. In light of EPA's decision to combine three rulemakings into one, the combined record for the Rule is very large, including three separate response to comments documents and a certified index to the record that is more than 500 pages long.

[2] *See* Petitioners' and Petitioner-Intervenors' Motion for Dismissal of the Petitions for Review As Moot (Doc. 1797267); EPA's Response in Support of Petitioners' Motion to Dismiss (Doc. 1797703).

ARGUMENT

EPA Has Not Established That Expediting This Case Is Warranted.

The Court grants motions to expedite cases "very rarely" and only when the reasons for doing so are "strongly compelling." *Handbook of Practice and Internal Procedures* at 33. The movant must show that delay from merits review in the normal course "will cause irreparable injury and that the decision under review is subject to substantial challenge." *Id.* The Court may also expedite a case in which the "public generally, or . . . persons not before the Court, have an unusual interest in prompt disposition." *Id.*

EPA makes no attempt to demonstrate that processing the case in the normal course would cause irreparable injury to any party. Instead, EPA argues that there are strongly compelling reasons to expedite the case because the general public or persons not before the Court have an unusual interest in prompt disposition. EPA Motion at 1, n.1. None of the reasons EPA cites justify granting its motion.

A. EPA fails to distinguish this case from other nationally important cases handled by this Court on a non-expedited basis.

EPA first argues that the Rule "bears on an issue of national importance, including both environmental concerns and the appropriate regulation of a significant sector of the economy." EPA Motion at 2; *see also id.* at 3 (regulation of power plant greenhouse gases is "a matter of intense public interest"). EPA's broad, generalized statements about the need to expedite litigation over this

particular Rule fail to differentiate it from many other important cases—including other reviews of regulations over "a significant sector of the economy," EPA Motion at 2—handled by this Court in the normal course. If the test were simply whether a case involves a nationally important issue, the Court would expedite cases routinely, not "very rarely." *See Handbook* at 33.

State and Municipal Petitioners concur that addressing climate change harms is a critical and urgent problem, as evidenced by our efforts to address those injuries, including by compelling EPA to take action under the Act. But EPA fails to explain how resolution of this challenge in the normal course would undermine any environmental or economic benefits it contends the Rule will achieve. Nor could it, because, as discussed below, the Rule's deadlines are several years away and there is no stay that would prevent the Rule from coming into effect.

B. There is no need to expedite the case to provide regulatory certainty.

EPA next relies on an allegedly prompt need for regulatory certainty for states, power companies, and ratepayers, noting that the "dispute over the appropriate form of regulation of [carbon dioxide] emissions . . . has been left unresolved for many years already." EPA Motion at 3-4. No doubt it is preferable for states and regulated entities to know sooner rather than later if a challenged regulation is lawful or not. But the Rule's compliance deadlines for states and power plants are several years from now. EPA significantly lengthened the period

for states to submit plans under section 111(d), meaning that state plans are not due until September 2022. *See* 40 C.F.R. § 60.23a(a)(1). In addition, EPA does not anticipate that power plants will be required to comply with any emission obligations under the Rule until 2025 at the earliest.[3]

Moreover, the agency's asserted need to address uncertainty rings hollow, given that EPA itself was the cause of several years of delay in obtaining a ruling from this Court in *West Virginia v. EPA* (case no. 15-1363). EPA engaged in repeated attempts to block issuance of a merits decision, rather than simply awaiting a ruling from this Court that would have (at a minimum) shed light on the "appropriate form of regulation" of carbon dioxide emissions from existing power plants. In light of their substantial, prolonged efforts to postpone obtaining judicial clarity on some of the very legal issues that will be litigated here, neither EPA nor respondent-intervenors (many of whom were petitioners in *West Virginia*) can credibly contend regulatory certainty necessitates expediting this case.

C. Granting EPA's motion would prejudice, not further, State and Municipal Petitioners' interests.

Next, citing our arguments for expeditious resolution of the lawfulness of the Clean Power Plan in *West Virginia*, EPA asserts that "expediting this case

[3] *See* EPA, Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, at ES-3 (June 2019) (assuming no emission reduction obligations until 2025).

would appear to serve Petitioners' interests." EPA Motion at 4 (citing Response Opposing Requests for Further Abeyance, *West Virginia v. EPA*, No. 15-1363, Doc. 1748706 (Sept. 4, 2018)). EPA is wrong. Granting the agency's motion would in fact substantially prejudice State and Municipal Petitioners' interest in the fair and efficient prosecution of this important matter.

EPA fails to acknowledge important factual differences between the two cases. In *West Virginia*, the Supreme Court stayed the Clean Power Plan's requirements pending merits review by this Court. Thus, we sought expeditious resolution in order to obtain the public health and environmental benefits that would not take effect until this Court's disposition of the case. Here, by contrast, the Rule took effect on September 6, and no party has moved this Court to stay it. Furthermore, as noted above, any emission reductions from the Rule would be minimal by EPA's own calculations, and not occur until 2025 at the earliest.

Moreover, EPA's approach would prejudice State and Municipal Petitioners' interest in the orderly and efficient processing of this important appeal. As noted above, at least nine petitions for review have been filed since EPA filed its motion to expedite, and the deadline to intervene in those cases will not expire until early October. Establishing a briefing schedule now—without knowing the universe of

litigants in the case—would frustrate the ability of the current Petitioners to coordinate on efficient briefing of the case.[4]

Furthermore, establishing a briefing schedule before resolving outstanding motions (which may be filed until October 7, *see* Doc. 1800451[5]), would be an unwarranted and prejudicial deviation from the Court's standard practice. *See Handbook* at 28. State and Municipal Petitioners are in the process of reviewing EPA's voluminous certified index to the record and evaluating whether it will be necessary to file a procedural motion concerning the completeness of the record. In addition, State and Municipal Petitioners filed a petition for reconsideration with EPA on September 6 to preserve the ability to raise objections that arose after the close of the comment period. *See* 42 U.S.C. § 7607(d)(7)(B). We are considering filing a procedural motion (after first conferring with EPA and other interested parties) on coordination of the agency's reconsideration process with briefing in this litigation. The disposition of those motions could impact the scheduling of

[4] In addition to the prospect of new parties intervening in the case, State and Municipal Petitioners will also be evaluating whether to file a motion to intervene as respondents in the litigation commenced by certain industry petitioners after EPA filed its motion to expedite. This would require additional coordination and make briefing of the case on EPA's schedule even more infeasible.

[5] State and Municipal Petitioners and petitioners in case no. 19-1166 have filed a motion to align their initial filing and motions deadlines with those in case no. 19-1140. *See* Doc. 1803230 (filed Aug. 22, 2019).

merits briefing, illustrating the soundness of Court's standard practice of resolving such motions before establishing a briefing schedule.

Finally, EPA's proposed approach of setting deadlines for briefs now, and postponing until October 16 submissions on the number of briefs and word allocations, is an inefficient approach to establishing briefing formats. Because the number of party briefs and length of the briefs necessarily affect what deadlines may be reasonable, considering those elements together makes sense. EPA's proposed piecemeal approach here would deviate from the Court's standard practice in complex, multiparty cases, potentially creating a situation in which the preordained deadlines become onerous to meet. That risk is enhanced here given that the Rule at issue is in fact three rules in one.

Instead of the rushed and ill-conceived process advocated by EPA, State and Municipal Petitioners suggest instead that the parties be directed to meet and confer on an appropriate briefing schedule and format shortly after the deadline for filing procedural motions in the case.

CONCLUSION

Based on the foregoing reasons, the Court should deny EPA's motion to expedite.

Dated: September 9, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Michael J. Myers, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2). According to the word processing system used in this office, this document, exclusive the caption, signature block, and any certificates of counsel, contains 2,329 words.

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/s/ *Michael J. Myers*
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to EPA's Motion to Expedite was filed on September 9, 2019 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Michael J. Myers
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