

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MURRAY ENERGY CORPORATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and
CATHERINE R. McCABE, Acting Administrator,
U.S. Environmental Protection Agency,¹

Respondents.

Case No. 16-1127
(and consolidated cases)

**JOINT MOTION BY PETITIONERS TO
EXTEND THE BRIEFING SCHEDULE**

Petitioners in these consolidated cases respectfully submit this motion to extend the briefing deadlines for the intervenor-respondent briefs, Petitioners' reply briefs, deferred appendix, and final briefs. Petitioners request an extension of 45 days for each of these deadlines. There is good cause for this short extension because it will allow the new administration to evaluate the possibility of resolving some or all of the issues that the Petitioners have raised in this case. The requested extension would not prejudice any party or the Court. Indeed, this Court recently granted a motion to extend the briefing deadlines for another case under substantially similar factual and

¹ Pursuant to Fed. R. App. P. 43(c)(2), Acting Administrator Catherine McCabe has been automatically substituted for Gina McCarthy as a party in this case.

procedural circumstances. *See Sierra Club v. EPA*, No. 15-1487, ECF No. 1653001 (D.C. Cir. Dec. 27, 2016).

Petitioners have conferred with the other parties in these consolidated cases regarding this motion. Respondents, the U.S. Environmental Protection Agency (“EPA”) and Acting Administrator Catherine McCabe, state that they take no position on this motion. The Respondent-Intervenors state that they oppose this motion.

I. BACKGROUND

The petitions for review in these consolidated cases challenge EPA’s final rule titled “Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units,” published at 81 Fed. Reg. 24,420 (Apr. 25, 2016) (the “Supplemental Finding”).

The Supplemental Finding represents EPA’s determination that it is “appropriate and necessary” to regulate emissions of hazardous air pollutants from coal- and oil-fired power plants under section 112 of the Clean Air Act (“CAA”), even after taking into account the cost of such regulation. CAA §112(n)(1)(A). This “appropriate and necessary” determination is a statutory prerequisite for EPA’s 2012 rule establishing standards for these emissions, commonly known as the Mercury and Air Toxics Standards or “MATS” Rule. 77 Fed. Reg. 9304 (Feb. 16, 2012). EPA issued the Supplemental Finding in response to the U.S. Supreme Court’s decision in

Michigan v. EPA, 135 S.Ct. 2699 (2015), rejecting EPA’s previous “appropriate and necessary” finding from the 2012 MATS Rule.

Petitioners challenged the Supplemental Finding within the statutory time period, and all petitions for review were consolidated by June 30, 2016. Petitioners also provided notice to the Court of a related case involving EPA’s denial of petitions for reconsideration of the MATS Rule, in which some petitioners had filed a motion to consolidate that case with the present challenges. *See ARIPPA v. EPA*, No. 15-1180, ECF No. 1618799 (D.C. Cir. June 10, 2016) (“MATS Reconsideration Case”). On August 29, 2016, the Court denied the motion to consolidate the MATS Reconsideration Case with this case, but set both cases for argument on the same day and before the same panel.² ECF No. 1632520.

The parties filed separate briefing proposals on September 30, 2016. On October 14, 2016, the Court issued the briefing format and schedule that currently governs this case. ECF No. 1641051. According to this schedule, Petitioners’ opening brief was due on November 18, 2016, and Respondents’ brief in response was due on January 19, 2017. Petitioners and Respondents have timely filed their opening and response briefs, respectively.

II. BRIEFING EXTENSION REQUEST AND JOINT STATEMENT

Petitioners request an extension of the briefing schedule as follows:

² Petitioners ARIPPA and the Utility Air Regulatory Group (“UARG”) are also petitioners in *ARIPPA v. EPA*. They represent that they will file a motion in that case seeking a similar 45-day extension of the remaining briefing deadlines.

Filing	Current Due Date	Proposed Due Date
Brief(s) of Respondent-Intervenors	February 10, 2017	March 27, 2017
Reply Brief(s) of State and Industry Petitioners	February 24, 2017	April 10, 2017
Deferred Appendix	March 10, 2017	April 24, 2017
Final Briefs	March 24, 2017	May 8, 2017

This Court has authority to grant this extension. This motion is timely because it is being filed more than seven days before the relevant due dates. D.C. Cir. R. 28(e)(2). And as explained below, there is good cause to extend these deadlines. Fed. R. App. P. 26(b) (allowing extension of deadlines in court orders for “good cause”). Further, a short extension of the briefing schedule would be justified based on the “power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Dietz v. Bouldin*, 136 S.Ct. 1885, 1888-89 (2016) (referencing district court’s “inherent power to modify or rescind its orders before final judgment . . . or to manage its docket and courtroom with a view toward the efficient and expedient resolution of cases”).

The facts in this case provide good cause for the requested extension. A new executive administration took office on January 20, 2017. This change may alter how this case proceeds because the new administration may be open to resolving some or all of the issues that Petitioners raised in their opening brief. A short extension would allow the new administration to evaluate whether alternative resolution of any of these

issues, such as settlement of the case involving further rulemaking proceedings, would be possible. Any such resolution would moot those issues in this litigation, making further briefing and argument on them unnecessary. As such, a short extension would promote judicial efficiency and conserve the parties' resources by focusing the Court's and the parties' time and attention only on those precise issues requiring judicial resolution. It would also prevent this Court from issuing rulings that could effectively be rendered advisory by subsequent executive action.

A short extension would not prejudice any of the parties or inconvenience this Court. Changing the remaining deadlines by 45 days would not substantially alter the progress of this case. Oral argument has not yet been scheduled. While the Court has ordered that this case be heard on the same day and by the same panel as *ARIPPA v. EPA*, Petitioners ARIPPA and UARG represent that they will file a motion in that case requesting the same 45-day extension. Further, neither the Supplemental Finding nor the MATS Rule which it was adopted to support has been stayed, and the MATS Rule's emission limitations are currently in effect for coal- and oil-fired power plants. *See White Stallion Energy Center, LLC v. EPA*, No. 12-1100, ECF No. 1588459 (D.C. Cir. Dec. 15, 2015) (remanding MATS Rule without vacatur). Therefore, extending these proceedings primarily disadvantages the Petitioners (who would have to wait longer for judicial resolution of any remaining issues) and not EPA or Respondent-Intervenors.

This Court has granted comparable or more extensive relief in cases presenting practically identical issues due to a change in administrations. For example, this Court recently granted a motion to extend the remaining briefing deadlines by approximately 45 days in a challenge to emission standards EPA promulgated under CAA §112 for two other source categories. *Sierra Club v. EPA*, No. 15-1487, ECF No. 1653001 (D.C. Cir. Dec. 27, 2016). That case presented a substantially similar procedural posture to this case: briefing had already commenced according to the Court's original scheduling order; the petitioners had filed their opening briefs; and oral argument had not been scheduled.³ *Id.*, ECF No. 1652757 (D.C. Cir. Dec. 23, 2016); *see also Nat'l Waste & Recycling Ass'n v. EPA*, No. 16-1371, ECF No. 1658272 (D.C. Cir. Jan. 30, 2017) (granting motion to extend deadline for briefing proposals by 57 days in light of new administration).

The Court's decision to grant an extension under those circumstances is consistent with other cases in which this Court or the Supreme Court has held the case in abeyance pending an incoming administration's evaluation of the issues and potential changes in policy or strategy. *See U.S. House of Reps. v. Burwell*, No. 16-5202, ECF No. 1649251 (D.C. Cir. Dec. 5, 2016) (placing case in abeyance in light of presidential transition); *EPA v. New Jersey*, No. 08-512 (S. Ct. 2009) (granting EPA

³ Although EPA in *Sierra Club* had not yet filed its brief as respondent at the time of the motion, the petitioners' proposed schedule did not alter the deadline for EPA's response brief. *Id.*, ECF No. 1652757 at 3. Accordingly, both this motion and the motion in *Sierra Club* would have the same effect on the interval between EPA's response brief and the remaining deadlines.

several extensions before the new administration ultimately dismissed appeal voluntarily); *New Jersey v. EPA*, No. 08-1065 (D.C. Cir. Aug. 5, 2009) (granting abeyance and continuing abeyance for seven years to allow new administration to review challenged regulations); *California v. EPA*, No. 08-1178 (D.C. Cir. Feb. 25, 2009) (granting multi-month stay of briefing to allow new administration to evaluate challenged regulations); *Mississippi v. EPA*, No. 08-1200 (D.C. Cir. Mar. 19, 2009) (clerk's order) (holding case in abeyance to allow new administration to review challenged rules). In light of this Court's past practice in the event of a change in presidential administrations, extending the remaining briefing deadlines by 45 days is reasonable and appropriate.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court extend the requested deadlines.

January 31, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served electronically through the Court's CM/ECF system on all ECF registered counsel.

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January 31, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(1)(D) of the Federal Rules of Appellate Procedure and Circuit Rules 27(a)(1) and 27(a)(1)(2), I certify that the foregoing Motion to Extend Briefing Schedule Deadline contains 1,630 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit of 5,200 words set by Rule 27(d)(2)(A) and the Court.

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