

ORAL ARGUMENT NOT YET SCHEDULED

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

American Lung Association, *et al.*,

Petitioners,

v.

U.S. Environmental Protection Agency, *et al.*

Respondents.

No. 19-1140

(and consolidated cases)

**ENVIRONMENTAL AND PUBLIC HEALTH PETITIONERS’
OPPOSITION TO EPA’S MOTION TO EXPEDITE**

The Court should deny the Environmental Protection Agency’s (“EPA”) unsupported and premature Motion to Expedite, ECF No. 1803976. EPA’s Motion does not make the extraordinary showing that the Court requires for expedited consideration and would unfairly prejudice the ability of Environmental and Public Health Petitioners (“Petitioners”) to challenge the “three separate and distinct rulemakings” at issue in this litigation. The Motion was made without meaningful consultation with Petitioners, before the deadline for additional parties to file petitions for review, and well in advance of the October 7, 2019 deadline set by the Court for initial filings and procedural motions. Further, petitioners have just filed petitions for administrative reconsideration in accordance with Clean Air Act

section 307(d)(7)(B), which may impact the timing of this matter. For these reasons, EPA's Motion should be denied.

I. EPA's MOTION DOES NOT MEET THIS COURT'S STANDARD FOR EXPEDITION

The Court's Handbook states:

The Court grants expedited consideration very rarely. The movant must demonstrate that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge. The Court also may expedite cases in which the public generally, or in which persons not before the Court, have an unusual interest in prompt disposition. The reasons must be strongly compelling.

Handbook of Practice and Internal Procedures for the U.S. Court of Appeals, District of Columbia at 33 (as amended through December 2018) ("Handbook").

EPA's Motion makes no serious effort to argue that it meets this standard, which it relegates to a footnote. Mot. to Expedite at 1 n.1. Despite the movant's obligation to demonstrate irreparable harm, no claim of irreparable harm to EPA's interests is advanced. Nor could one be: the challenged rules have not been stayed, so whatever public or private benefits EPA or the supporting Respondent-Intervenors claim for them are being provided already and do not constitute grounds for expedition. (EPA's current request for expedition and its support from Respondent-Intervenors, of course, stand in stark contrast to the same parties' longstanding efforts to delay review of the predecessor rule, even as that rule was subject to a judicial stay.) Nor does EPA make any claim that irreparable harm will

befall others during the normal period for completing this litigation.¹ The fact that the Agency, not the challengers, is seeking expedition is no reason to relax the requirement that the party seeking expedition must make a compelling showing for expedition. EPA has not done so.

Instead, EPA relies solely on what it declares an “unusual interest in prompt disposition” – and offers only the vaguest and unexplained generalities in support of its Motion. Mot. to Expedite at n.1. But the general public interest in regulatory certainty is present in *every* EPA regulatory challenge and does not constitute a “strongly compelling” or “unusual interest in prompt disposition” of this matter. Handbook at 33. EPA’s interest in expedition is weakest when, as here, it has moved slowly at the administrative level to ultimately promulgate a rule that requires little action by either states or regulated entities and only by distant compliance dates (and that, in any event, will be in effect during the litigation absent any stay). EPA’s only stated basis for expedition is to resolve “environmental concerns and the appropriate regulation of a significant sector of the economy,” Mot. to Expedite at 2, that “has been left unresolved for many years

¹ The challenged rule does not require States to submit implementation plans until 2022, 40 C.F.R. § 60.23a(a)(1), and, according to the Agency’s modeling, would not impose standards of performance on regulated facilities until at least 2025, 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).

already,” *id.* at 3. Petitioners note that EPA took every step to avoid the Court’s resolution of those very same questions in *West Virginia v. EPA*, No. 15-1363, argued *en banc* three years ago. Indeed, in seeking abeyance of that challenge, EPA proclaimed current Petitioners’ “desire for ‘clarity’ ... wholly insufficient to demonstrate meaningful harm.” Reply ISO EPA’s Mot. to Hold Case in Abeyance at 6-7, *West Virginia v. EPA*, No. 15-1363, ECF 1670856 (Apr. 12, 2017). EPA has failed to show why this case falls within the extraordinary few that, under this Court’s practice, warrant expedition.

II. EPA’S REQUESTED EXPEDITION WOULD PREJUDICE PETITIONERS

Though EPA did not consult with Petitioners in any meaningful way,² its Motion asserts that the proposed expedition “would appear to serve Petitioners’ interests,” Mot. to Expedite at 4. Petitioners disagree. Petitioners certainly are concerned by the severity of the climate change impacts already manifest and the urgency of meaningful action by EPA under the Clean Air Act. Petitioners have made no secret of their frustration with EPA’s dilatory behavior and, now, its issuance of these rules that are utterly inadequate. But both Petitioners and EPA must observe the Clean Air Act and this Court’s procedural requirements. And Petitioners’ interest in challenging this rule is coupled with an interest in ensuring

² EPA did not consult at all with Chesapeake Bay Foundation, which filed its timely petition on August 29, 2019.

that the course of litigation is orderly, fair and efficient³— that the massive record is properly identified, that parties have the opportunity to file appropriate motions, and that the three combined actions at issue are presented fully and in an organized way. That means making sure that procedural matters are handled in a rational and orderly way, as contemplated by the Clean Air Act and this Court’s rules and procedures,⁴ not thrown off course by an early demand to expedite despite the complete absence of any compelling grounds.

First, Petitioners are in the course of reviewing the 561-page index of record that EPA filed on August 23, 2019, a few minutes before it informed then-petitioners that it would seek expedition, and may identify missing or incorrectly listed items that will require further consultations with the Agency in order to ensure that the record is complete and correct. Petitioners may need to file

³ EPA promised as much in opposing a motion to decide the case in *West Virginia v. EPA*, stating, “There will be a full and fair opportunity for judicial review at the conclusion of EPA’s ongoing rulemaking.” EPA’s Opp. to Intervenor’s Mot. to Decide the Merits of Case at 12, *West Virginia v. EPA*, No. 15-1363, ECF 1750684 (Sept. 14, 2018).

⁴ “Normally, cases will not be given oral argument dates or briefing schedules until all pending motions have been resolved.” Handbook at 28. *See also* Circuit Rule 27(g)(3) (deferring briefing until pending dispositive motions have been resolved). Procedural motions in this matter are due October 7, 2019, and dispositive motions are due October 21, 2019. Order, ECF 1800451 (Aug. 2, 2019); Joint Unopposed Mot. to Align Deadlines for Initial Filings and Procedural and Dispositive Motions, ECF 1803230 (Aug. 22, 2019).

procedural motions to ensure that the administrative record before the Court is complete.

Second, on September 6, 2019, many petitioners in these cases filed petitions for administrative reconsideration in accordance with the Clean Air Act's provisions requiring reconsideration and administrative exhaustion⁵—petitions that may well bear upon the proper management of the pending petitions for review in this Court.

Petitioners' reconsideration petitions address a large number of issues, including EPA's reliance upon new statutory arguments, that were first presented only in the final rule, and as to which Petitioners had no opportunity to comment during the public comment period. Petitioners plan to consult with EPA imminently about how to manage the litigation in light of their pending reconsideration petitions and may need to file procedural motions on this topic.

Third, this case is complex. As EPA recognizes, this case challenges “three separate and distinct rulemakings,” each with its own lengthy administrative

⁵ Under section 307(d)(7)(B) of the Act, “[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review,” and EPA “shall” convene a proceeding for administrative reconsideration “[i]f the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule[.]” 42 U.S.C. § 7607(d)(7)(B).

record. Mot. to Expedite at 2. In order to have a full and fair opportunity to challenge these complex rulemakings, Petitioners must be given the normal time usually allotted for resolution of procedural motions and developing a briefing schedule appropriate to the case.⁶ Doing so will aid the orderly and proper consideration of these important matters, and avoid substantial prejudice to Petitioners.

Finally, EPA's Motion is premature. EPA made no effort to meaningfully confer with the then-existing petitioners. Rather, minutes after filing the certified index of record, EPA presented those petitioners with a request to state their position on an expedited briefing schedule, giving petitioners one business day to respond. Further, EPA filed its Motion before many of the timely challengers to the actions at issue were even identified. The Motion was filed nine days before the September 6, 2019, statutory deadline for filing petitions for review. 42 U.S.C. § 7607(b)(1); *see* 84 Fed. Reg. at 32,521/3. Indeed, numerous additional parties, with

⁶ Notably, EPA has not conferred with Petitioners on how to brief the issues relating to the "three separate and distinct rulemakings" combined in the final rule. There has been no conferral on what page limits are appropriate. Briefing this matter has only become more complex since the filing of EPA's Motion as numerous additional petitions for review have been filed. Further, it is too early to determine if there will be intervenors on Petitioners' side. "The amount of time for briefing a case may vary depending on [a number of factors, including] whether there are intervenors or amici curiae." Handbook at 24. Motions to intervene are due October 7, 2019, thirty days from the last-filed petition. Fed. R. App. P. 15(d). EPA's proposed schedule makes no provision for petitioner-intervenor or amicus briefs.

diverse and likely divergent interests, have filed petitions for review since this Motion was filed.⁷ Some of these petitioners are likely to challenge EPA's authority and obligation to regulate in this area at all. The presence of such challenges would add significantly to the complexity of the case and may prompt motions to intervene in support of Respondent from Petitioners or other entities supporting that authority, which are due on October 7, 2019.

EPA's Motion inappropriately seeks to bind the parties to "any cases subsequently consolidated with this matter," Mot. to Expedite at 1, to a briefing schedule on which their position was not even sought. It will be necessary for all the petitioners to confer—and in the circumstances here, EPA should reasonably be required to confer with all the parties before filing a proposed briefing schedule.

In sum, without any plausible claim for expedition, EPA filed this accelerated case management motion even before all the parties to the case were known and with no serious effort to engage with the existing Petitioners. The

⁷ Among these are Chesapeake Bay Foundation (No. 19-1173), The North American Coal Corp. (No. 19-1179), Westmoreland Mining Holdings (No. 19-1176), City and County of Denver, Colorado (No. 19-1177), Robinson Enterprises, Inc. *et al.* (No. 19-1175), Biogenic CO2 Coalition (No. 19-1185), Advanced Energy Economy (No. 19-1186), American Wind Energy Assoc., *et al.* (No. 19-1187) and Consolidated Edison, Inc. *et al.* (No. 19-1188) Additional petitions may have been filed before the end of the statutory period on September 6, 2019 but had not appeared on the Court's docket at the time this response was filed.

Respondent's peremptory and unilateral approach to managing a complex case should be denied.

Petitioners have a strong interest in faithful and effective implementation of Clean Air Act section 111(d) to reduce dangerous carbon dioxide pollution from existing power plants, and are committed to the orderly, efficient and fair adjudication of this case. Petitioners will be happy to confer with EPA, Respondent-Intervenors, entities that have filed petitions for review since EPA's Motion was filed, and all other parties about appropriate case management. But EPA's Motion fails to meet the standard for expedition, substantially prejudices Petitioners' ability to prosecute their case, and was filed prematurely after no serious effort to confer with the other parties.

CONCLUSION

For the foregoing reasons, the Court should deny EPA's Motion.

Dated: September 9, 2019

Respectfully submitted,

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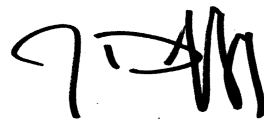
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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that, on this 9th day of September 2019, I caused the foregoing **Environmental and Public Health Petitioners' Opposition to EPA's Motion to Expedite** to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system.



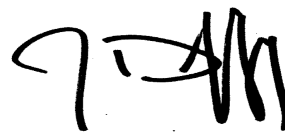
James P. Duffy

CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 27(d)(2), I hereby certify that **Environmental and Public Health Petitioners' Opposition to EPA's Motion to Expedite** complies with the type-volume limitations. According to the word processing system used in this office, this document, exclusive the caption, signature block, and any certificates of counsel, contains 2,641 words.

2. Pursuant to Fed. R. App. P. 32(a)(5)-(6), I hereby certify that **Environmental and Public Health Petitioners' Opposition to EPA's Motion to Expedite** complies with the typeface requirements and the type-style requirements because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: September 9, 2019



James P. Duffy