ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

State of West Virginia, et al., *Petitioners*, v. U.S. Environmental Protection Agency, et al., *Respondents.*	No. 15-1363 and consolidated cases

JOINT REPLY OF NON-STATE MOVANTS IN SUPPORT OF MOTION TO ESTABLISH BRIEFING FORMAT AND EXPEDITED BRIEFING SCHEDULE

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Movants' request for bifurcated and expedited briefing and oral argument on core legal issues in May 2016 is rooted in an effort to obtain meaningful judicial review of an EPA final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"), that the Administration says will "aggressive[ly] transform[] … the domestic energy industry"[1] and whose first binding deadline occurs in early September 2016. These core legal issues are whether: (i) the Rule is lawful under the plain language of the Clean Air Act; (ii) the Rule violates the U.S. Constitution; and (iii) EPA has impermissibly intruded on authority that is exclusive to the States and the Federal Energy Regulatory Commission. Movants ask this Court to address as soon as possible these core legal issues separately and on an expedited basis because the interest of justice requires an early resolution of whether the Rule should be permitted to remain in effect and because briefing both the core and the myriad non-core issues together will likely defer briefing and require more words. Resolving core issues first also serves judicial economy because it could avoid the need for litigation of the remaining issues.

EPA asks this Court to deny the Joint Motion, ECF No. 1587531 ("Joint Mot."), calling Movants' bifurcated briefing proposal "highly unusual" and "excep-

[1] Joby Warrick, *White House set to adopt sweeping curbs on carbon pollution*, WASH. POST (Aug. 1, 2015) (quoting White House Fact Sheet), *available at* https://www.washingtonpost.com/national/healthscience/white-house-set-to-adopt-sweeping-curbs-oncarbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html.

tional." EPA Opposition, ECF No. 1589819, at 1, 6 ("EPA Opp."). But bifurcation and expedition is not unprecedented. *See* Joint Mot. at 17. It occurs where, as here, a Rule presents a discrete set of threshold legal issues. Indeed, the federal government just sought such briefing last month for a "purely legal matter" because "judicial economy would be served." *Wyoming v. Dep't of the Interior*, No. 2:15-cv-43-SWS, ECF No. 155, at 2 (D. Wyo. Nov. 30, 2015).

The final Rule is unquestionably the most complex and transformative Clean Air Act regulation ever adopted. The Rule is unusual, too, in that its structure, effect, and purpose find no parallel to any prior rulemaking under the provision of the Act under which EPA claims authority—Section 111. Among other things, the Rule requires States to impose either (i) EPA-established emission rates for each affected electric generating unit in the State that EPA concedes these units cannot meet or (ii) mandatory state-wide carbon dioxide reduction "goals." Under the Rule, States are expected to implement these requirements through broad—perhaps nationwide—trading programs that do not yet exist.

Bifurcated briefing is necessary to ensure that petitioners obtain meaningful judicial review. Should the Court be disinclined to order bifurcated briefing of core legal issues before the fact-based and often petitioner-specific programmatic issues, briefing both issues at one time without a *substantial* increase in word allocation, as EPA suggests, is clearly untenable. Under such conditions, the various petitioners would be prevented from raising more than a few of the numerous programmatic objections

they have to the Rule, forcing them to forgo altogether many of the challenges they collectively seek to raise. Such an approach would effectively deprive petitioners of their right to judicial review. The judicial review provision of the Clean Air Act reflects a congressional decision to allow "preenforcement review of agency rules and regulations." *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998). That congressional directive can be given effect only by allowing a meaningful opportunity to present all ripe issues. If the Court declines to order phased briefing, petitioners will require a substantial enlargement of words to meet the Court's standards for adequate briefing of the numerous programmatic issues presented by the Rule.[2] Because phased briefing would allow speedy resolution of whether EPA even has authority to issue such a rule, the proposed bifurcation may obviate any need even to brief those other issues.

The need for bifurcation is driven by the unparalleled scope of this rulemaking and by the number of discrete issues different petitioners seek to raise with the Rule. The proposed rule spanned 129 pages in the *Federal Register*, 79 Fed. Reg. 34,830 (June 18, 2014), and was by EPA's own account the subject of "one of the most extensive

[2] This Court has made clear that issues must be raised with specificity. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1251 (D.C. Cir. 2014) ("[C]ursory treatment is inadequate to place [a] challenge … before the court, because 'it is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.'") (quoting *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166-67 (D.C. Cir. 2013)). Given the number of programmatic issues that exist, many words would be required to meet the Court's specificity requirement and to ensure meaningful judicial review.

and long-running public engagement processes the EPA has ever conducted," with the Agency eventually receiving over 4.3 million comments on the proposal, 80 Fed. Reg. at 64,663, 64,672. When the final Rule was ultimately published in October 2015, it had swelled to 303 pages, evidencing that it had evolved into something quite different from what EPA had initially proposed.[3] The final Rule was accompanied by a single-spaced, 152-page supporting legal memorandum, "intended to be read in conjunction with the [Rule] preamble and the Response to Comments document." EPA, Legal Memorandum Accompanying Clean Power Plan for Certain Issues at 1 (undated). The Response to Comments document spans another 7,656 single-spaced pages, and the Rule is explained further in six technical support documents and accompanying spreadsheets spanning hundreds of additional pages. *See* EPA, Clean Power Plan Final Rule Technical Documents, at http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-technical-documents.

At least 150 distinct entities have filed a total of 41 petitions for review of the Rule during the 60-day judicial review period provided under the Clean Air Act. 42 U.S.C. § 7607(b)(1). Thirty-two of those 150 petitioners are States or state regulatory

[3] EPA itself identified ten "key changes" in the final Rule from what was proposed, requiring 6,073 words just to identify and briefly summarize those key changes. *See* 80 Fed. Reg. at 64,672-77.

agencies. Most petitioners have already filed non-binding issue statements, raising scores of issues with the Rule.[4]

EPA contends that Movants' proposal to brief separately the fundamental issues of legal authority, which are common to all petitioners and have long been familiar to EPA because they were raised in public comments filed more than a year ago, "would substantially prejudice Respondents' ability to effectively litigate the case." EPA Opp. at 10. EPA's position underscores the unlawfulness of the Rule. If EPA indeed possesses the legal authority it claims, it should have no trouble articulating that authority succinctly to the Court. Certainly EPA should be able to marshal its considerable legal resources, including arguments it has already developed in its 70-page response to the stay motions filed on December 3, 2015, ECF No. 1586661, and in its 75,000-word Legal Memorandum accompanying the Rule,[5] to prepare a response brief in the span of 33 days—over a month's time.

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[4] EPA expresses concern that Movants filed their briefing proposal before the close of the judicial review period. EPA Opp. at 6. EPA has no standing to make such an objection. The judicial review period has now closed, and if any petitioners who entered the case after the filing of this motion object to this proposal, they have the ability to raise such objections themselves. Movants are not aware of any petitioners having any such objection.

[5] Additionally, one of the core issues specified in Movants' briefing proposal—whether regulation under Section 111(d) of the Clean Air Act is permissible when the target source category is already regulated under Section 112 of the Act—has been fully briefed and argued in earlier litigation. *See In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015) (denying petition for a writ of prohibition "because the complained-of agency action is not final").

In calling Movants' briefing proposal "unworkable," EPA incorrectly asserts that the core legal issues that should be briefed first in the name of judicial economy cannot be distinguished from the programmatic issues that would be briefed later only if necessary. EPA Opp. at 7. EPA's position is meritless. As explained in the stay motions, the Rule represents a radical reimagining of EPA's authority under Section 111(d), departing from 45 years of agency interpretation of that provision. The core issues as to whether EPA has basic legal authority to undertake this unprecedented new approach are open and obvious and were hotly debated during the rulemaking; they were the issues that motivated EPA to support the Rule with such a lengthy Legal Memorandum; and they were the issues that petitioners briefed in their stay motions. Movants have identified with specificity the fundamental core issues they propose to address in this initial (and potentially sole) round of briefing. Joint Mot. at 12-15. Consideration of these issues will not require any "assiduous 'record-based' analysis," EPA Opp. at 7, as these issues go to the facial validity of the Rule itself. It is simply false that this Court will need to review "an extensive record" to decide, for example, the purely legal question whether "generation-shifting" can *under any circumstances* be used as a "best system of emission reduction" under Section 111, or whether a rule under Section 111(d) *in any form* can be directed at source categories already regulated under Section 112. *Id.* at 8. EPA also vastly understates the possibility that the Court's resolution of those core legal issues would render briefing on the numerous

programmatic issues entirely unnecessary, which promotes judicial economy and preserves the parties' resources, including those of EPA.

EPA's objection that the programmatic issues cannot now be ascertained is misplaced. EPA Opp. at 11. The sampling of such issues that Movants provided in their motion was illustrative; many other such issues have been identified in the Statements of Issues filed with the Court. For present purposes, however, it is necessary to identify only the core issues that would be addressed in the initial round of briefing. What issues, if any, might be included in any subsequent briefing will depend on the Court's resolution of the core legal issues, and is thus a matter for a future day.

Finally, States are engaged in extensive efforts to implement the Rule, *see* Table of State Compliance Actions, Exh. A, State Stay Motion Reply, ECF No. 1590286, and the first deadline for state plan submittals is looming in September 2016. This alone makes a May 2016 oral argument and an early decision on EPA's legal authority for this program of utmost importance to the States and regulated parties. Moreover, as discussed above, any briefing schedule that includes both core and programmatic issues would require substantial enlargement in petitioners' word allocation to address all of the numerous record-based issues identified in the non-binding Statements of Issues. Even then, as EPA makes clear, phased briefing is the "proper course" to address pending reconsideration issues that are not yet ripe for review. EPA Opp. at 9. Movants' bifurcated briefing proposal is the most efficient way to adjudicate those issues that are subject to pending reconsideration petitions.

It is EPA's proposal, therefore, that threatens protracted delay in completing judicial review of all issues raised by the Rule. Movants' briefing proposal will assure prompt resolution of EPA's asserted authority to transform the energy industry, allow meaningful and expeditious briefing of all programmatic issues that are ripe for review, and manage efficiently the briefing of issues subject to petitions for reconsideration that EPA recognizes are not ripe. EPA Opp. at 9-10. For these reasons, Movants ask that this Court adopt its briefing proposal.[6]

CONCLUSION

The proposed briefing format will expedite overall resolution of this litigation. Briefing the core legal issues first will ensure the integrity of the judicial review process, be more efficient, promote judicial economy, and facilitate, not impede, prompt resolution of this case. The Court should grant the motion.

[6] EPA's objections to Petitioner-Intervenors having a separate brief are meritless. EPA Opp. at 10 n.6. First, the intervention motions were unopposed. Second, Petitioner-Intervenors know what the Court's rules governing intervenors' briefs provide. Petitioner-Intervenors will expand on issues raised by petitioners, just as intervenors on EPA's side will presumably expand on EPA's arguments. Denying Petitioner-Intervenors their right to a separate brief based solely on EPA's speculation that those parties will not be adding anything worthwhile is an objection that could also be advanced by petitioners with respect to the multiple briefs that Respondent-Intervenors proposed to file in support of EPA. The Court's rules, not petitioners' or respondents' speculation regarding a brief's value, establish the right of intervenors on either side of this litigation to file a brief in compliance with those rules. And, in no event should EPA and its supporting intervenors be given more words than petitioners and their supporting intervenors are given for their opening briefs.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December 2015, the foregoing document was served electronically through the Court's CM/ECF system on all registered counsel.

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