

**ORAL ARGUMENT HELD APRIL 16, 2015  
DECISION ISSUED JUNE 9, 2015**

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

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STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent,  
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CITY OF NEW YORK, *et al.*,

Intervenors.

Case No. 14-1146

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**On Petition for Review of an EPA Settlement Agreement**

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**REPLY IN SUPPORT OF PETITIONERS' ALTERNATIVE MOTIONS TO  
STAY THE MANDATE**

As a mere alternative to rehearing or rehearing *en banc*, the States moved this Court with good cause to issue a modest stay of the mandate in these related cases—Nos. 14-1112, 14-1146, & 11-1151—until a final rule is published in the

Federal Register. *See* ECF 1564350 (No 14-1112); ECF 1564355 (No. 14-1146). As the States explained, holding this case would permit this Court to address the concerns raised in the State’s Petition For Rehearing And Rehearing *En Banc*, as well as serving both judicial economy and the public interest by permitting, after consolidation, a more prompt adjudication of the merits of the Section 112 Exclusion issue. *See* ECF 1564350, at \*14-15 (No. 14-1112); ECF 1564355 at \*14-15 (No. 14-1146). After all, the present case involved 300 pages of briefing and full oral argument on the Section 112 Exclusion issue, an issue the resolution of which could well render entirely moot the upcoming massive litigation over the final Section 111(d) Rule. All of this provides ample “good cause” for the States’ alternative request. *See* Circuit Rule 41(a)(2).

In its Opposition, EPA raises three reasons that the agency believes counsel against a stay of the mandate.

*First*, EPA argues that that this Court is powerless to stay the mandate because this Court allegedly lacked “jurisdiction” over these cases. ECF 1566711 at \*2-3 (No. 14-1146); ECF 1566736, at \*2-3 (No. 14-1112). As a threshold matter, Petitioners disagree that this Court lacks jurisdiction for the reasons stated in their Petition For Rehearing and, with respect to the writ in particular, the reasons recently acknowledged by EPA in the Tenth Circuit. *See* EPA’s Response, No. 15-5066, ECF 01019469058, at \*10 (10th Cir. July 31, 2015) (“because the

D.C. Circuit has exclusive jurisdiction to review any final [Section 111(d) Rule] . . . that court also has exclusive jurisdiction over ‘any suit seeking relief that might affect [its] future jurisdiction’ (quoting *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 78-79 (D.C. Cir. 1984)). In any event, to the extent EPA is asserting that this Court has no ability to stay its own mandate, that argument contradicts the bedrock principle that this Court can “manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quotation omitted). This necessarily includes the power to stay the mandate, as principles of judicial efficiency, public interest and equity dictate. *See* Fed. R. App. P. 40 & 41; *see also Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1129 (D.C. Cir. 1978) (“for as long as the appellate court retains its mandate it maintains its jurisdiction over the case, and thus the power to alter the mandate”) (footnote omitted); *N. California Power Agency v. Nuclear Regulatory Comm’n*, 393 F.3d 223, 224 (D.C. Cir. 2004) (same). Whether the action is formally a stay of the mandate or simply to defer ruling on the rehearing petitions,<sup>1</sup> it is clearly within this Court’s discretion to hold this case. *See Chambers*, 501 U.S. at 43. EPA does not cite any case, from any jurisdiction, holding that a court of appeals lacks such authority, for jurisdictional reasons or otherwise.

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<sup>1</sup> The mandate has not issued in No. 14-1151 or No. 14-1146. Under Circuit Rule 41(a)(3), no mandate exists in No. 14-1112.

*Second*, EPA argues that this Court should not consider the benefits to judicial efficiency and the public that would flow from consolidation after a stay of the mandate because the panel would not be permitted to consolidate the final Rule challenge with these pending cases. ECF 1566711 at \*3-4 (No. 14-1146); ECF 1566736, at \*3-4 (No. 14-1112). EPA's only support for this counterintuitive assertion is to point to cases failing to draft a panel into serving on a related issue, arising after the mandate had already issued ending the original case. *See id.* at \*3 n.7.<sup>2</sup> But the mandate has *not* issued here and petitions for rehearing are still pending, meaning that these cases are still very much alive. *See California Power*, 393 F.3d at 224 (“[I]ssuance of the mandate formally marks the end of appellate jurisdiction.” (quotations omitted)). In such circumstances, a straightforward application of this Court's rules governing consolidation of newly-filed cases with

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<sup>2</sup> In *Public Citizen, Inc. v. Federal Motor Carrier Safety Administration*, on May 8, 2006, this Court denied a motion to assign the petition for review to the same panel that heard case No. 03-1165—the mandate for which had *already issued* nearly two years before. *See* ECF 855695, No. 03-1165 (Oct. 22, 2004). And in *Public Service Commission for New York v. Federal Power Commission*, 472 F.2d 1270 (D.C. Cir. 1972), this Court refused to transfer the case to the Fifth Circuit based on the argument that several judges of that court decided a similar case *over two years before*, *see id.* at 1271-72 n.1 (citing *Austral Oil Co. et al. v. FPC*, 428 F.2d 407 (5th Cir. 1970)). Likewise, the additional cases cited by the NGOs, *see* ECF 1565784, at \*5 n.4 (No. 14-1112), involved requests to assign new cases to panels that either heard the case in which the mandate had already issued or which were already set for *en banc* argument. *See Comcast Corp. v. FCC*, ECF 08-1291, No. 08-1291 (June 2, 2010) (mandate); *Judicial Watch, Inc. v. Dep't of Energy*, ECF 853640, No. 04-5204 (Oct. 8, 2004) (declining to assign case to same panel as *In re Cheney*, No. 02-5354, which was already scheduled for *en banc* argument).

active cases favors a panel acutely familiar with one of the primary “issues” in the now-final Section 111(d) Rule. This is especially true in a case involving the “same parties.” D.C. Circuit Handbook 23 (2015).

Finally, EPA claims that any efficiency considerations are “illusory” because this Court did not address the merits of the Section 112 Exclusion issue in its Opinion, and that the Final Rule involves different “legal interpretations.” ECF 1566711 at \*4 (No. 14-1146); ECF 1566736, at \*4 (No. 14-1112). But this Court’s detailed questions on the merits of the Section 112 Exclusion issue at the April 16 argument definitively refute EPA’s suggestion that the panel lacks special expertise and learning on that issue. Indeed, the efficiencies gained from staying the mandate and then consolidation are particularly compelling now that the Final Rule has issued, given that the entirety of EPA’s reasoning as to the Section 112 Exclusion derives, often word-for-word, from its briefs in the presently active cases. *Compare* Final Brief for Respondent EPA (“EPA Brief”), No. 14-1146, ECF 1540645 at 49 (Section 111(d) fills program “gap”) *with* Final Rule at 250, 260 (“section 111(d) is designed to regulate pollutants . . . that fall in the gap”); *compare* EPA Brief at 45 (“legislative history of the 1990 Amendments . . . sought to expand EPA’s regulatory authority”) *with* Final Rule at 268 (“Congress’s intent in the 1990 CAA Amendments was to expand the EPA’s regulatory authority”); *compare* EPA Brief at 40 (“the Senate’s amendment is straightforward”), *with*

Final Rule at 253 (“the Senate amendment is straightforward”). And EPA has no response to the States’ other efficiency consideration: a stay of the mandate would give this Court the ability to address the concerns raised by the States in their Petition For Rehearing And Rehearing *En Banc*. See ECF 1564355 at \*14-15 (No. 14-1146); ECF 1564350, at \*14-15 (No. 14-1112).

### CONCLUSION

If the petition for rehearing or rehearing *en banc* is not granted, this Court should stay the mandate until publication of the final rule in the Federal Register.

Dated: August 14, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 14th day of August, 2015, a copy of the foregoing Reply In Support Of Petitioners' Alternative Motions To Stay The Mandate was served electronically through the Court's CM/ECF system on all registered counsel.

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