

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

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| _____ |) | |
| State of West Virginia, et al., |) | |
| |) | |
| Petitioners, |) | No. 14-1146 |
| |) | |
| v. |) | MOTION TO |
| |) | EXTEND TIME TO |
| United States Environmental Protection Agency, |) | FILE DISPOSITIVE |
| |) | MOTIONS AND |
| Respondent. |) | RECORD |
| _____ |) | |

Motion to Extend Time to File Dispositive Motions and Record

Respondent the United States Environmental Protection Agency (“United States”) respectfully moves to extend the deadline for filing dispositive motions, currently set for September 18, 2014, by forty-five days to November 3, 2014.¹

The United States also moves to extend the time to file the administrative record to thirty days after the Court decides any dispositive motions, assuming a record is still required at that point (i.e., if this petition has not been dismissed).

Petitioners West Virginia *et al.* have indicated that they oppose this motion. All proposed Intervenors (New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the

¹ The forty-fifth day after the current deadline (September 18, per the Court’s August 4, 2014 Order, Doc. #1505984) would be November 2, which is a Sunday; accordingly, the deadline resulting from a forty-five day extension would be Monday, November 3, 2014.

Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively, “State Intervenors”); and Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund (collectively, “Environmental Petitioners”)) have represented that they do not oppose this motion. The reasons for this motion are as follows:

1. Petitioners purport to challenge a Settlement Agreement executed by EPA, State Intervenors, and Environmental Intervenors in December of 2010, and approved as final by EPA on March 2, 2011 (the “2010 Settlement Agreement”). Petition for Review (Doc. #1505986) at 1-2; Exhibit 1 (Settlement Agreement).

2. In the 2010 Settlement Agreement, EPA agreed, *inter alia*, to sign “a proposed rule under section 111(d) [of the Clean Air Act] that includes emissions guidelines” for greenhouse gases for existing electric utility steam generating units (known as “EGUs” or “power plants”) by July 26, 2011. Exhibit 1 ¶ 2. EPA further agreed that, after considering any comments received on the proposed rule and taking certain other actions, it would sign a final rule taking action with respect to the proposed rule by May 26, 2012. *Id.* ¶ 4.

3. The 2010 Settlement Agreement was modified in early June, 2011. *See* Exhibit 2. That modification changed the date by which EPA was to sign a proposed rule addressing greenhouse gas emissions from existing power plants to September 30, 2011.

4. EPA did not issue a proposed or final rule under section 111(d) of the Clean Air Act concerning greenhouse gas emissions from existing power plants by the dates set forth in the 2010 Settlement Agreement.

5. EPA did publish a proposed rule addressing greenhouse gas emissions from existing power plants on June 18, 2014. *See* 79 Fed. Reg. 34,830 (July 18, 2014). The comment period for that proposed rule is currently ongoing, and continues to October 16, 2014. No final rule has issued. EPA has announced that it plans to take final action on the proposed rule in June 2015.

6. Petitioners ask this Court to “hold the settlement agreement unlawful,” “vacate the settlement agreement,” and “enjoin EPA from complying with the settlement agreement by continuing the present ongoing comment period regarding EPA’s proposed coal-fired power plants rule under Section 111(d).” Petition for Review at 4-5. They claim that the settlement agreement and the ongoing section 111(d) rulemaking with respect to greenhouse gases are unlawful because EPA has already regulated emissions of other pollutants (specifically, hazardous air pollutants) from power plants under Section 112 the Clean Air Act.² Petition for Review at 3.

² Two other petitions have been filed asking this Court to stop EPA’s section 111(d) rulemaking for the same reason, despite the fact that no final rule has issued. *See Murray Energy Corp. v. EPA* (No. 14-1112) (petition for an extraordinary writ to halt the 111(d) rulemaking) & *Murray Energy Corp. v. EPA* (No. 14-1151) (petition for review of EPA’s alleged “final action” of “initiating a rulemaking without authority and in violation of the Clean Air Act”). Petitioner States in this matter have filed an amici brief in support of petitioner in the first of those two

7. Petitioners' challenge to the 2010 Settlement Agreement presents a number of substantial threshold jurisdictional issues to be resolved before the Court reaches the merits of Petitioners' claim that the 2010 Settlement Agreement – and EPA's *ongoing* rulemaking addressing greenhouse gas emissions from power plants – are both unlawful. These threshold jurisdictional issues include, among other things: whether Petitioners can challenge a settlement agreement that does not commit the Agency to any particular course of final action; whether the 2010 Settlement Agreement is moot because the deadlines therein expired without EPA meeting its obligations under the agreement; and whether this Court has any jurisdiction under the Clean Air Act to stop an ongoing rulemaking.

8. In view of the number of the substantial jurisdictional issues that need to be briefed, other briefing deadlines that Department of Justice counsel is obligated to meet over the next few weeks, and the need to allow adequate time for EPA and Department of Justice management review, EPA requests a forty-five day extension of the time to file dispositive motions.

petitions. *See* No. 14-1112, Dkt. #1499435. All three cases raise the same challenge to the ongoing rulemaking: the argument that EPA regulation of power plants' greenhouse gas emissions under CAA section 111(d) is unlawful because EPA has regulated power plants' emissions of other pollutants under CAA section 112.

9. In the interest of judicial economy, EPA further requests that the deadline for filing the administrative record (if such action is necessary) be extended until thirty days after the Court acts on any dispositive motions.³

10. WHEREFORE, EPA respectfully requests that the Court extend the time to file dispositive motions to November 3, 2014, and also extend the time for the Agency to file the administrative record (if such action remains necessary) until thirty days after the Court acts on any dispositive motions.

Respectfully submitted,

/s/ Amanda Shafer Berman

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³ As indicated above, the United States intends to file a dispositive motion, subject to review and approval of such a motion by Department of Justice management. If, however, no dispositive motion is ultimately filed, then the United States requests that the deadline for filing the administrative record be reset for December 3, 2014 – thirty days after the proposed deadline for dispositive motions.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was today served electronically through the court's CM/ECF system on all registered counsel.

/s/ Amanda Shafer Berman

DATED: September 3, 2014