

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

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

Case No. 14-1146

**PETITIONERS' OPPOSITION TO RESPONDENT'S MOTION TO  
EXTEND TIME TO FILE DISPOSITIVE MOTIONS**

EPA's request for a 45-day extension should be denied. While the States as a gesture of good will are willing to consent to a 14-day extension for the filing of EPA's dispositive motion, the States respectfully submit that EPA has not shown "good cause" for any further modification of this Court's scheduling order. *See* Circuit Rule 27(g)(1); Fed. R. App. P. 26(b); *cf.* Fed. R. Civ. P. 16(b).

In deciding whether EPA has satisfied its burden to show "good cause" to modify the briefing schedule, the primary consideration is whether EPA has "show[n] that the [present] deadlines cannot reasonably be met despite its diligence." *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 226 (D.C. Cir. 2011) (alterations and quotations omitted). EPA asserts that there

are several bases on which EPA may (or may not) seek dismissal. *See* Motion to Extend 4-5 & n.3 (suggesting that a motion to dismiss may not be filed even after 45 days). But EPA’s brief recitation of potential grounds on which it may move to dismiss—all straightforward questions of law—falls far short of its duty to “*show* that the [present] deadlines cannot reasonably” be met. *Capitol Sprinkler*, 630 F.3d at 226 (emphasis added and quotations omitted). Nor does EPA’s boilerplate assertion of “other briefing deadlines” and the need to permit “adequate time for . . . management review” suffice. *See* Dkt. No. 1510481, at 4. As noted, the States are willing to agree to a 14-day extension for the filing of EPA’s dispositive motion—which would result in a deadline *two months* after the States filed their Petition. The agency’s statements simply do not “show” why such a briefing schedule would not be “reasonably” sufficient to permit EPA to satisfy the internal drafting and review procedures attendant to any court filing by the Federal Government. *Capitol Sprinkler*, 630 F.3d at 226.

EPA’s request must also be denied because further delay would significantly prejudice the States. *Dag Enterprises, Inc. v. Exxon Mobil Corp.*, 226 F.R.D. 95, 110 (D.D.C. 2005) (“The existence or degree of prejudice to the party opposing modification may supply an additional reason to deny a motion to modify a scheduling order. . . .”) (quoting 3 *Moore’s Federal Practice* § 16.14 [b] (2003)). EPA’s attempt to delay the dispositive motions deadline by yet another month will

cause the States “to incur significant expense and produce further delay in these proceedings.” *Id.* As the States explain in their Motion To Set A Consolidated Briefing Schedule And To Expedite Consideration, the States are expending resources *now* to develop the state plans that EPA mandated pursuant to its settlement agreement, and those expenditures will only increase in the coming months. *See* Dkt. No. 1510480, at 15-18. If EPA’s motion for delay is granted, the States will not receive a ruling on their Petition for Review for at least an additional month, and every month that passes without relief will impose significant, unrecoverable costs on the States. *See id.* The continued expenditure of these substantial public resources in multiple States—not to mention the resources that numerous stakeholders are expending to provide critical input to the States during this process—far outweighs the burden that would fall upon the Federal Government from having to submit a single motion to dismiss, on discrete issues of law, two months after the filing of the initial Petition.

In all events, the States urge this Court to consider their pending Motion To Set A Consolidated Briefing Schedule And To Expedite Consideration when resolving EPA’s request for an extension. The potential harm from delay that justifies denying EPA’s request is an even stronger reason to grant the States’ request. While the time extension requested by EPA means that the States will continue to expend substantial resources for an additional month, failure to

consolidate briefing and expedite consideration could well mean that the States are forced to expend such resources for many months, and perhaps more than a full year. *See id.* at 15-18.

Dated: September 8, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 8th day of September, 2014, a copy of the foregoing *Petitioners' Opposition To Respondent's Motion To Extend Time To File Dispositive Motions* was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Elbert Lin

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