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

State of West Virginia, et al.,	)	
Petitioners,	)	No. 14-1146
v.	)	
United States Environmental Protection Agency,	)	
Respondent.	)	

EPA's Opposition to Petitioners' Motion to Set a
Consolidated Briefing Schedule and Expedite Consideration

The United States Environmental Protection Agency opposes Petitioners' Motion to Set a Consolidated Briefing Schedule and Expedite Consideration ("Motion") (ECF No. 1510480). Petitioners have not provided "strongly compelling" reasons for expedition. *D.C. Circuit Handbook of Practice and Internal Procedures* § VIII.B. Under this Court's rules, they must demonstrate "irreparable injury" and a "substantial challenge." *Id.* But Petitioners have not shown *any* injury arising from the settlement agreement they challenge, much less irreparable harm. Moreover, rather than raising a "substantial challenge," Petitioners' challenge to a long-defunct settlement agreement raises a number of substantial jurisdictional issues, which should be resolved before merits briefing. Accordingly, this is not the "very rare" case that warrants expedited consideration.

BACKGROUND

In December 2010, EPA, various states, and several environmental organizations executed a settlement agreement ("Settlement Agreement") (Ex. 1), which was finalized after a public comment period on March 2, 2011. In that document, EPA agreed, *inter alia*, to sign "a proposed rule under [Clean Air Act] section 111(d) that includes emissions guidelines" for greenhouse gases for existing electric utility steam generating units ("power plants") by July 26, 2011. Ex. 1 ¶ 2. EPA further agreed that, if it separately elected to finalize standards of performance for new and modified sources, and after considering any comments received, it would take final action with respect to the proposed rule by May 26, 2012. *Id.* ¶ 4. The Settlement Agreement was modified in June 2011, changing the date by which EPA was to sign a proposed rule addressing greenhouse gas emissions from existing power plants to September 30, 2011. *See* Ex. 2.

In the Settlement Agreement, EPA expressly preserved all of the discretion accorded EPA by the Clean Air Act ("CAA") and by general principles of administrative law, *see* Ex. 1 ¶ 9, including the discretion to withdraw the proposed emission guidelines for existing power plants. Moreover, the sole remedy provided, in the event that EPA did not take the steps outlined in the Settlement Agreement, was for the other parties to file a motion or petition, or initiate a new

civil action, seeking to compel EPA to take action in response to this Court's remand order in *New York v. EPA*, No. 06-1322 (ECF No. 1068502).[1] *Id.* ¶ 7.

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 Settlement Agreement. The other parties to the Settlement Agreement elected not to pursue any relief.

In June 2013 – nearly two years after the deadline under the Settlement Agreement for proposing a rule addressing greenhouse gas emissions from power plants had passed – the President announced his "Climate Action Plan." This plan described the Administration's intended future actions for addressing climate change through a variety of national and international actions, and directed EPA to work expeditiously to complete carbon dioxide (CO_2) emission standards for both new and existing power plants. Pursuant to that direction – not the 2010 Settlement Agreement – on June 18, 2014, EPA proposed state-specific rate-based emissions guidelines for states to follow in developing plans to address CO_2

[1] In *New York v. EPA*, state and environmental groups filed petitions for judicial review of an EPA final rule under the section 111 of the Clean Air Act, 42 U.S.C. § 7411, contending that the final rule was required to include standards of performance for greenhouse gas emission from power plants. Following the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that greenhouse gases are "air pollutants" within the meaning of the Act), this Court granted EPA's requested remand for further consideration of the issues related to greenhouse gas emissions in light of that decision. *See* ECF No. 1068502, September 24, 2007 order (Case No. 06-1322).

emissions from existing power plants pursuant to CAA section 111(d), 42 U.S.C. § 7411(d). 79 Fed. Reg. 34,830 (June 18, 2014) (the "Proposed Rule"). The comment period for the Proposed Rule is scheduled to end on December 1, 2014.[2] EPA plans to take final action in June 2015.

Petitioners now challenge the 2010 Settlement Agreement. *See* Petition for Review (ECF No. 1505986) at 1-2. The substantive basis for their challenge is an event that occurred after the finalization of the Settlement Agreement: EPA's 2012 regulation of hazardous air pollutant emissions from power plants under CAA Section 112, 42 U.S.C. § 7412, which Petitioners argue bars EPA from regulating CO_2 emissions from power plants under Section 111(d), even though CO_2 emissions are not hazardous air pollutants regulated under Section 112. Petition for Review at 3.[3] And while Petitioners characterize this case as a challenge to the Settlement Agreement (an agreement to take action by dates that have long passed), their true aim is plainly to obstruct the ongoing Section 111(d)

[2] The comment period was originally scheduled to end on October 16, 2014, but EPA recently announced it would be extended to December 1, 2014. Publication of this extension in the Federal Register is pending.

[3] 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 In re: Murray Energy Corp.*, No. 14-1112 (D.C. Cir. filed June 18, 2014) (petition for an extraordinary writ to halt the 111(d) rulemaking) & *Murray Energy Corp. v. EPA*, No. 14-1151 (D.C. Cir. filed Aug. 15, 2014) (petition for review of EPA's alleged "final action" of "initiating a rulemaking without authority and in violation of the Clean Air Act").

rulemaking. They ask the Court to "enjoin EPA" from "continuing the present ongoing comment period regarding EPA's proposed coal-fired power plants rule under Section 111(d)" and "finalizing a coal-fired power plants rule under Section 111(d)." *Id.* at 4-5.

ARGUMENT

As discussed below, petitioners' Motion to Set a Consolidated Briefing Schedule and Expedite Consideration should be denied because (1) Petitioners have not demonstrated any concrete injury, let alone irreparable injury; (2) Petitioners do not raise a "substantial challenge" to the Settlement Agreement, given that there are obvious jurisdictional bars to that challenge; and (3) expediting review of the merits of a Proposed Rule – as opposed to allowing the public the opportunity to comment on the proposal and have those comments considered by EPA in the course of issuing a final rule – is not in the public interest.

I. Expedition Is Not Warranted Because Petitioners Have Not Demonstrated Any Actual Injury, Let Alone Irreparable Injury.

Petitioners have not demonstrated that expedition is necessary to avoid irreparable injury. This Court has made clear that an extremely strong showing is needed to demonstrate irreparable harm. *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985). Movants must demonstrate injury that is "both certain and great; it must be actual and not theoretical." *Id.* "Bare allegations of what is likely to occur are of no value since

the court must decide whether the harm will *in fact* occur." *Id.* Further, movants must show that the alleged injury will "directly result" from the challenged action. *Id.* Petitioners meet none of these criteria.

A. Petitioners' claimed injury does not result from the action they challenge: the Settlement Agreement.

To begin with, Petitioners' alleged injury does not "directly result" from the action Petitioners claim to be challenging here: the 2010 Settlement Agreement. *Wisconsin Gas Co.*, 758 F.2d at 674.

Petitioners claim they are injured because they must expend resources now to be ready to comply with a final section 111(d) rule that may be issued next year. Mot. at 11, 17. But the 2010 Settlement Agreement did not require EPA to promulgate a final rule pursuant to CAA section 111(d); rather, it simply required EPA to propose a rule, and then (*if* EPA had separately decided to take other action, and *after* considering all comments) take "final action" on the proposed section 111(d) rule. Ex. 1 ¶¶ 4. In other words, under the Settlement Agreement, EPA could decide *not* to promulgate a final section 111(d) rule.

Furthermore, the challenged Settlement Agreement – contemplating promulgation of a proposed rule by September 2011 – did not spur EPA's issuance of the Proposed Rule almost three years later in June 2014. Rather, it was the President's Climate Action Plan that spurred EPA to publish the Proposed Rule at that time. But in any event, Petitioners' arguments demonstrate that their claims of

injury are based on the Proposed Rule itself, not the Settlement Agreement. Thus, Petitioners cannot show that their alleged injury "directly results" from the agency action they challenge in their petition – the Settlement Agreement – and their demand for expedited briefing must fail. 758 F.2d at 674.

B. Petitioners' claimed injury is theoretical, not actual.

Next, Petitioners' claimed "injury" – the need to expend resources *now* in order to be able to comply with a final Section 111(d) rule to be issued in mid-2015, which may call for the submission of State Plans by mid-2016 (*see* Mot. at 11, 17) – is entirely theoretical, and thus does not justify expedition.

As noted in the "Planning Guide" on which Petitioners rely (Mot. at 11, 17): "EPA may revise the final rule pursuant to state and stakeholder comments." Mot., Ex. E at 2. Indeed, EPA may. That is the precisely the point of issuing a proposed rule: stakeholders, including Petitioners, now have the opportunity to submit their comments to EPA, and EPA will consider them prior to any final action.

While any state is certainly free to try to "get ahead of the ball" by starting to think now about what steps it *could* take to comply *if* a final rule contains similar requirements to the Proposed Rule, nothing in the Proposed Rule requires states to do so. The proposed compliance schedule – under which states would

have thirteen months at a minimum and as much as three years,[4] depending on their circumstances, to submit their plans after promulgation of a final rule – is intended to provide a sufficient period for states to design plans following final rule promulgation. But if Petitioners or other stakeholders do not believe that proposed compliance period is sufficient, they can bring their concerns to the Agency's attention in comments, and the compliance period could change in response to those comments. Therefore, Petitioners' claim that they "must" incur costs now to be in a position to comply with a final rule that has not yet been issued, by a compliance date that could yet change, is entirely theoretical.

Furthermore, Petitioners' own choice of language in describing their alleged harms conclusively demonstrates the theoretical nature of their claimed injury. Petitioners argue that the State Plans they would have to design and submit "*may* . . . involve revolutionizing the State's entire economy," "*may*" require states to restructure their regulatory institutions, and "*will likely* involve major state legislative action and *perhaps* state constitutional revision." Mot. at 16 (emphasis added). Such hyperbolic, hypothetical claims of injury – which are doubly theoretical in that they assume that EPA will finalize the Proposed Rule without substantial revision – do not justify expediting review of a challenge to an ongoing

[4] *See* 79 Fed. Reg. 34,830, 34,915 (June 18, 2014) (discussion of the process and timing for State Plan submittals).

agency rulemaking. *Wisconsin Gas Co.*, 758 F.2d at 674. Indeed, if such hypothetical costs and burdens were sufficient to show irreparable injury, nearly every agency rulemaking process would be subject to expedited challenge, long before the issuance of a final rule actually requiring certain action

C. Petitioners' claimed injury is unsubstantiated.

Expedition is also unwarranted because Petitioners' claimed injury rests on "bare allegations," not evidence of actual harm. *Wisconsin Gas*, 758 F.2d at 674.

Petitioners argue that, as states potentially subject to EPA's proposed CAA section 111(d) rulemaking, they "must *now* begin the costly process of designing State Plans to comply with the Section 111(d) rule" in order to be prepared to meet the date that EPA has proposed for submission of those plans (June 30, 2016). Mot. at 15-16. They claim that some states have already begun to expend resources to that end. *Id*. at 11. These allegations not only rest on speculation regarding the contents of a final rule, they are wholly unsubstantiated. Petitioners fail to submit any concrete evidence that they are, in fact, expending, or will soon expend, resources as a result of either the Settlement Agreement or the Proposed Rule. Movants have submitted no affidavits so attesting.

Petitioners rely "generally" on three documents (*see* Mot. at 9-11): (1) EPA's Technical Support Document, which only expands on the compliance options available to States under the Proposed Rule (Mot. Ex. C); (2) a "White

Paper" criticizing the Proposed Rule published by industry counsel (Mot. Ex. D); and (3) a "Planning Guide" published by the Center for New Energy Economy, a think tank advertising its services to the potentially-regulated community (Mot. Ex. E at 2-3). None of these documents contain any concrete evidence for the proposition that states "must now" incur, or are already incurring, costs as a result of the Proposed Rule. Indeed, the "Planning Guide" states that it does *not* "take a position on compliance pathways" but only "suggests a number of practical steps that states *can* take now to prepare for the final rule next June." Mot. Ex. E at 2.

In fact, the only "evidence" of injury specific to *these Petitioners* is movants' Exhibit G, a news article entitled "Kentucky, Indiana get head start of global warming regs."[5] But that article explains that those two Petitioner states may have a "leg up" on compliance in the sense that "[e]ach state's carbon dioxide emissions are already declining, and the rules were written to take into account their historic reliance on coal and manufacturing." Exhibit G at 1. Indeed, the

[5] Petitioners also point to an article entitled "Coal-Dependent Arkansas Faces Stiff Emissions Target and a Running Clock." Mot. at 11 n.4. But Arkansas is not a petitioner here, and the article states only that Arkansas is "poring over the proposed regulations, attempting to grasp their implications and preparing to file formal responses before the public comment period closes." Mot. Ex. F at 4. The costs associated with such activities do not constitute irreparable injury.

article undermines Petitioners' argument that they have to take action now to comply with the potential final rule, as it notes that "[t]here is a 'plausible argument' that even if the EPA rule were not put in place, the states and nation would meet EPA's goals as a result of already occurring changes in the energy sector of the nation's economy." *Id.* at 2. The only statement suggesting any current incurrence of costs related to the reduction of CO_2 emissions is a quote from a university research group: "There are things that Indiana is doing today or will be doing in the next few years, in terms of retrofitting of coal plants to burning natural gas, that will move us in that direction [of decreasing greenhouse gas emissions]." *Id*. at 3. That statement cannot fairly be read as demonstrating that Indiana is currently expending resources to do the thing that Petitioners point to as the source of their injury: preparing a State Plan for submission is June 2016.

The only actual, numerical costs to which Petitioners point (Mot. at 19) flow not from either the Settlement Agreement Petitioners purport to challenge or the Proposed Rule, but from a separate CAA rule that was upheld by this Court earlier this year. *See White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. Apr. 15, 2014) (cert. petitions pending). Petitioners attempt to piggyback on the costs to industry that they allege flow from *that* EPA rule by arguing that the "Section 111(d) rulemaking greatly complicates these calculations and *may* force more coal-fired power plants to close their doors." Mot. at 19 (emphasis added).

But the alleged burdens of a different rule on third parties cannot stand in for what Petitioners themselves lack: concrete evidence of "great" injury flowing directly from the agency action challenged. *Wisconsin Gas Co.*, 758 F.2d at 674. Thus, Petitioners have failed to justify the extraordinary step of expedition.

II. Petitioners' Challenge Is Not "Substantial," But Rather Raises Substantial Jurisdictional Issues.

Petitioners cannot show that their challenge to the Settlement Agreement is "substantial," given that it presents a number of significant jurisdictional issues, which should logically be resolved before the merits. Moreover, the merits issue Petitioners seek to bring before this Court is not straightforward or easily resolved in their favor, as they suggest. Accordingly, the motion to expedite and consolidate briefing should be denied. *See D.C. Circuit Handbook* § VIII.B.

A. Petitioners' challenge raises several significant jurisdictional issues, which should be resolved before turning to the merits.

Petitioners' challenge to the Settlement Agreement raises several significant jurisdictional issues,[6] which should logically be resolved before either the Court or the parties turn to the merits.

[6] EPA has moved to extend the dispositive motions deadline to November 3, 2014, so that, *inter alia*, it has sufficient time to prepare a thorough motion to dismiss addressing the multiple jurisdictional issues raised here, and to obtain review and approval of that motion by EPA and DOJ management. ECF No. 1510914. Petitioners opposed that motion. ECF No. 1511087. EPA today filed its Reply.

As discussed above, Petitioners purport to challenge a 2010 Settlement Agreement, but ask this Court to not only vacate that Agreement, but also to enjoin EPA from continuing the ongoing Section 111(d) rulemaking. Petition at 4-5; Mot. at 20 (requesting "[a]n expedited ruling from this Court that the Settlement – and thus the entire rulemaking – is unlawful"). This unusual challenge to the contents of a long-defunct settlement agreement, brought in order to stop an ongoing EPA rulemaking before a final rule has been issued, poses a number of obvious jurisdictional problems, which are likely to result in dismissal.

First, the Court lacks jurisdiction to entertain Petitioners' challenge because neither the Settlement Agreement nor the ongoing section 111(d) rulemaking is final agency action subject to review. *See* 42 U.S.C. § 7607(b). Neither marks the consummation of EPA's decision-making process with respect to section 111(d) emission guidelines. *See Bennett v. Spear*, 520 U.S. 154 (1997) (action must mark consummation of agency's decision-making process to be final). Unless and until EPA promulgates (or chooses not to promulgate) a final section 111(d) rule, there is no reviewable final agency action. *See* December 13, 2012 Order, *Las Brisas Energy Center v. EPA*, (D.C. Cir. No. 12-1248) (dismissing challenge to EPA's 2012 proposed emission guidelines for new plants because "[t]he challenged proposed rule is not final agency action subject to judicial review."). Accordingly,

the Court lacks jurisdiction to do what Petitioners ask – declare EPA's section 111(d) rulemaking unlawful before it reaches a conclusion. *See* Mot. at 20.

Second, even if the Settlement Agreement were final agency action subject to review, it has not caused Plaintiffs injury, and therefore Plaintiffs lack standing to challenge it. *See Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013) (holding that trade association lacked standing to challenge a consent decree in which EPA agreed to take action by a certain date where that consent decree did not restrict EPA's discretion as to the substance of the action). As noted above, the Settlement Agreement did not actually require EPA to promulgate a final rule under section 111(d); it only required EPA to issue a proposed section 111(d) rule, and then take final action on that proposed rule. Ex. 1 ¶ 4. EPA thus retained the discretion to determine *not* to promulgate a section 111(d) rule. Moreover, as a factual matter, the Proposed Rule was published pursuant to the President's Climate Action Plan, not the Settlement Agreement. *Supra* pp. 3-4. Thus, Plaintiffs' claimed injury – the alleged need to expend resources to comply with a final section 111(d) rule requiring them to submit State Plans by June 2016 – does not flow from the Settlement Agreement they challenge, and they lack standing.

Third, Petitioners' challenge is moot given that the deadlines set in the Settlement Agreement have all long passed. As discussed above, the Settlement Agreement contemplated publication of a proposed section 111(d) rule for existing

power plants in September 2011, with final action on that rule in May 2012 (but only if certain other standards had been promulgated). *See* Ex. 1 ¶¶ 4, Ex. 2. EPA, however, took no such action, and the other parties to the Settlement Agreement did not pursue their remedies under the agreement, which were limited to seeking to compel EPA to take action in response to this Court's remand order in *New York v. EPA*, No. 06-1322. *Supra* pp. 2-3. Any decision issued by this Court addressing the Settlement Agreement would accordingly be purely advisory. *See Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627 (D.C. Cir. 2002).

EPA will develop these jurisdictional arguments further in moving to dismiss this case, and reserves its right to brief other jurisdictional issues in that motion. But for the purposes of Petitioners' motion to expedite, it is clear that there are significant jurisdictional issues that may well result in the dismissal of this case without reaching the merits. Accordingly, it would not only be inappropriate to expedite merits briefing, it would also be inefficient to consolidate merits briefing with jurisdictional briefing.

B. Petitioners' Merits Argument Does Not Warrant Expedition.

Even if the multiple jurisdictional issues presented by Petitioners' challenge to a long-defunct Settlement Agreement are set aside, the substance of that challenge does not warrant expedition.

Petitioners argue that EPA cannot promulgate a rule addressing greenhouse gas emissions from existing power plants under CAA section 111(d) because EPA has already regulated power plants' emissions of a different category of pollutants – hazardous pollutants – under CAA section 112. *See* Petition at 3-5; Mot. at 2-7, 12-15. They say the "plain text" of the CAA "unambiguously prohibits" regulation of a source category where that source category has previously been regulated under section 112, even if in regard to a different type of pollutant. Mot. at 12.

But the text of CAA section 111(d) is far from "plain" or "unambiguous" in this regard. Two different amendments to section 111(d) were enacted as part of the 1990 Amendments to the CAA. The House amended the relevant language to provide that section 111(d) authorizes EPA to require states to submit standards of performance for existing sources "for any air pollutant . . . which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 . . . .". 42 U.S.C. § 7411(d)(1)(A). Read in context, and in conjunction with the legislative history, there is no indication that the House amendment was intended to address anything more than potentially duplicative regulation of *hazardous air pollutants* under Sections 111 and 112. Petitioners, however, read this language as barring any regulation of a source category under section 111(d) once that source category has been regulated under section 112, even if in regard to different pollutants. Mot. at 12-13.

In any event, the Senate amended the text of section 111(d) differently in 1990, such that – like the preexisting text – it provides simply that EPA can promulgate standards of performance for any air pollutant that is not listed as a hazardous air pollutant under section 112(b). As CO_2 is not a listed hazardous air pollutant, the Senate Amendment would plainly *not* bar regulation of CO_2 emissions from power plants under section 111(d). Both versions of the amendment to section 111(d) were included in the Statutes at Large, which is controlling. *See* 1 U.S.C. 112 & 204(a); *see also Stephan v. United States*, 319 U.S. 423, 426 (1943) (per curiam).

Petitioners would ignore the Senate amendment on the ground that it is a "clerical error" that should be given "no weight." Mot. at 14.[7] But when addressing the proper treatment of the two amendments in the context of this Court's review of the 2005 "Clean Air Mercury Rule," 70 Fed. Reg. 28,606 (May

[7] Petitioners also rely heavily on dicta within a footnote in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"). *See* Mot. at 5-6, 12-13. In that footnote, the Court stated: "EPA may not employ [section 111(d)] if existing sources *of the pollutant in question* are regulated under the . . . 'hazardous air pollutants' program." *AEP*, 131 S. Ct. at 2537-38 n.7 (emphasis added). But CO_2 is not a "hazardous air pollutant" that is regulated under the statutory program for those pollutants, and the Supreme Court in *AEP* made clear that section 111 of the Act "speaks directly to emissions of [CO_2]" from power plants," and therefore, displaces any federal common law right to seek abatement of CO_2 from power plants. *Id.* at 2537. In short, EPA does not believe that the footnote is properly read to say that EPA's regulation of hazardous air pollutants under CAA 112 bars the Agency from regulating carbon dioxide under CAA 111(d).

18, 2005), several of these Petitioners *agreed* that, by interpreting the House and Senate amendments as collectively allowing regulation of a source category's emissions of a pollutant under section 111(d) so long as that pollutant is not *a hazardous pollutant actually subject to regulation under section 112*, "EPA developed a reasoned way to reconcile the conflicting language and the Court should defer to EPA's interpretation." Joint Brief of State Respondent-Intervenors, Industry Respondent-Intervernors, and State Amicus at 25 (May 18, 2007), *State of New Jersey v. EPA*, No. 05-1097, 2007 WL 3231261 (D.C. Cir. Aug. 3, 2007).[8]

In any event, the merits issue that Petitioners seek to have this Court address is a complicated one, and EPA's interpretation set forth in the Proposed Rule is just a proposed interpretation that is currently subject to comments. EPA may or may not ultimately reaffirm, alter, or retain its interpretation of the relevant portion of section 111(d) after considering comments and further analyzing the issue. Therefore, this issue does not warrant expedited briefing.

III. It Would Be Against the Public Interest to Require EPA to Brief the Merits of Petitioners' Challenge Now.

Finally, expedited and "consolidated" briefing, requiring the parties to brief and the Court to consider the jurisdictional and merits issues simultaneously, at the

[8] The parties filing this brief included Alabama, Indiana, Nebraska, South Dakota, West Virginia and Wyoming, who are Petitioners here.

same time that EPA is reviewing and addressing comments on the Proposed Rule,[9] is counter to judicial economy and the public interest.

Under Circuit Rule 27(g)(3), merits briefing is generally deferred until after the Court decides any dispositive motions, for reasons of judicial economy. There is simply no reason to depart from the Court's customary rule here. To the contrary, given that this challenge presents substantial jurisdictional issues, it would be judicially inefficient to brief the jurisdictional issues and merits issues simultaneously, potentially requiring the Court to delve unnecessarily into a thorny merits issue, and then perhaps to have to do so a second time when the same issue is presented in the context of a challenge to the final section 111(d) rule (assuming EPA determines, after reviewing the comments, to promulgate such a final rule).

Furthermore, briefing the merits of this petition in the near term would also disserve the public interest, because it would require the Agency to divert its attention and resources from the task before it: reviewing and addressing the comments submitted by the public on the Proposed Rule – which already number more than 16,000 – and completing the section 111(d) rulemaking. This is

[9] The schedule Petitioners propose does not, in fact, actually call for "consolidated" jurisdictional and merits briefing. Rather, what Petitioners ask for is *parallel* briefing of the jurisdictional and merits issues: i.e., Petitioners would file both an opposition to EPA's Motion to Dismiss and an opening merits brief on the same day, and EPA would then file its Reply supporting the motion to dismiss and its Response to Petitioners' Opening brief on the same day. *See* Mot. at 2.

particularly true given that the merits issue raised by Petitioners will no doubt be the subject of comments on the Proposed Rule, and it is in the public's interest that EPA have the opportunity to fully consider those comments in the normal course of the rulemaking, rather than being forced to rush its analysis of the issue to an early conclusion in this litigation, before taking final action on the Proposed Rule.

Therefore, both expedition of merits briefing and "consolidation" of such briefing with briefing on the significant jurisdictional issues raised by Petitioners' challenge are inappropriate. Petitioners' proposed path forward is legally unjustified, would unnecessarily waste the Court's and the Agency's resources, and would disserve the public interest.

CONCLUSION

For the foregoing reasons, Petitioners' Motion to Set a Consolidated Briefing Schedule and Expedite Consideration should be denied.

Respectfully submitted,

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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 18, 2014