

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

State of West Virginia, et al.,	)	No. 14-1146
Petitioners,	)	<b>REPLY IN</b>
v.	)	<b>SUPPORT OF</b>
United States Environmental Protection Agency,	)	<b>MOTION TO</b>
Respondent.	)	<b>EXTEND TIME TO</b>
	)	<b>FILE DISPOSITIVE</b>
	)	<b>MOTIONS AND</b>
	)	<b>RECORD</b>

**The United States’ Reply in Support of  
Motion to Extend Time to File Dispositive Motions and Record**

Respondent the United States Environmental Protection Agency (“United States”) respectfully submits this Reply in support of its Motion to Extend Time to File Dispositive Motions and Record (“Extension Motion”) (ECF No. 1510481).

The Court should grant the United States’ request for a forty-five day extension of the dispositive motions deadline to November 3, 2014, in light of the existence of several significant jurisdictional issues that require thorough briefing, as well as thorough management review at both the Department of Justice (DOJ) and EPA. Petitioners argue that EPA did not show “good cause” for the requested extension. *See* Opposition to Extension Motion (“Opp.”) (ECF No. 1511087) at 1-2. But in its motion, EPA outlined several of the jurisdictional issues to be briefed, and explained the need for sufficient time to both brief those issues and have that

(substantial) brief reviewed by DOJ and EPA management. Extension Motion at 4. This alone constitutes “good cause” for the modest extension requested.

Moreover, in its Opposition to Petitioners’ Motion to Set a Consolidated Briefing Schedule and Expedite Consideration (Opp. to Mot. to Expedite), filed today, EPA has further elaborated on the jurisdictional issues to be addressed through a dispositive motion, addressing three independent grounds on which the United States believes this Court lacks jurisdiction over the long-defunct settlement agreement Petitioners’ purport to challenge, as well as the ongoing section 111(d) rulemaking that is their true aim. *See* Opp. to Mot. to Expedite at 12-15. These grounds include lack of standing, mootness, and the non-final nature of both the challenged settlement agreement and the ongoing section 111(d) rulemaking. *Id.* This further demonstrates the substantial nature of the jurisdictional issues in play, showing that there is good cause for an extension.

Indeed, as Petitioners concede, it is really their demand for expedition of merits briefing, and “consolidation” of that briefing with jurisdictional briefing, that motivates their opposition to the United States reasonable extension request. *See* Opp. at 3 (“[t]he States urge this Court to consider their pending Motion . . . 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 they States are forced to

expend such resources for many months”). But the “injury” that forms the basis for both Petitioners’ demand for expedition, as well as their opposition to the United States’ request for an extension of the dispositive motions deadline – the claimed need to expend “substantial” resources “now” in order to develop state plans (Opp. at 3) – is both entirely theoretical (in that it assumes EPA will promulgate a final section 111(d) rule containing the same requirements as the proposed rule) and factually unsubstantiated. *See* Opp. to Mot. to Expedite at 7-12.

In light of the significant jurisdictional issues to be briefed – and the fact that DOJ and EPA counsel have had to spent substantial time responding to Petitioners’ Motion to Expedite – Petitioners’ proposed 14-day extension, resulting in a deadline of October 2, 2014, “cannot reasonably be met despite [the United States’] diligence.” *Capitol Sprinkler Inspection, Inc. v. Guest Services, Inc.*, 630 F.3d 216, 226 (D.C. Cir. 2011). This is particularly true given that this Court today ordered the United States to respond to Murray Energy Corp.’s related petition for an extraordinary writ of prohibition,<sup>1</sup> which also asks this Court to halt the ongoing section 111(d) rulemaking, within thirty days. Per Curiam Order, *Murray Energy Corp. v. EPA*, No. 14-1112 (Doc. 1512897).

Therefore, the United States’ request for an extension of the dispositive motions deadline to November 3, 2014, is reasonable, and this Court routinely

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<sup>1</sup> *See* Extension Motion at n.2 (describing the three pending challenges to the section 111(d) rulemaking).

grants such modest extensions. Petitioners' insistence that this case must be expedited at all stages – a separate issue to be decided based on the briefing on the Motion to Expedite – does not justify a denial of EPA's reasonable request.

Finally, the United States notes that Petitioners have not addressed, and thus have not opposed, the United States' request that filing of the administrative record be deferred until thirty days after the Court acts on dispositive motions, as it may well be rendered unnecessary by that action. Accordingly, that component of the United States' extension motion should also be granted.

Respectfully submitted,

/s/ Amanda Shafer Berman  
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DATED: September 18, 2014

**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