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' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO SET A CONSOLIDATED BRIEFING SCHEDULE AND TO EXPEDITE CONSIDERATION

In their motion, twelve sovereign States explained that failure to expedite consideration and to set a consolidated briefing schedule would delay adjudication of this case by as much as a year, thus causing them to expend substantial public resources. Dkt. 1510480 ("States' Motion") 8-11, 15-18. To avoid this irreparable harm to the public fisc, the States proposed a modest modification to the briefing schedule, which would permit the parties to brief all of the issues in a timely fashion. *Id.* at 2.

The States' procedural request here is exceedingly modest. This case involves two categories of issues. First, a series of threshold issues that EPA plans to raise to avoid adjudicating the substance of this case. Second, a *single*

substantive issue: whether EPA can rewrite the "literal" terms of the Clean Air Act (EPA's own description) by regulating the emission of pollutants from existing coal-fired power plants under Section 111(d), even though those pollutants are now unquestionably "emitted from a source category which is regulated under [Section 112]." 42 U.S.C. § 7411(d) (hereinafter "Section 112 Exclusion"). The States' request would merely mean that this single, additional issue would be included in a consolidated briefing schedule. EPA, on the other hand, seeks to brief only the threshold issues, while deferring briefing on the Section 112 Exclusion until a later date, which may be many months down the line. EPA's position is a transparent delaying tactic, given that EPA has *repeatedly* opined on the meaning of the Section 112 Exclusion—in its 2005 rulemaking that led to the rule that this Court invalidated in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), in its briefing during the 2007-2008 *New Jersey v. EPA* litigation, and then in its Legal Memorandum issued just three months ago.

EPA's position is particularly indefensible because this Court has now ordered EPA to file within 30 days a response brief in *In re: Murray Energy Corp.*, No. 14-1112 (Dkt. 1512897), a brief that *will necessarily require EPA to opine in detail on the very same Section 112 Exclusion issue*. Now that EPA is filing a brief on the meaning of the Section 112 Exclusion in the next month, it makes no sense to delay briefing on that *same issue* in the present case. Indeed, judicial economy

militates strongly in favor of expediting briefing here, so that this Court can have the option of holding a single oral argument in both cases as soon as possible.

In addition to the general unreasonableness of EPA's desire to defer the briefing on a single issue that it already must brief in another case pending before this Court, many of the assertions in EPA's opposition are wrong.

First, EPA claims that the States have not shown that expedition would avoid irreparable harm. Dkt. 1513050 ("EPA Response") 5. The harm the States are suffering is that they must expend resources now to prepare their State Plans during the pendency of this suit. States' Motion 8-11, 15-18. If the States prevail in this case and secure a ruling that the Section 112 Exclusion now renders the settlement agreement unlawful, there will be no reason for the States to continue preparing their State Plans. The sooner that decision issues, the quicker the States can stop the expenditure of those unrecoverable public resources; and this is true regardless of the validity of EPA's subjective assertions as to the primary "spur" for issuance of the proposed Section 111(d) rule (be that "spur" the legally binding settlement requiring just such a rule, the ideological commitments of EPA personnel, or the President's political timetables). EPA Response 6-7.[1]

[1] While EPA claims that the settlement agreement does not commit it to issue a final Section 111(d) rule for coal-fired power plants (EPA Response 6), that claim is contradicted by both the plain text of the agreement and the Supreme Court's understanding of the agreement. *See Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2533 (2011) ("Pursuant to a settlement finalized in March 2011, EPA has

Second, similarly meritless is EPA's assertion that the harms the States are experiencing are somehow too "theoretical" or "unsubstantiated" to support their request for a modest modification in the briefing schedule. EPA Response 7-12. As the States demonstrated in their motion, it is widely understood that, in light of the complexity and unprecedented scope of EPA's requiring that States revolutionize their energy sectors under Section 111(d), as well as the extremely short timeframes EPA intends to require States to abide by, States throughout the country have already begun to expend public resources to begin creating their State Plans. *See* States' Motion 8-11, 15-18. Although EPA asserts that these are gratuitous expenditures to "get ahead of the ball" (EPA Response 7), that ignores the on-the-ground reality that EPA well-knows its unprecedented Section 111(d) proposal has created.[2]

Third, EPA previews some of the threshold arguments it plans to raise against the present lawsuit, but those arguments are insubstantial. EPA Response 12-15. EPA's claim that the settlement is not "final agency action" contradicts

---

committed to issuing . . . a final rule" for coal-fired power plants under Section 111(d)). Moreover, the claim is entirely irrelevant to the question of whether the States are experiencing harm *right now* that will be avoided by expedition.

[2] EPA can point to no case even suggesting that a movant must show "numerical" harms or submit an "affidavit" to obtain a modification of the briefing schedule (EPA Response 11, 9), as opposed to when seeking substantive relief such as a preliminary injunction. Indeed, the petitioners in *ICI* and *Halbig* included no exhibits or affidavits to support their successful requests for expedition. *See Inv. Co. Inst. v. CFTC.*, No. 12-5413, dkt. 1413282, at 13-15; *Halbig v. Burwell*, No. 14-5018, dkt. 1475591, at 13-15.

EPA's explanation that it "*finaliz[ed]*" the settlement under the procedures required by Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g). *See* Memorandum from Scott Jordan, Air and Radiation Law Office, to Scott C. Fulton, General Counsel 2 (March 2, 2011) (emphasis added). EPA's assertion that a rule issued pursuant to a legally binding settlement was somehow not "caused" by the settlement relies upon an incorrectly narrow view of the Article III "fairly traceable" standard. *See Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001). And EPA's claim that the settlement is "moot" because its suggested deadlines have lapsed is, among other things, contrary to well-established principles of contract law. *See* 2 *Farnsworth on Contracts* § 8.16; *Restatement (Second) Of Contracts* § 236.

Fourth, EPA also attempts to muddy the waters on the only substantive issue in this case—the meaning of the Section 112 Exclusion—by raising the possibility of arguments that it knows to be meritless. EPA Response 15-18. EPA has *repeatedly* admitted that the "literal" terms of the Section 112 Exclusion, as they appear in the U.S. Code, prohibit EPA from regulating under Section 111(d) any "source category" already regulated under Section 112. *See, e.g.*, 70 Fed. Reg. 15,994, 16,031 (March 29, 2005); EPA, Legal Memorandum at 26.[3] EPA's argument for ignoring this text has always been based upon a clerical entry, which

[3] http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf

was excluded from the U.S. Code because "it could not be executed." States' Motion 12-15. Yet, EPA now asserts that "[r]ead in context, and in conjunction with the legislative history," the Section 112 Exclusion—as it appears in the U.S. Code—might (perhaps) have some different (unspecified) meaning. EPA Response 16. In its 2007 brief in this Court in *New Jersey v. EPA*, however, EPA conducted a careful analysis of exactly the "context" and "legislative history" of the language in the U.S. Code and concluded that this language was intended to mean just what it says: Section 111(d) regulation of a "source category" is forbidden if the "source category . . . is regulated under [Section 112]." 42 U.S.C. § 7411(d); *see* Br. of Respondent EPA, D.C. Cir. No. 05-1097, *New Jersey v. EPA*, 2007 WL 3231264, at *104-09 & n.35. EPA cannot manufacture delay by vaguely gesturing to arguments that EPA itself has explained to this Court are wholly meritless.[4]

Finally, EPA claims that "the public interest" will benefit from a delay in the briefing on the Section 112 Exclusion because such briefing "would require the

[4] After suggesting that it plans to contradict *entire sections* of its briefing in *New Jersey v. EPA*, EPA then faults some of the States for a single sentence in a brief filed in that same litigation. EPA Response 17-18. In defending EPA's delisting of power plants under Section 112, the entities on that brief—which include Alabama, Indiana, Nebraska, North Dakota, South Dakota, Wyoming, and West Virginia's Department of Environmental Protection—were obligated to support the agency's underlying reasoning. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). In any event, that sentence contained no analysis and was wrong for reasons that will be explained in the States' merits briefs in this case.

Agency to divert its attention and resources." EPA Response 18-20. The assumption underlying this argument is that EPA's resources are somehow more valuable than the far greater public funds being spent every month by the States, in their efforts to comply with the rule EPA issued pursuant to the settlement agreement. Notably, EPA offers no response to the States' point that EPA itself would benefit greatly from a prompt decision on the purely legal question of whether the Section 112 Exclusion prohibits entirely its regulatory enterprise, such that EPA can know whether it should halt immediately the waste of public resources involved in "reviewing and addressing the comments submitted by the public on the Proposed Rule—which already number more than 16,000." EPA Response 19. In any event, given that EPA is now required by this Court's order to brief the meaning of the Section 112 Exclusion in *In re: Murray Energy* in the next month, EPA adding substantially similar briefing on this *same issue* in the present case would require the expenditure of only minimal additional resources.

Dated: September 22, 2014

Respectfully submitted,

/s/ Elbert Lin
Patrick Morrisey
Attorney General of West Virginia
Elbert Lin
Solicitor General
Counsel of Record
Misha Tseytlin
Deputy Attorney General
J. Zak Ritchie
Assistant Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel. (304) 558-2021
Fax (304) 558-0140
Email: elbert.lin@wvago.gov
Counsel for Petitioner State of West Virginia

/s/ Andrew Brasher
Luther Strange
Attorney General of Alabama
Andrew Brasher
Solicitor General
Counsel of Record
501 Washington Ave.
Montgomery, AL 36130
Tel. (334) 590-1029
Email: abrasher@ago.state.al.us
Counsel for Petitioner State of Alabama

/s/ Timothy Junk
Gregory F. Zoeller
Attorney General of Indiana
Timothy Junk
Deputy Attorney General
Counsel of Record
Indiana Government Ctr. South, Fifth Floor
302 West Washington Street

Indianapolis, IN 46205
Tel. (317) 232-6247
Email: tom.fisher@atg.in.gov
Counsel for Petitioner State of Indiana

/s/ Jeffrey A. Chanay
Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Chief Deputy Attorney General
Counsel of Record
120 SW 10th Avenue, 3d Floor
Topeka, KS 66612
Tel. (785) 368-8435
Fax (785) 291-3767
Email: jeff.chanay@ag.ks.gov
Counsel for Petitioner State of Kansas

/s/ Jack Conway
Jack Conway
Attorney General of Kentucky
Counsel of Record
Sean Riley
Chief Deputy Attorney General
700 Capital Avenue
Suite 118
Frankfort, KY 40601
Tel: (502) 696-5650
Email: Sean.Riley@ag.ky.gov
Counsel for Petitioner Commonwealth of Kentucky

/s/ Megan K. Terrell
James D. "Buddy" Caldwell
Attorney General of Louisiana
Megan K. Terrell
Deputy Director, Civil Division
Counsel of Record
1885 N. Third Street
Baton Rouge, LS 70804

Tel. (225) 326-6705
Email: TerrellM@ag.state.la.us
Counsel for Petitioner State of Louisiana

/s/ Katie Spohn
Jon Bruning
Attorney General of Nebraska
Katie Spohn
Deputy Attorney General
Counsel of Record
2115 State Capitol
Lincoln, NE 68509
Tel. (402) 471-2834
Email: Katie.spohn@nebraska.gov
Counsel for Petitioner State of Nebraska

/s/ Eric E. Murphy
Michael DeWine
Attorney General of Ohio
Eric E. Murphy
State Solicitor
Counsel of Record
30 E. Broad St., 17th Floor
Columbus, OH 43215
Tel. (614) 466-8980
Email:
eric.murphy@ohioattorneygeneral.gov
Counsel for Petitioner State of Ohio

/s/ Patrick R. Wyrick
E. Scott Pruitt
Attorney General of Oklahoma
Patrick R. Wyrick
Solicitor General
Counsel of Record
P. Clayton Eubanks
Deputy Solicitor General
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel. (405) 521-3921

Email: Clayton.Eubanks@oag.ok.gov
Counsel for Petitioner State of Oklahoma

/s/ James Emory Smith, Jr.
Alan Wilson
Attorney General of South Carolina
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
Counsel of Record
P.O. Box 11549
Columbia, SC 29211
Tel. (803) 734-3680
Fax (803) 734-3677
Email: ESmith@scag.gov
Counsel for Petitioner State of South Carolina

/s/ Roxanne Giedd
Marty J. Jackley
Attorney General of South Dakota
Roxanne Giedd
Deputy Attorney General
Counsel of Record
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Tel. (605) 773-3215
Email: roxanne.giedd@state.sd.us
Counsel for Petitioner State of South Dakota

/s/ Jeremiah I. Williamson
Peter K. Michael
Attorney General of Wyoming
James Kaste
Deputy Attorney General
Michael J. McGrady
Senior Assistant Attorney General
Jeremiah I. Williamson

Assistant Attorney General
Counsel of Record
123 State Capitol
Cheyenne, WY 82002
Tel. (307) 777-6946
Fax (307) 777-3542
Email: jeremiah.williamson@wyo.gov
Counsel for Petitioner State of Wyoming

CERTIFICATE OF SERVICE

I certify that on this 22d day of September, 2014, a copy of the foregoing *Petitioners' Reply Brief In Support Of Their Motion To Set A Consolidated Briefing Schedule And To Expedite Consideration* was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Elbert Lin
Elbert Lin