

**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,

CITY OF NEW YORK, *et al.*,

Intervenors.

Case No. 14-1146

On Petition for Judicial Review

**REPLY IN SUPPORT OF PETITIONERS' MOTION REGARDING ORAL
ARGUMENT AND OPPOSITION TO EPA'S CROSS-MOTION**

Unlike Petitioners' request, EPA's proposal to combine oral argument is contrary to the way this Court and the parties have handled briefing in this case and the two separately consolidated cases. By Order of November 13, 2014, as amended on November 14, this Court scheduled this case, No. 14-1146, for oral argument on the same date and before the same panel as two separately consolidated cases, Nos. 14-1112, 14-1151. Case No. 14-1112 (hereinafter

“Consolidated Cases”), Dkt. 15222086, as amended, Dkt. 1522086. As a direct result of this Order, EPA, the State Intervenors, and the NGO Intervenors have each filed lengthy briefs in both this case and the Consolidated Cases, which differ in several substantial respects. The amicus and other intervenor filings in this case and the Consolidated Cases also differ greatly, both in terms of the identities of the parties and the content of their arguments.

In addition, EPA’s proposal is at odds with this Court’s decisions so far with respect to oral argument. By order of January 27, 2015, this Court set argument in this case for April 16, 2015, making no reference to consolidating that argument with argument in the Consolidated Cases. Dkt. 1534469. Consistent with the November 13 and January 27 Orders, Petitioners here have merely asked for this case to be argued sequentially after the Consolidated Cases, and requested a reasonable 20 minutes per side in this case. In contrast, EPA asks this Court to impose a fundamentally different structure on this case by treating this case and the Consolidated Cases as one matter—something this Court could have done months ago but never has.

Nor is there any reason for this Court to change its approach now. EPA is incorrect that both cases raise related threshold and merits issues that warrant combined argument. EPA Opp. 3-4. As the substantial amount of briefing has

borne out, the issues in this case are different in several significant respects from those in the Consolidated Cases:

As to threshold issues, many of the arguments in this case and the Consolidated Cases are entirely different. To take just the most obvious example, the primary threshold issue in the present case is whether a settlement agreement rendered “final” under Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), qualifies as “any . . . final action taken” under that same Act. 42 U.S.C. § 7607(b)(1). *See* Pet. Br. 51. That issue is not even arguably relevant in the Consolidated Cases, which deal with distinct complex issues such as when it is appropriate for this Court to issue a Writ of Prohibition stopping an unlawful agency rulemaking.

Even as to the merits, the briefing in this case differs from that in the Consolidated Cases. For example, Petitioners had argued in the present case that there is no merit to the suggestion in procedural filings by the NGO Intervenors that the Section 112 Exclusion, as it now appears in the U.S. Code, has the same meaning as it did before the 1990 Amendments. *See* Pet. Br. 37 (responding to argument that “the Exclusion still prohibits only the regulation of HAPs under Section 111(d)”). In their Brief in support of Respondent in this case, the NGO Intervenors declined to defend that prior suggestion, arguing instead that the 1990 Amendments narrowed the Exclusion. *See* NGO Intervenors Br. 3 (Exclusion

applies “only if there is a section 112 emission standard covering emissions of that [HAP] *from that source category*”) (emphasis added)). In contrast, the NGO Intervenors’ primary argument in the Consolidated Cases is that the pre- and post-1990 versions of the Section 112 Exclusion have the same meaning. Cases No. 14-1112/1151, Dkt. 1538051, at 14 (arguing that “[t]he natural inference” is that the Exclusion “exempts only HAPs from regulation under section 111(d)”); *see also id.* at 17, 32. This is an argument that the NGO Intervenors and every other party opposing Petitioners waived in the present case.

In sum, this case and the Consolidated Cases were briefed separately by order of this Court, involve different issues and arguments, and should be argued separately, as this Court’s January 27 Order contemplated. Petitioners respectfully submit that in the present case, it would be equitable to afford each side 20 minutes to make its oral presentation, to be held after argument in the Consolidated Cases.

Dated: March 11, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 11th day of March, 2015, a copy of the foregoing Reply In Support Of Petitioners' Motion And Opposition To EPA's Cross-Motion was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Elbert Lin

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