

## ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NORTH DAKOTA, ET AL.,	)	
	)	
Petitioners,	)	No. 15-1381 (and
	)	consolidated cases)
v.	)	
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	
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**RESPONDENTS' PROPOSED BRIEFING FORMAT AND SCHEDULE**

Pursuant to the Court's January 21 order (ECF No. 1594939), Respondent United States Environmental Protection Agency ("EPA") and Respondent-Intervenors (collectively "Respondents") propose the briefing format set forth in paragraph 18 below. Petitioners are filing a separate proposed schedule and format. In support of their proposed format and schedule, Respondents submit as follows:

**Background**

1. These consolidated petitions seek review of EPA's "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule" ("the 111(b) Rule"). 80 Fed. Reg. 64,510 (Oct. 23, 2015). The 111(b) Rule secures CO<sub>2</sub> emission reductions from new, modified, and reconstructed fossil-fuel-fired power plants by establishing

standards of performance for two subcategories of plants: fossil fuel-fired electric utility steam generating units and stationary combustion turbines. See generally id.

2. Sixteen petitions for review of the Rule have been filed and consolidated under lead case No. 15-1381.<sup>1</sup> While there are numerous state and industry Petitioners,<sup>2</sup> along with two industry intervenors on the Petitioners' side (the Lignite Energy Council and the Gulf Coast Lignite Coalition), the interests of Petitioners and Petitioner-Intervenors are aligned. The Lignite Energy Council, for example, is both an intervenor and a co-filer of the petition for review submitted by the United States Chamber of Commerce. See Petition No. 15-1469.

3. A number of states and other governmental entities, industrial entities, and environmental groups have intervened or moved to intervene in support of EPA in regard to Petitioners' challenges. These intervenors are described further in paragraph 9 below.

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<sup>1</sup> One of the petitioners, Biogenic CO<sub>2</sub> Coalition, has moved to sever and hold in abeyance its petition, which raises narrow and particularized issues relating to the 111(b) Rule's treatment of emissions resulting from the combustion of biologically based feedstocks. See ECF No. 1594030 (Motion, filed Jan. 15, 2016). EPA did not oppose severing and holding this petition in abeyance. ECF No. 1596033 (EPA's Response, filed Jan. 28, 2016). Accordingly, the merits briefing schedule proposed here would not apply to Biogenic CO<sub>2</sub> Coalition's petition.

<sup>2</sup> Case Nos. 15-1381 and 15-1399 were filed by state governmental entities. The remaining cases were filed by companies, trade organizations, and labor groups, all of which for purposes of this proposal will be referred to as "Industry Petitioners."

### **Proposed Word Limits**

4. Respondents recognize that Petitioners have identified a sizable number of potential issues for briefing. In view of the complexity of the Rule and the considerable number of issues to be raised by Petitioners, Respondents believe that Petitioners are justified in seeking more words than a standard-length brief. Respondents are mindful, however, that the Court “looks with extreme disfavor upon repetitious submissions” and “encourages” parties “to limit both the number and size of the briefs” they file. E.g., ECF No. 1594951 (Jan. 21, 2016 Order in West Virginia v. EPA, a case involving expedited challenges to EPA’s related “Clean Power Plan” rule).<sup>3</sup> In that regard, there is a significant amount of overlap and duplication in Petitioners’ non-binding statements of issues. For example, although the International Brotherhood of Boilermakers and the United Mine Workers each filed a separate petition for review, they have identified the same list of eight issues that they anticipate raising in their merits brief. Compare ECF No. 1592810 (statement of issues filed by International Brotherhood of Boilermakers) with id. No. 1593959 (United Mine Workers). Similarly, Peabody Energy Corporation and Indiana Utility

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<sup>3</sup>The Clean Power Plan, promulgated on the same date as the 111(b) Rule, establishes emission guidelines for states to follow in developing plans to limit CO<sub>2</sub> from existing power plants. See generally 42 U.S.C. § 7411(d); 80 Fed. Reg. 64,662 (Oct. 23, 2015). Although the litigation challenging these two rules has not been consolidated into one action, the rules themselves are clearly related. See 42 U.S.C. § 7411(d)(1) (requiring standards for existing sources “to which a standard of performance under this section would apply if such existing source were a new source”). Cases challenging the Clean Power Plan are consolidated under West Virginia v. EPA, No. 15-1363.

Group each filed separate petitions for review but have identified the same list of thirteen issues; moreover, their list also duplicates all but one of the eight issues identified by International Brotherhood of Boilermakers and United Mine Workers. Compare ECF No. 1592107 (Peabody Energy Corp.) with id. 1594156 (Indiana Utility Group) and id. No. 1593959 (United Mine Workers, issues 1-7). The number of *discrete* issues Petitioners collectively identify in their filed statements thus is substantially smaller after accounting for such duplication.

5. Taking into consideration the complexity of the case, the number of issues to be raised, and the number of overlapping or duplicative issues, Respondents believe that the number of words allotted to Petitioners should be similar to the number of words allotted to petitioners in comparably complex cases involving challenges to other significant EPA rules promulgated under authority of the Clean Air Act. Specifically, Respondents propose that a collective allotment of 28,000 words in aggregate to Petitioners and Petitioner-Intervenors for opening briefs would be reasonable here and consistent with the Court's practice in similar cases. See, e.g., White Stallion Energy Ctr., LLC v. EPA, Case No. 12-1100, Aug. 24, 2012 Order (ECF No. 1391295) (allotting a combined total of 28,000 words to state, environmental, and industry petitioners in challenge to EPA's rule setting emission standards for hazardous air pollutants emitted by fossil-fuel-fired power plants); EME Homer City Generation, L.P. v. EPA, Case No. 11-1302, Jan. 18, 2012 Order (ECF No. 1353334) (allotting a combined total of 28,000 words to petitioners, and 7,000

words to intervenors and amicus curiae in support of petitioners, in challenge to rule governing interstate transport of pollutants).

6. The word allotment Respondents propose adequately accounts for any additional issues that may be raised by intervenors on the Petitioners' side. See ECF No. 1592984 (Clerk's Order of Jan. 12, 2016, noting that the Court will "automatically" provide for briefing by Respondent-Intervenors but that any Petitioner-Intervenors must notify the Court of their intentions to file a brief). As noted above, the Lignite Energy Council and Gulf Coast Lignite Coalition have intervened in this case as Petitioners. The former entity did so despite already being both a co-filer of the petition for review submitted by the United States Chamber of Commerce (supra ¶ 2) *and* a member of yet another separate Petitioner, the National Mining Association (Case No. 15-1456).<sup>4</sup> Both Petitioner-Intervenors are affiliated with the coal industry, and they share the same interests as other Petitioners affiliated with that industry. Moreover, most of the issues identified by Petitioner-Intervenors are also raised by Petitioners. Compare, e.g., ECF No. 1595365 (statement of issues filed by Petitioner-Intervenors, issues 1-2, 5-9 & 11) with id. Nos. 1585649 (North Dakota, issues 3-5) and 1592107 (Peabody Energy Corp., issues 1, 10, and 12). Accordingly, there is no reason to believe that Petitioner-Intervenors and Industry Petitioners cannot join in the same brief. But if Petitioner-Intervenors are granted

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<sup>4</sup> See <http://www.nma.org/index.php/member-list>.

leave to file a separate brief, there is no reason to expand the overall word limit for Petitioners and Petitioner-Intervenors to account for that separate brief addressing mostly the same issues from a perspective that is not fundamentally distinct from that of other Industry Petitioners.<sup>5</sup>

7. The collective 28,000-word limit Respondents propose also is reasonable in proportion to the 52,000-word allotment granted by the Court to the petitioners and petitioner-intervenors in the related case of West Virginia v. EPA. That case involves a much larger number of petitions (39 in all) seeking review of the Clean Power Plan, and the parties there are expected to raise a much wider-ranging set of issues for the Court's resolution than in the present case. See ECF No. 1595492 (Proposed Briefing Format and Schedule of Petitioners and Petitioner-Intervenors filed Jan. 27, 2016 in Case No. 15-1363) ("Petitioners' CPP Briefing Proposal").<sup>6</sup> For example, the petitioners and petitioner-intervenors in West Virginia have identified a large number of what they referred to as "fundamental legal" disputes with the Clean Power Plan that necessitate additional words to adequately brief that case, but none of these issues applies in the 111(b) Rule context. See Petitioners' CPP Briefing Proposal at 9-12.

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<sup>5</sup> Respondents do not have a position on the number of briefs that Petitioners should be granted leave to file.

<sup>6</sup> Petitioners in West Virginia filed their opening briefs on February 19, 2016. See ECF No. 1599889 (Opening Brief of Petitioners on Core Legal Issues); ECF No. 1599898 (Opening Brief of Petitioners on Procedural and Record-Based Issues). The opening brief of Petitioner-Intervenors and any *amicus* briefs supporting Petitioners in West Virginia are due February 23, 2016. ECF No. 1595922 (Order dated Jan. 28, 2016).

Likewise, the West Virginia petitioners identified at least 93 discrete “record-based” challenges to the Clean Power Plan,<sup>7</sup> whereas the petitioners here appear to identify substantially fewer than half that many discrete record-based challenges to the 111(b) Rule after accounting for duplication and overlap of issues. E.g., supra ¶¶ 4, 6 (noting extensive duplication among several Petitioners’ filed statements). Accordingly, it is reasonable to adopt a word allotment here that is slightly more than half the exceptionally large word allotment granted in West Virginia.

8. Because of the need to address the issues raised by all Petitioners in a comparable level of detail, EPA requests that it be accorded the same total number of words allotted for Petitioners’ and Petitioner-Intervenors’ opening briefs collectively (i.e., 28,000 words if EPA’s proposal were to be accepted), as this Court has ordered in similar cases. See, e.g., Coalition for Responsible Regulation v. EPA, Case No. 10-1073, Mar. 21, 2011 Order (ECF No. 1299257) (allotting EPA same total number of words as allotted to Petitioners and Petitioner-Intervenors collectively).

9. Respondent-Intervenors are composed of three distinct groupings, each of which includes many individual parties. These three groupings are as follows:

***State Intervenors.*** State Intervenors consist of eighteen states, the District of Columbia, and the City of New York; each has a compelling interest in addressing the deleterious effects of climate change on its residents. State Intervenors have been pursuing legislative, regulatory, and judicial avenues to address greenhouse gas emissions from fossil-fuel-fired power

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<sup>7</sup> See ECF No. 1595492 at A-1 to B-13 (Petitioners’ CPP Briefing Proposal Atts. A & B).

plants for years. Indeed, some of the State Intervenor sought to compel EPA to regulate greenhouse gas emissions from electric generating units. See New York v. EPA (D.C. Cir. No. 06-1322).

***Environmental and Health Intervenor.*** The environmental respondent-intervenors are nine nonprofit organizations dedicated to protecting public health and the environment. These organizations participated extensively in the judicial and administrative proceedings that preceded the 111(b) Rule; have broad expertise with the legal, administrative, technical, and public health aspects of air pollution control; and collectively have millions of members who could be affected by the Court's decision in this case.

***Power Companies.*** Respondent-Intervenor, NextEra Energy, Inc., along with the following proposed intervenors, include eight of the nation's largest electric utilities and owners of generating units subject to the 111(b) Rule and together represent roughly 10 percent of the nation's electricity generating capacity: Calpine Corporation; the City of Austin d/b/a Austin Energy; the City of Los Angeles, by and through its Department of Water and Power; the City of Seattle, by and through its City Light Department; National Grid Generation, LLC; New York Power Authority; Pacific Gas and Electric Company; and Sacramento Municipal Utility District. See ECF No. 1595013 (motion to intervene filed January 21, 2016). These Power Companies have extensive experience developing and procuring power from both renewable and fossil fuel-fired power plants and will benefit from the certainty that the 111(b) Rule's implementation will provide for future investment decisions.<sup>8</sup>

10. Respondent-Intervenors respectfully request that they be granted an allocation of words that allows them fairly and adequately to brief the case. They request a collective allocation of 17,500 words, double the standard allotment for an

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<sup>8</sup> Certain other Respondent-Intervenors or proposed Respondent-Intervenors may or may not need to submit any briefing as a Respondent, depending on the nature of the issues raised by Petitioners. All of the Respondent-Intervenors and proposed Respondent-Intervenors, including those that are not otherwise signatories to this proposal, have confirmed through counsel their agreement that any such contingent needs for words are small enough that they can be accommodated within the collective proposed limit of 17,500 words.



intervenor's brief, which is consistent with the 28,000-word limit proposed above for the main parties' briefs. See Fed. R. App. P. 32(e).

11. Respondents propose that Petitioners' (and if allowed, Petitioner-Intervenors') reply briefs be one-half the length of their opening briefs, consistent with Fed. R. App. P. 32(a)(7)(B)(ii).

### **Proposed Deadlines for Initial and Subsequent Briefs**

12. EPA filed the certified index to the administrative record for this case on December 11, 2015. ECF No. 1588089. Ordinarily, the Petitioners' opening briefs would have been due within 40 days after that date, i.e., by January 20, 2016. See Fed. R. App. P. 31(a)(1). However, some delay was necessary given the number of petitions that were filed, and the time needed to consolidate later-filed petitions with the lead case and for each petitioner to file its non-binding statement of issues. See ECF Nos. 1595533 and 1595704 (last statements of issues filed Jan. 27, 2016).<sup>9</sup> Accordingly, EPA proposes that all opening briefs of Petitioners (including any separate brief that may be filed by Petitioner-Intervenors) be due on Friday, April 1, 2016. Any *amicus* brief in support of Petitioners would be due one week later (April 8,

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<sup>9</sup> See Clerk's Order of Dec. 1, 2015 (ECF No. 1586106; granting EPA's motion to extend deadline for briefing schedule submissions to Jan. 11, 2016); Order of Jan. 21, 2016 (ECF No. 1594939; denying procedural request by Petitioners and making briefing schedule submissions due Feb. 22, 2016).

2016).<sup>10</sup> The April 1 deadline EPA proposes would give Petitioners a total of 112 days following EPA's filing of the certified index to submit their opening briefs — nearly triple the standard time interval. In addition, April 1 is 65 days after the *last* of Petitioners' non-binding statements of issues was filed. This proposed schedule accords Petitioners a generous period in which to prepare opening briefs, and fully accounts for the number of issues to be briefed as well as the time Petitioners will need to coordinate with jointly-filing parties in advance of the deadline for opening briefs.<sup>11</sup>

13. The proposed April 1 deadline also minimizes any burden to Petitioners that may be posed by the overlap between this case's schedule and that of West Virginia. Under the expedited schedule in West Virginia, Petitioners' opening briefs are due on Friday, February 19, 2016, and they will have no filing deadlines in West Virginia during the remaining six weeks before their opening briefs would be due here under Respondents' proposal. See Order of Jan. 28, 2016 in West Virginia v. EPA (ECF No. 1595922). Petitioners' reply briefs in West Virginia are not due until April 15,

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<sup>10</sup> Respondents take no position on appropriate word limits for *amicus* briefs in support of either Petitioners or Respondent.

<sup>11</sup> Even the interval from February 19, 2016 — the date Petitioners are due to file their opening briefs in West Virginia — until the opening-brief deadline EPA proposes here is 42 days, longer than the standard opening-brief interval under the Rules.

2016, two weeks after their opening briefs would be due here. Id.; see also Fed. R. App. P. 31(a)(1) (two weeks is the standard time interval for filing reply briefs).<sup>12</sup>

14. EPA generally requests 60 days from the date of the opening brief to file its respondent's brief in challenges to significant nationwide environmental rules, due to the complex nature of these types of cases and the time needed to coordinate a draft brief with management-level reviewers at both the Department of Justice and EPA. Were such an interval incorporated in EPA's proposal here, however, EPA's brief would be due on Tuesday, May 31, 2016, just two days before the oral argument in West Virginia. ECF No. 1594951 (Order of Jan. 21, 2016 in West Virginia, scheduling oral argument on June 2, 2016). Accordingly, EPA requests that its brief be due June 15, 2016, 75 days after the proposed date for opening briefs. This 75-day interval is reasonable in proportion to the time Petitioners will have to submit their opening brief as described in Paragraph 12 above, and also fairly accounts for the complete overlap between EPA's briefing interval and the time it will need to prepare for oral argument in West Virginia. EPA further proposes that Respondent-Intervenors' briefs be due one week later on June 22, 2016 (to allow Respondent-

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<sup>12</sup> April 1, 2016, is also the date on which the last of the Respondent-side briefs in West Virginia is due. See ECF No. 1595922 (amicus briefs in support of Respondents in West Virginia are due April 1, and Respondent-Intervenor briefs in West Virginia are due one day earlier). Thus, the schedule proposed here will not materially affect Petitioners' preparation of their West Virginia reply briefs.

Intervenors to minimize duplication of EPA's brief), and that any *amicus* brief in support of Respondents also be due on that date.

15. EPA then proposes that Petitioners and Petitioner-Intervenors have until July 6, 2016 to file reply briefs — 21 days after EPA's brief would be due, or one week longer than the standard reply interval. Fed. R. App. P. 31(a)(1).

16. Under this proposal, the deferred joint appendix would be due by July 13, 2016, and final briefs would be due by July 20, 2016. Such a schedule should enable argument of this case to occur during the Court's Fall 2016 term.<sup>13</sup> The Court has already scheduled oral argument in the related challenges to the Clean Power Plan for June 2, 2016. Supra ¶ 14; see also supra ¶ 4 n.3. Given the great public interest in these two related rules, as well as the desirability from a regulatory perspective of having all judicial challenges to these two rules resolved in as efficient and coordinated a fashion as possible, EPA respectfully urges the Court to schedule this case for oral argument as soon as is feasible in the Court's Fall term.

17. The Respondent-Intervenors listed below (following the signature block) have authorized EPA to report that they support the schedule EPA proposes in Paragraph 18 below, as well as EPA's request that oral argument in this case be scheduled early in the Court's Fall 2016 term.

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<sup>13</sup> Arguments typically are heard "a minimum of 45 days after briefing is completed." D.C. Cir. Handbook of Practice and Internal Procedure X.D.

18. In summary, given the considerations discussed above, EPA respectfully requests that the Court establish the following briefing schedule and format:

<b>Documents</b>	<b>Due Date</b>	<b>Word Limits</b>
Petitioners' and Petitioner-Intervenors' Opening Brief(s)	Apr. 1, 2016	The aggregate length of the brief(s) submitted by Petitioners and Petitioner-Intervenors shall not exceed <b>28,000</b> words
<i>Amici</i> for Petitioners	Apr. 8, 2016	
EPA's Brief	June 15, 2016	<b>28,000</b> (the same number of words as Petitioners'/Petitioner-Intervenors' Opening Briefs in aggregate)
Respondent-Intervenors' Briefs	June 22, 2016	<b>17,500</b> words (to be divided among Respondent-Intervenors)
<i>Amici</i> for EPA	June 22, 2016	
Petitioners' and Petitioner-Intervenors' Reply Briefs	July 6, 2016	<b>14,000</b> words in aggregate (one-half the word allocation for Petitioners'/Petitioner-Intervenors' opening briefs)
Joint Appendix	July 13, 2016	N/A
Final Briefs	July 20, 2016	N/A

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February 22, 2016

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*Pacific Gas and Electric Company, and Sacramento Municipal Utility District*

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Respondents' Proposed Briefing Format and Schedule have been served through the Court's CM/ECF system on all registered counsel this 22nd day of February 2016.

/s/ Brian H. Lynk  
Counsel for Respondent