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*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*.	No. 15-1381 (and consolidated cases)

PROPOSED BRIEFING FORMAT AND SCHEDULE OF
NON-STATE PETITIONERS AND PETITIONER-INTERVENORS

On January 21, 2016, the Court directed the parties to submit a briefing proposal by February 22, 2016. ECF No. 1594939. The parties have conferred and have been unable to agree on a single proposed format and schedule for briefing these cases. This pleading sets forth the briefing proposal of the undersigned Non-State Petitioners and Petitioner-Intervenors for the Court's consideration.

These consolidated cases involve petitions for review of a final rule promulgated under Section 111(b) of the Clean Air Act ("CAA" or "Act") by the U.S. Environmental Protection Agency ("EPA" or "Agency") entitled "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg.

64,510 (Oct. 23, 2015) ("Rule"). The Rule sets new source performance standards to address carbon dioxide ("CO_2") emissions from new, modified, and reconstructed coal-fired and gas-fired electric generating units.

Recognizing that the Court "looks with extreme disfavor on the filing of duplicative briefs in consolidated cases," D.C. Circuit Handbook of Practice and Internal Procedures at 37, and considering the number, diversity, and complexity of these consolidated petitions, and that all but a handful of the parties in this case are before this Court in another matter that is undergoing expedited briefing (*West Virginia et al. v. EPA*, No. 15-1363 and consolidated cases (D.C. Cir.)), Non-State Petitioners and Petitioner-Intervenors propose the following briefing format and schedule:

Document	**Due Date**	**Word Limits**
24 State Coalition Petitioners' Opening Brief	July 15, 2016	12,000 words[1]
State of North Dakota Opening Brief	July 15, 2016	6,000 words[2]
Non-State Petitioners' Opening Briefs	July 15, 2016	24,000 words total in three briefs
Petitioner-Intervenors' Opening Brief	July 25, 2016	10,000 words
Amici Briefs in Support of Petitioners	July 25, 2016	To be determined by Court
Respondent EPA's Brief	September 28, 2016	To be determined by Court

[1] *See* Briefing Proposal filed by 24 State Coalition Petitioners.

[2] *See* Briefing Proposal filed by Petitioner State of North Dakota.

Document	Due Date	Word Limits
Joint Brief(s) of Respondent-Intervenors	October 10, 2016	To be determined by Court
Amici Briefs in Support of Respondents	October 10, 2016	To be determined by Court
24 State Coalition Petitioners' Reply Brief	November 9, 2016	6,000 words
State of North Dakota Reply Brief	November 9, 2016	3,000 words
Non-State Petitioners' Reply Briefs	November 9, 2016	12,000 words total in three briefs
Petitioner-Intervenors' Reply Brief	November 9, 2016	5,000 words
Deferred Joint Appendix	November 23, 2016	N/A
Final Briefs	December 5, 2016	N/A

I. SCHEDULE

The proposed briefing schedule is reasonable in light of the fact that nearly all the parties in this case are currently engaged in expedited briefing in the *West Virginia v. EPA* case discussed above. The parties in that case must file final briefs by April 22, 2016; oral argument will take place on June 2 (and possibly June 3), 2016. No. 15-1363, ECF No. 1595922. Petitioners propose that opening briefs in this case be due July 15, just 42 days after oral argument in *West Virginia*. In light of the size and complexity of that case, its expedition, the abbreviated time to prepare for oral argument, and the complexity of organizing and coordinating the parties involved in both cases, Petitioners will not be able to meaningfully and effectively brief this case until after oral argument takes place in the *West Virginia* case in early June. The

schedule proposed here therefore provides for briefing of this case to begin after oral argument in the *West Virginia* case has concluded, and proceeds in an orderly fashion thereafter.

The Rule at issue in this case has not been stayed and remains in effect, and thus there is no harm to EPA or its supporting intervenors in commencing the briefing after the *West Virginia* oral argument.

II. WORD LIMITS, NUMBER OF BRIEFS, AND ISSUES

Given the scope, complexity, and number of parties and issues in these consolidated cases, Non-State Petitioners and Petitioner-Intervenors request the minimum number of words required to ensure that *all* of the diverse group of Non-State Petitioners and Petitioner-Intervenors obtain meaningful judicial review. This group includes owners and operators of electric generating units, coal companies, electricity consumers, business interest groups, and non-governmental organizations, which are allied on some issues but have differing (and sometimes competing) interests on others.

The word limits sought by Petitioners are in line with the limits imposed by this Court in other large and complex CAA cases, including the *West Virginia* case mentioned above. That case involves petitions for review of another complex and important CAA rule addressing greenhouse gas emissions from existing (as opposed to new, modified, and reconstructed) electric generating units. There, this Court ordered a total of 78,000 words for all petitioners (including state and non-state

petitioners) and their supporting intervenors (42,000 words for petitioners' opening briefs, 10,000 words for petitioner-intervenors' opening brief, 21,000 words for petitioners' reply brief, and 5,000 words for petitioner-intervenors' reply). Here, State and Non-State Petitioners and Petitioner-Intervenors request 52,000 words for opening briefs and 26,000 words on reply, for a total of 78,000 words.

Fewer words would effectively deprive Non-State Petitioners of their right to meaningful judicial review. The judicial review provision of the CAA, CAA § 307(b), 42 U.S.C. § 7607(b), reflects a congressional decision to allow "'preenforcement review of agency rules and regulations.'" *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998). That congressional directive can be given effect only by allowing a meaningful opportunity to present all issues. Moreover, this Court has made clear that issues must be raised with specificity. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1251 (D.C. Cir. 2014) (per curiam) ("[C]ursory treatment is inadequate to place [a] challenge . . . before the court, because 'it is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.'") (quoting *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166-67 (D.C. Cir. 2013)). Given the number of issues in this case, as detailed below, and the Court's directive in

White Stallion that all issues be briefed with specificity, the word limits proposed here are necessary to ensure meaningful judicial review and due process.[3]

Among the critical issues that some or all of the Petitioners and Petitioner-Intervenors intend to raise[4] include:

1. Whether the Rule violates Section 111(b) of the CAA by basing its standard of performance on a "system of emission reduction" that includes elements that are not part of the source and not within the control of the source;

2. Whether EPA violated the Energy Policy Act of 2005 by impermissibly considering government-funded technologies either under the Clean Coal Power Initiative, 42 U.S.C. § 15962, or that received Section 48A tax credits, 26 U.S.C. § 48A, as part of its consideration of whether carbon capture and storage is an adequately demonstrated technology for purposes of Section 111(b) of the Clean Air Act;

3. Whether the Rule is unlawful because it imposes a national uniform standard of carbon dioxide sequestration on vast geographic areas of the nation where

[3] Petitioner Biogenic CO2 Coalition moved on January 15, 2016 (ECF No. 1594030), with Respondents' consent (ECF No. 1596033), to sever and hold in abeyance issues relating to the challenged Rule's treatment of biogenic emissions from agricultural crop-derived biomass. The panel in *West Virginia v. EPA*, No. 15-1363, discussed above, has granted similar relief with respect to biogenic issues raised by the Biogenic CO2 Coalition in *National Alliance of Forest Owners v. EPA*, No. 15-1478 (D.C. Cir.), ECF No. 1594946. The Court has yet to rule on the Biogenic CO2 Coalition's motion in this case; a timely decision by the Court on the pending motion will help simplify briefing in this case.

[4] As explained below, because of diverging interests, the parties anticipate that Petitioners will not join all of these issues and some will be joined only by a subset of Petitioners.

new generation will be needed to meet future electric demand but where there is no sequestration capacity;

4. Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise unlawful because EPA failed to make a proper "Endangerment Finding" that CO_2 emissions from new, modified, or reconstructed coal-fueled electric generating units are "reasonably . . . anticipated to endanger public health or welfare," as required for EPA to regulate under Section 111(b) of the CAA;

5. Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise unlawful for establishing standards of performance based on technologies that have not been adequately demonstrated and are not achievable, including whether:

(a) EPA failed to demonstrate that its emission standard for new coal-fired sources of 1,400 lbs CO_2/MWh is achievable;

(b) EPA failed to demonstrate that its emission standard for new coal-fired sources is adequately demonstrated because:

(i) a determination of adequate demonstration requires more than "technical feasibility";

(ii) the Boundary Dam facility on which EPA relies does not support a determination of adequate demonstration; and

(iii) the other projects to which EPA refers do not support a determination of adequate demonstration;

(c) EPA's inclusion of carbon capture and storage as part of the "best system of emission reduction" for coal-fired electric generating units is unlawful because EPA failed to meet its burden to show that carbon capture and storage is the "best system" when considering costs as required by Sections 111(b) and 111(a)(1);

(d) EPA failed to demonstrate that a modified fossil fuel-fired electric utility steam generating unit can achieve its best historical carbon dioxide emission rate under all expected operating conditions;

(e) EPA failed to show that its standard of performance for reconstructed fossil fuel-fired electric utility steam generating units, which requires converting a boiler from subcritical to supercritical steam conditions, is adequately demonstrated; and

(f) EPA failed to show that its standard of performance for reconstructed fossil fuel fired electric utility steam generating units is achievable using the designated boiler types;

6. Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise unlawful because EPA abused its discretion by failing to create a separate subcategory for lignite coal in the Rule and by failing to recognize regional variability of fuels;

7. Whether EPA failed to properly consider the Rule's cost and energy impacts and failed to engage in a proper cost-benefit analysis, including whether:

(a) EPA's failure to adequately address infrastructure and carbon dioxide transportation costs in States without storage capacity violates the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*; and

(b) EPA's weighing of costs and benefits was improper because EPA's Rule will, by EPA's admission, result in negligible CO_2 emission reductions;

8. Whether EPA's inclusion of carbon capture and storage as part of the "best system of emission reduction" for coal-fueled electric generating units but not for natural-gas-fueled electric generating units was arbitrary and capricious or otherwise contrary to law, including constitutional principles of equal protection under the Fifth Amendment;

9. Whether the Rule creates an unconstitutional taking of property interests that can be avoided by an interpretation that is more consistent with the plain text of the statute and more consistent with past practice; and

10. Whether EPA properly complied with the Administrative Procedure Act, 5 U.S.C. § 553, including whether:

(a) EPA placed into the public docket and Agency record during the Notice of Proposed Rulemaking all relevant and necessary materials;

(b) EPA engaged in improper ex parte communications prior to the Notice of Proposed Rulemaking that formed the basis of the Agency action and were undisclosed during the notice-and-comment process;

(c) Allowed personnel with conflicts of interest to draft the Rule;

(d) Failed to recuse decisionmakers with "unalterably closed minds" from reaching the determination to implement the Rule; and

(e) Failed to comply with procedural due process requirements to ensure a fair, not outcome-driven, process.

III. FURTHER JUSTIFICATION FOR NUMBER OF WORDS AND BRIEFS

Individual Non-State Petitioners possess different perspectives from both State Petitioners and other Non-State Petitioners on many of the issues listed above, and may present arguments that other Petitioners will not join. Non-State Petitioners have varying interests based on the Rule's adverse effects on their unique circumstances and may need to raise competing arguments on some issues, as described further below. The word allocation requested here is necessary to allow Non-State Petitioners to adequately present their distinct perspectives and arguments, and to allow this Court to properly consider them. Non-State Petitioners request permission to file three briefs to satisfactorily and cogently address these differences. The State Petitioners provide justification in their separate briefing proposals as to why they require 18,000 words in two briefs to address their specific issues and arguments. As discussed below, Petitioners and Petitioner-Intervenors provide justification for the words they will need to present their respective arguments in three separate briefs.

A. Electric Utility, Labor, and Business Petitioners

Petitioners representing electric utilities, labor, and business organizations request 12,000 words to present their distinct arguments and perspectives. These entities actively participated in this rulemaking and have been heavily involved in many cases challenging EPA regulation under the Clean Air Act and regulation of CO_2 emissions specifically. These Petitioners share an interest in focusing briefing on the fundamental respects in which EPA transgressed its legal authority under Section 111(b) and other statutes. For example, these Petitioners intend to argue EPA violated Section 111(b) by adopting a "system of emission reduction" that included elements that are not part of the source being regulated and that EPA violated the Energy Policy Act of 2005 by relying on specific U.S. Department of Energy-funded utility industry projects.

The electric utility industry in particular brings an essential perspective to whether EPA's new source performance standards meet the requirements of the Act. As the industry targeted by the Rule, electric utilities participated actively in this rulemaking, and have participated in every other Section 111 rulemaking regulating electric utilities over the past 40 years. Moreover, electric utilities have expended substantial resources on CO_2 and other control technologies. Because electric utility Petitioners operate around the country, they are familiar with the regionally-variable conditions that affect electric utility and air pollution control operations, as well as the cost and other impacts of such operations. Supported by labor and business

organizations, electric utilities will explain why EPA's "best system of emission reduction" for certain types of units is not "adequately demonstrated," as required by the Act, and why the Rule will in fact preclude the development of new coal-fired power plants in many areas. Electric utilities will explain why EPA has failed to show that its performance standards for new sources are "achievable," as required by the Act. Utilities will also explain why EPA's standards for modified and reconstructed units fail to reflect the range of variable operating conditions that must be considered in setting standards of performance.

In sum, the electric utility, labor, and business organization Petitioners intend to present both fundamental legal challenges to the Rule as well as record-based challenges that will depend upon the detailed technical record developed in the rulemaking. Electric utility, labor, and business Petitioners believe 12,000 words is the minimum number with which they can adequately address these important issues.

B. Coal Industry

Certain coal industry Petitioners are suppliers of coal to electric generating units. These Petitioners require a separate brief of their own. They have an aligned interest with respect to their position on the 111(b) Rule, which, in some respects, may diverge from those in the electric generating industry itself and the States that must manage and oversee permitting and compliance issues, while addressing energy diversity.

These coal industry Petitioners, for example, have a unique interest in overturning the disproportionate burdens imposed on coal-fired electric generating units in the final Rule. These Petitioners are also uniquely interested in addressing the fundamental flaws with EPA's endangerment finding, including its reliance on outdated information. After consultation with the other Petitioners, these Petitioners believe they can brief the issues unique to their aligned interests in a separate brief of 10,000 words.

C. Energy & Environment Legal Institute

The Energy & Environment Legal Institute ("EELI") asks this Court to grant it 2,000 words (plus 1,000 words for reply) to allow it to make specific arguments to which other Petitioners do not plan to join. EELI is a non-profit organization made up of members focused on the public interest and transparency in government. Reflecting these interests, EELI plans to argue that the Rule fails to comport with the requirements of the statute and due process as a result of ex parte contacts between EPA and outside entities, which communications were not publicly docketed during the notice-and-comment period. Further, EELI plans to argue that the Agency permitted entities with clear conflicts of interest to engage in the drafting of the Rule and failed to recuse decision-makers with unalterably closed minds. By so doing, and by failing to provide essential documents disclosing these facts during the rulemaking, the Agency rendered the Rule unlawful. EELI notes that, in the *West Virginia* case mentioned above, it was forced to seek leave to file a supplemental brief to make

similar arguments concerning the rule at issue there due to different views on this issue of other petitioners, and the lack of space afforded it in the opening briefs. No. 15-1363, ECF No. 1599886.

D. Petitioner-Intervenors

Petitioner-Intervenors should also be granted a separate brief. In their motions to intervene, Petitioner-Intervenors showed that they have distinct interests in this proceeding and have met the standard for showing that the existing parties do not adequately represent their interests. Petitioner-Intervenors represent the lignite coal industry. Because of its unique properties, lignite, unlike other grades of coal, has few commercial uses other than as fuel for power plants, and it cannot efficiently be shipped long distances. For this reason, electric generating units that utilize lignite will often be located right next to a lignite mine whose sole purpose is to provide fuel for that generating unit. Generating units that utilize lignite coal as fuel and the lignite mines that fuel such units often share the same owners. By contrast, the owners of generating units that utilize other types of coal typically do not also own the source of the fuel for the generating unit. Accordingly, the lignite coal industry has distinct interests from Petitioners. Petitioner-Intervenors seek 10,000 words for their opening brief, the minimum they deem necessary to address their critically important and unique issues.

CONCLUSION

For the foregoing reasons, Non-State Petitioners and Petitioner-Intervenors respectfully request that the Court adopt the briefing schedule and format set forth above.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2016, the foregoing document was electronically filed with the Clerk of the Court using the Court's CM/ECF system. All registered CM/ECF counsel were electronically served by the Court's CM/ECF system.

/s/ Tauna M. Szymanski
Tauna M. Szymanski