

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

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)	
STATE OF WISCONSIN, et al.,)	
)	
<i>Petitioners,</i>)	
)	
v.)	
)	No. 16-1406 (and consolidated
U.S. ENVIRONMENTAL)	cases)
PROTECTION AGENCY and)	
E. SCOTT PRUITT, Administrator,)	
U.S. Environmental Protection Agency)	
)	
<i>Respondents.</i>)	
)	
)	

**RESPONSE IN OPPOSITION BY SIERRA CLUB, APPALACHIAN
MOUNTAIN CLUB, AMERICAN LUNG ASSOCIATION,
ENVIRONMENTAL DEFENSE FUND, AND STATE OF DELAWARE TO
JOINT MOTION FOR MODIFICATION OF BRIEFING SCHEDULE AND
ALTERNATIVE CROSS-MOTION BY SIERRA CLUB, APPALACHIAN
MOUNTAIN CLUB, AND STATE OF DELAWARE TO
SEVER THEIR PETITIONS**

Pursuant to Federal Rule of Appellate Procedure 27(a)(3), Petitioners and Respondent-Intervenors Sierra Club and Appalachian Mountain Club (“Public Health Petitioners”), Petitioner State of Delaware, and Respondent-Intervenors American Lung Association and Environmental Defense Fund (“Respondent-Intervenors”) hereby respond to the Joint Motion for Modification of Briefing

Schedule filed in this proceeding on August 7, 2017 (Doc. No. 1687655) (“Joint Motion”).

1. a. Pointing to the Court's power "to *stay* proceedings," *id.* at 6 (emphasis added; citation and internal quotation marks omitted), several parties (“Movants”) seek to extend briefing deadlines by 120 days (and to require EPA status reports in the meantime). Their proffered reason is to await EPA's decision on petitions for reconsideration—but those petitions were *already* pending five months ago when Movants submitted their March 20, 2017 briefing proposal (Doc. No. 1666899). Though that proposal noted the pendency of the reconsideration petitions, *id.* at 5, Movants did not state or suggest that briefing be deferred to await EPA's ruling.

b. Though the Joint Motion is nominally styled as a request to extend briefing deadlines, Movants' rationale makes clear that the motion is in reality an attempt to "stay" this litigation. Joint Motion at 6. Moreover, Movants offer no basis to expect EPA will rule within the 120-day timeframe they propose. Given Movants' position that the challenges to the original rule and EPA's reconsideration decision should be heard together, *id.* at 5-6, it is not difficult to foresee further extension requests by Movants when the 120-day initial extension expires. Indeed, EPA's August 11, 2017 Response to the Joint Motion offers no timeframe for ruling on the reconsideration, instead indicating (Doc. No. 1688478 at 4) that the

reconsideration process "may be lengthy" and that "no administrative reconsideration proceeding is currently underway." The prospect of additional extensions simply confirms that Movants' request is in reality a "stay"—thinly disguised, at best.

c. As such, Movants' request is an untimely procedural motion. The time for motions to stay these proceedings expired long ago. Such motions are procedural motions, *see* D.C. Cir. Handbook at 28 (procedural motions include "motions to hold the case in abeyance" and "motions for stay"), and this Court set deadlines of December 29, 2016 and January 3, 2017 for procedural motions. Order, Doc. No. 1648154 (Nov. 29, 2016); Order, Doc. No. 1648706 in Case No. 16-1410 (Dec. 1, 2016). *See also* D.C. Cir. Handbook at 28 (time limit for procedural motions is "30 days from docketing"). Procedural motion deadlines are "important," *id.*, and Movants have failed to seek leave to file an untimely procedural motion, nor have they shown "good cause" for untimely filing. *See* Fed. R. App. P. 26(b).

d. Indeed, no such good cause exists. Movants indicate that (1) multiple petitions for reconsideration are pending, and (2) it is unknown when EPA will rule on them. But because those circumstances already existed when the

procedural motion deadlines expired on December 29, 2016 and January 3, 2017,¹ those circumstances cannot constitute "good cause" for late filing.

2. a. But even assuming Movants' request is treated solely as a request to extend briefing deadlines, it still fails to make the required showing. This Court "disfavors" such motions, which will be granted "only for extraordinarily compelling reasons." D.C. Cir. R. 28(e)(1). As indicated supra, the key circumstances remain now what they were months ago, when the parties submitted briefing formats and when the Court entered the May 2017 briefing order: petitions for reconsideration are pending, and it is unknown when EPA will rule on them. In addition, the possibility that EPA will act on the pending petitions in a manner that affects this litigation is speculative, not "extraordinarily compelling."

b. Moving forward under the existing briefing schedule will break no new ground. EPA's response to the Joint Motion (Doc. No. 1688478 at 4) indicates that "it is not unusual for rulemakings to be subject to judicial review while petitions for administrative reconsideration are still pending." Indeed, that is what happened in the litigation challenging *the predecessor to the very rules at issue here*. *EME Homer City Generation v. EPA*, 795 F.3d 118, 137 (D.C. Cir. 2015) (having reached and resolved some challenges to the Cross-State Air Pollution

¹ Eight of the nine reconsideration petitions were filed before expiration of both procedural motion deadlines. <https://www.epa.gov/airmarkets/petitions-reconsideration-received-csapr-update> (last visited Aug. 8, 2017).

Rule, Court declined to reach a different challenge where a party had asked EPA for reconsideration and EPA "ha[d] not ruled on that request"); *see also Utility Air Regulatory Group v. EPA*, 744 F.3d 741, 747 (D.C. Cir. 2014).

3. Whether viewed as a stay request or an extension motion, Movants' request prejudices Public Health Petitioners and the State of Delaware.

a. By this proceeding, Public Health Petitioners and the State of Delaware seek to reduce air pollution that threatens harm to the health of their members and residents, respectively. *See* Declarations to Motion to Intervene, Doc. No. 1652870, Exhibits A, B, C, D, J (Dec. 23, 2016). The unsupported extension proposed by the Joint Motion delays any remedy that will reduce transported air pollution and protect the health of those members and residents.

b. Also, in compliance with the Court's existing briefing schedule, counsel for Public Health Petitioners and the State of Delaware have invested substantial time preparing their joint opening brief. If briefing is delayed and its scope changed, much of that work will need to be redone. And that inefficient cycle may well repeat itself: if the deadlines are extended by 120 days, Public Health Petitioners and Delaware will need to expend substantial time to meet that new deadline—yet may need to redo much of *that* work, if Movants seek another extension.

4. The Joint Motion cites vacancies at EPA,² but offers no reason why these vacancies constitute extraordinarily compelling reasons to delay this proceeding. In fact, EPA fills top management vacancies with career officials in “acting” status, including, as of this writing, the Acting Deputy Administrator and the Acting Assistant Administrator of the Office of Air and Radiation.³ These acting officials carry out the duties of their offices until replaced by the political appointees whose current absence is cited in the Joint Motion. The Joint Motion (¶ 4) offers no reason why this transition at EPA should affect the expectations regarding petitions for reconsideration or the briefing schedule.

5. EPA's response to the Joint Motion suggests (Doc. No. 1688478 at 6) the agency might not oppose an extension of the briefing schedule "to allow Petitioners additional time for preparation of their briefs, should they so require." But Movants' own motion asserted no such rationale for the requested extension. Instead of arguing that Movants need more time to prepare their brief, the Joint Motion rests on the assertion that briefing should await EPA's ruling on the reconsideration petitions. If Movants were facing an "extraordinarily compelling"

² The Joint Motion (at ¶ 4) claims that, besides the EPA Administrator, “[o]ther EPA officials whose positions require Senate confirmation have not yet been nominated and confirmed.”

³ EPA, “About EPA – Acting Deputy Administrator,” <https://www.epa.gov/aboutepa/epas-acting-deputy-administrator> (last visited Aug. 9, 2017); EPA, “About EPA – About the Acting Assistant Administrator of EPA’s Office of Air and Radiation,” <https://www.epa.gov/aboutepa/about-acting-assistant-administrator-epas-office-air-and-radiation> (last visited Aug. 9, 2017).

need (*see* D.C. Cir. R. 28(e)(1)) for more brief preparation time, they could have mentioned it in the Joint Motion—but did not.

6. In the alternative, if the Court grants the Joint Motion, Public Health Petitioners and Delaware request that the Court sever their petitions (Nos. 16-1443 and 16-1448) and allow briefing in the severed case to proceed. That approach would accommodate Movants' late-arising preference for deferring judicial consideration of their issues, while avoiding prejudice to Public Health Petitioners and Delaware from delayed adjudication of their fully ripe claims.

In sum, Movants' request is an untimely procedural motion for which Movants have not shown good cause. Even if viewed solely as an extension motion, Movants have not shown "extraordinarily compelling reasons." D.C. Cir. R. 28(e)(1). In addition, as demonstrated above, their motion prejudices Public Health Petitioners and Delaware. Therefore, the motion should be denied.

In the alternative, if the Court grants the Joint Motion, Public Health Petitioners and Delaware request that the Court sever their petitions (Nos. 16-1443 and 16-1448) and allow briefing in the severed case to proceed.

In light of the current suspension of the briefing schedule and associated uncertainty about the briefing deadlines in this case, Public Health Petitioners, Delaware, and Respondent-Intervenors would not oppose extending by three

weeks the briefing deadlines established by the Court's Order of May 15, 2017

(Doc. No. 1675267).

DATED: August 15, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies, in accordance with Federal Rules of Appellate Procedure 32(g)(1) and 27(d)(2)(A), that the foregoing **Response in Opposition by Sierra Club, Appalachian Mountain Club, American Lung Association, Environmental Defense Fund, and State of Delaware to Joint Motion for Modification of Briefing Schedule and Alternative Cross-Motion by Sierra Club, Appalachian Mountain Club, and State of Delaware to Sever Their Petitions** contains 1,515 words, as counted by counsel's word processing system, and thus complies with the 5,200 word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) & (a)(6) because it has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** using **14-point Times New Roman** font.

Dated: August 15, 2017

/s/ Charles McPhedran
Charles McPhedran

*Counsel for Sierra Club and
Appalachian Mountain Club*

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2017, I have served the foregoing **Response in Opposition by Sierra Club, Appalachian Mountain Club, American Lung Association, Environmental Defense Fund, and State of Delaware to Joint Motion for Modification of Briefing Schedule and Alternative Cross-Motion by Sierra Club, Appalachian Mountain Club, and State of Delaware to Sever Their Petitions** on all registered counsel through the court's electronic filing system (ECF).

/s/ Charles McPhedran
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