

ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

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

STATE OF WEST VIRGINIA, ET AL.,	)	
	)	
Petitioners,	)	No. 15-1363 (and
	)	consolidated cases)
v.	)	
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, ET AL.,	)	
	)	
Respondents.	)	
_____	)	

**JOINT PROPOSAL OF RESPONDENT EPA AND SUPPORTING  
INTERVENORS CONCERNING FORMAT FOR ORAL ARGUMENT**

Pursuant to the Court’s March 28, 2016, letter, Respondents United States Environmental Protection Agency et al. (“EPA”) and Respondent-Intervenors (collectively “Respondents”) submit this proposed format for oral argument. Respondents consulted with Petitioners, and while the parties appear to collectively agree on certain aspects of the argument structure, they disagree on others. Respondents therefore submit this separate proposal.

Respondents propose that argument proceed in five phases with a total of 95 minutes per side for argument. Within that total, Respondents propose the following division of issues, presented in the proposed order that follows:

1. All statutory legal issues raised by Petitioners in their “Core Legal Issues” brief concerning EPA’s authority under Section 111 of the Clean Air Act, 42 U.S.C. § 7411, to promulgate the challenged Rule, with the exception of the “Section 112” issue (30 minutes per side).
2. The Section 112 issue (i.e., whether EPA’s regulation of hazardous pollutant emissions under Clean Air Act Section 112, 42 U.S.C. § 7412, bars regulation of CO<sub>2</sub> emissions under Section 111(d)) (15 minutes per side).
3. The Tenth Amendment argument raised by Petitioners (10 minutes per side).
4. Procedural issues raised by Petitioners (10 minutes per side).
5. All other issues raised by Petitioners in their “Procedural and Record-Based Issue Brief,” except those identified below which are to rest on written submissions (30 minutes per side).

Respondents believe that the issues naturally break into the five discrete and identified segments identified above, with each segment covering a set of related issues or sub-issues. Respondents therefore propose that the argument be formally divided into these five segments, with argument on each segment to be completed by both sides before moving to the next. Respondents believe, however, that breaking the argument into more than the five argument segments proposed would lead to an inefficient use of judicial time and frustrate the Court’s ability to focus argument, within a group of related issues, on the sub-issues of particular interest to it.

Respondents acknowledge that the proposed argument length of 95 minutes of argument per side—three hours and ten minutes in total—is considerably longer than allotted in a standard case, but believe this amount of time is warranted given the increased word allotment for briefing, the large number of issues raised in this litigation and their scope, and the technical complexity of many of the issues. The proposed argument, however, could be completed in one day, and Respondents suggest that the Court does not need to schedule two days of argument.

Respondents’ proposed oral argument format is set forth in greater detail, along with the identification of counsel to present argument for Respondents, in the following table:

Issues	Time	Counsel Presenting Argument
All “core” statutory legal issues concerning Rule, other than the Section 112 issue <ul style="list-style-type: none"> <li>• Pet. Core Legal Issue Op. Br. §§ I, III, Core Legal Issue Reply Br. §§ I, II, IV</li> <li>• EPA Br. § I</li> </ul>	30 minutes per side	Eric Hostetler (EPA) (20 min.) Michael Myers (State Int.) Kevin Poloncarz (Power Co. Int.) (total of 10 minutes to be divided among intervenors’ counsel)
Section 112 Issue (i.e., whether regulation of hazardous pollution under Section 112 bars regulation of CO <sub>2</sub> emissions under Section 111(d)) <ul style="list-style-type: none"> <li>• Pet. Core Legal Issue Op. Br. § II, Core Legal Issue Reply Br. § III</li> <li>• EPA Br. § II</li> </ul>	15 minutes per side	Amanda Berman (EPA) (12 min.) Sean Donahue (Environmental Int. 3 min.)
Tenth Amendment issue <ul style="list-style-type: none"> <li>• Pet. Core Legal Issue Op. Br. § IV, Core Legal Issue Reply Br. § V</li> <li>• EPA Br. § III</li> </ul>	10 minutes per side	Amanda Berman (EPA) (7 min.) Michael Myers (State Int.) (3 min.)

Procedural issues <ul style="list-style-type: none"> <li>• Pet. Procedural and Record Op. Br. § I, Pet. Procedural and Record Reply Br. § I</li> <li>• EPA Br. § IV</li> </ul>	10 minutes per side	Chloe Kolman (EPA) (10 min.)
All record issues not submitted on briefs <ul style="list-style-type: none"> <li>• Pet. Procedural and Record Op. Br. §§ II, IV.C.-D., V.A., V.D., Pet. Procedural and Record Reply Br. §§ II, III.D, IV at 33-34.</li> <li>• EPA Br. §§ V, VI.A-B., VII.B-C.</li> </ul>	30 minutes per side	Norman Rave (EPA) Brian Lynk (EPA) (total of 25 minutes to be divided among EPA counsel) <sup>1</sup> Kevin Poloncarz (Power Co. Int.) (5 minutes) <sup>2</sup>

### Issues to Rest on Written Submissions

Respondents propose that the following record-based issues rest on the written submissions:

- Issues related to pre-2013 generating facilities and emission-rate credits, including North Carolina state-specific issue. Pet. Procedural and Record Opening Br. § III.A, B, V.F., Pet. Procedural and Record Reply Br. § III.A, EPA Br. § VII.A.
- Issue related to establishment of subcategories. Pet. Procedural and Record Op. Br. § IV.B, Pet. Procedural and Record Reply Br. III.C, EPA Br. § VI.C.

<sup>1</sup> Mr. Rave will address Petitioners' arguments concerning individual plant achievability analyses, interstate trading programs, grid reliability and infrastructure issues, and the state-specific issues raised by Wisconsin and Utah (EPA Br. §§ V.E-G, VI.A., VII.B-C.). Mr. Lynk will address Petitioners' arguments concerning the achievability of Building Blocks 1, 2 and 3, and EPA consideration of costs (EPA Br. §§ V.A-D, VI.B).

<sup>2</sup> If the Court has any questions regarding the issues addressed in the brief of the Trade Association Intervenors, Richard Ayres will be prepared and available to answer them.

- Issue related to new sources. Pet. Procedural and Record Op. Br. § IV.A, EPA Br. § VI.D.
- Issue related to enhanced oil recovery. Pet. Procedural and Record Op. Br. § III.C, Pet. Procedural and Record Reply § III.B, EPA Br. § VI.E.
- The state-specific issues raised related to Wyoming, New Jersey, and Arizona/Utah tribes. Pet. Procedural and Record Op. Br. § V.B, V.C., and V.E., Pet. Procedural and Record Reply § IV at 34-36, EPA Br. §§ VII.D, VII.E., p. 59.

Request Pursuant to Circuit Rule 34(c)

In view of the large number of issues to be argued and their complexity, as set forth in the above table, Respondent EPA respectfully requests leave for five counsel to appear for EPA—one to appear within each argument segment, except for the proposed 30-minute “record-issue segment,” in which EPA requests leave for two EPA counsel to appear. Respondents further request that limited time be allotted to three additional counsel representing State Intervenor-Respondents, Environmental and Public Health Organization Intervenor-Respondents, and Power Company Intervenor-Respondents respectively, as set forth within the table above.

WHEREFORE, Respondents respectfully request that the Court adopt the proposed oral argument format set forth above.<sup>3</sup>

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<sup>3</sup> Should the Court elect to structure the argument differently than Respondents propose, Respondents reserve the right to request that the Court allow them to reallocate time between Respondents’ attorneys in any differently organized or timed argument segments.

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April 28, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Joint Proposal of Respondent EPA and Supporting Intervenors Concerning Oral Argument Format have been served through the Court's CM/ECF system on all registered counsel this 28<sup>th</sup> day of April, 2016.

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