

ORAL ARGUMENT HELD APRIL 16, 2015
DECISION ISSUED JUNE 9, 2015

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

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MURRAY ENERGY CORPORATION,)
)
Petitioner,)
)
v.)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY and REGINA)
A. MCCARTHY, Administrator,)
)
Respondents.)
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STATE OF WEST VIRGINIA, ET AL.,)
)
Petitioners,)
)
v.)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)
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Nos. 14-1112, 14-1151

No. 14-1146

**EPA’S RESPONSE IN OPPOSITION TO PETITIONERS’
ALTERNATIVE MOTIONS TO STAY THE MANDATE**

Dated: August 6, 2015

Respondents the United States Environmental Protection Agency (“EPA”) and Administrator Gina McCarthy hereby oppose the alternative motions filed by Petitioner States West Virginia et al., Petitioner Murray Energy Corp., and Intervenor Peabody Energy (“Rehearing Petitioners”) to stay the mandate until EPA publishes its final rule addressing carbon dioxide emissions from existing power plants under section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), in the Federal Register.¹

In their Petitions for Rehearing or Rehearing en banc, Rehearing Petitioners include an alternative request – styled as a motion² – that the Court stay the mandate in these cases if it denies the petitions for rehearing.³ This alternative motion should be denied. The Court held that it “does not have authority” over the petitioners’ challenges, and that the states lack standing. In re Murray Energy Corp., 788 F.3d 330, 334-36 (D.C. Cir. 2015). Accordingly, the only thing left for the Court to do is

¹ Final rules addressing power plant carbon dioxide emissions were signed by the Administrator on August 3, 2015, and (contrary to Rehearing Petitioners’ baseless speculations of delay) will be published in the Federal Register in the normal course. Once the final rules are published in the Federal Register, this Court will have jurisdiction to hear challenges to those rules. See 42 U.S.C. § 7607(b)

² EPA is well aware that no response to a rehearing petition is permitted unless the Court so orders. See F.R.A.P. 35(e). But to avoid any suggestion that it has missed its opportunity to oppose the “alternative motion” portion of the rehearing petitions, EPA is filing this brief response thereto. EPA will fully address the rehearing petitions (including the requested “alternative” relief) should the Court order a response to those petitions.

³ Pet. for Reh’g . . . or in the Alternative, Motion for a Stay of the Mandate, No. 14-1146, Doc. 1564355 (July 24, 2015) (“State Reh’g Pet.”) at 13-15; Joint Pet. of Murray Energy Corp. and Peabody Energy for Reh’g . . . or in the Alternative, Motion for a Stay of the Mandate, Nos. 14-1112 & 14-1151, Doc. 1564467 (July 24, 2015) at 1.

dismiss the cases.⁴ EPA's issuance of a final rule changes nothing in this regard.⁵ In any event, the final rule has not been published, and under the Court's well-settled law, any challenge to a final rule at the pre-publication stage is premature.⁶

Rehearing Petitioners suggest that a stay of the mandate is appropriate so that they can move to consolidate their planned future challenges to the final rule with these challenges to the proposed rule. State Reh'g Pet. at 14. But Petitioners offer no legitimate basis for departing from established jurisdictional and judicial review principles in this manner. A court obviously cannot *retain* jurisdiction – for any purpose – where it lacks it in the first place. And this Court has rebuffed previous attempts to link challenges to final agency action to prior proceedings addressing allegedly similar actions or issues⁷ – and for good reason, as holding otherwise would

⁴ Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (absent jurisdiction, a court's "only function is that of announcing the fact and dismissing the cause"); Ege v. Dep't of Homeland Security, 784 F.3d 791, 794 n.4 (D.C. Cir. 2015) (same).

⁵ See Western Union Telegraph Co. v. FCC, 773 F.2d 375, 378 (D.C. Cir. 1985) (Scalia, J.) (a "challenge to now-final agency action that was filed before it became final must be dismissed").

⁶ See Horsehead Resource Development Co. v. EPA, 130 F.3d 1090 (D.C. Cir. 1997), (statutory review period creates a "filing window" that does not open until publication of the rule in the Federal Register); Western Union, 773 F.2d at 376-78 (challenge to rule filed before publication in Federal Register was jurisdictionally barred).

⁷ See Public Citizen, Inc. v. Federal Motor Carrier Safety Administration, 2006 U.S. App. LEXIS 12533 (D.C. Cir. May 8, 2006) (denying motion to assign review of a rule to the same panel that had vacated a prior version of the rule); Pub. Serv. Comm'n for New York v. Fed. Power Comm'n, 472 F.2d 1270, 1273 (D.C. Cir. 1972) (stating, this Court "has adopted a system of selection of judges by lot that eschews any concept of specialized appellate judges, and contemplates broadening of judicial exposure in

only invite all manner of premature challenges to proposed agency rules with the aim of gaining some perceived tactical advantage.

Finally, even if Petitioners could overcome the lack of jurisdiction, the efficiencies they claim would result from consolidation are illusory. The Court correctly did not address the merits of the proposed rule in rejecting Petitioners' challenge. Moreover, at issue in any subsequent challenge will be the final rule, EPA's legal interpretations supporting that rule, and the underlying administrative record, none of which were before the Court in these cases. In short, judicial economy will not be served by treating this case and any future challenge as one and the same.

Therefore, Rehearing Petitioners' alternative motion to stay the mandate in these cases should be denied.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611/Washington, D.C. 20044
(202) 514-1950/amanda.berman@usdoj.gov

meeting common problems” and rejecting idea that a case should be referred “to a panel that handled a different case on the basis of similarity of underlying questions”).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition was today served electronically through the court's CM/ECF system on all registered counsel.

/s/ Amanda Shafer Berman

DATED: August 6, 2015