

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

STATE OF WEST VIRGINIA,
STATE OF ALABAMA,
STATE OF INDIANA, STATE OF KANSAS,
COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA,
STATE OF NEBRASKA,
STATE OF OHIO, STATE OF
OKLAHOMA, STATE OF
SOUTH CAROLINA, STATE OF
SOUTH DAKOTA, and
STATE OF WYOMING

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

PETITION FOR REVIEW

Case No. ~~14-1146~~

The States of West Virginia, Alabama, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, South Carolina, and Wyoming, and the Commonwealth of Kentucky, respectfully petition this Court, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (“CAA”), for review of a final settlement agreement pursuant to which United States Environmental Protection Agency (“EPA”) committed to proposing and then finalizing a rule requiring States to regulate existing coal-fired

power plants under Section 111(d) of the CAA, *see* 42 U.S.C. § 7411(d). The settlement agreement is between EPA and various non-party States, governmental entities and private organizations who had threatened litigation against the agency. EPA published a notice of the proposed settlement agreement on December 30, 2010. *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010). Following a notice and comment period, the settlement agreement was approved as final by EPA on March 2, 2011. *See* Memorandum from Scott Jordan, Air and Radiation Law Office, to Scott C. Fulton, General Counsel (March 2, 2011). On June 13, 2011, EPA modified the settlement agreement to change certain suggested dates for EPA's actions, without otherwise altering EPA's commitment to propose and then to finalize a Section 111(d) existing coal-fired power plants rule. This Court has jurisdiction over final actions of EPA pursuant to the CAA, § 307(b)(1), 42 U.S.C § 7607(b)(1).

The present petition is, at a minimum, timely under the Clean Air Act's statutory after-arising-ripeness exception. The CAA requires a petition for review to be brought "within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." 42 U.S.C. § 7607(b)(1). The CAA specifically recognizes an exception to the 60-day requirement for claims that are "based solely" on grounds that occur after the 60-day period. *Id.* This Court has held that under this statutory exception, a party may bring a challenge to a final agency action within 60 days of an "occurrence of an event that ripens a

claim.” *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 129 (D.C. Cir. 2012), *aff’d in part and vacated in part on other grounds by Utility Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

Petitioners’ claim challenging the legality of the settlement agreement ripened, for purposes of the exception, when EPA declared its final position that it has legal authority to propose and adopt a rule under Section 111(d) regarding coal-fired power plants notwithstanding intervening events that have rendered such a rule clearly unlawful. On June 11, 2011, the Supreme Court explained that “EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the ‘hazardous air pollutants’ program, § 7411(d) [Section 112].” *Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011). Then, on February 16, 2012, EPA finalized Section 112 regulations on “stationary sources” that included coal-fired power plants. *See* 77 Fed. Reg. 9,304 (Feb. 16, 2012). Notwithstanding the fact that these developments had rendered any Section 111(d) coal-fired power plants rule plainly unlawful, on June 2, 2014, EPA issued a legal memorandum explaining that EPA had determined that it retains the legal authority to issue just such a Section 111(d) rule.¹ Consistent with

¹ EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* (“Legal Memorandum” or “Mem.”), available at <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf>.

this legal memorandum and the settlement, on June 18, 2014, EPA announced in the Federal Register a proposed rule regarding coal-fired power plants under Section 111(d).²

In light of these developments, both elements of ripeness are now satisfied. It was not until EPA's announcement of its flawed view of its Section 111(d) authority that the "fitness of the issues" that Petitioners seek to raise against the legality of the settlement became ripe "for judicial resolution." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). In addition, the "hardship to the parties of withholding court consideration" now would be substantial because without this Court's prompt intervention, Petitioners will be forced to undertake burdensome measures in the coming months to meet the demands of the unlawful rule that EPA committed to proposing and then finalizing under the settlement agreement. *Id.*

Petitioners ask this Court: (1) to hold the settlement agreement unlawful to the extent that the settlement commits EPA to proposing a coal-fired power plant rule under Section 111(d); (2) to hold the settlement agreement unlawful to the extent that the settlement commits EPA to finalizing a coal-fired power plant rule under Section 111(d); (3) to enjoin EPA from complying with the settlement agreement by continuing the present ongoing comment period regarding EPA's

² 79 Fed. Reg. 34,830 (June 18, 2014).

proposed coal-fired power plants rule under Section 111(d); (4) to enjoin EPA from complying with the settlement agreement by finalizing a coal-fired power plants rule under Section 111(d); (5) to vacate the settlement agreement in relevant part; and (6) to grant such other relief as this Court deems appropriate.

Dated: July 31, 2014

Respectfully submitted,

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State of Oklahoma (Petitioner), the State of South Carolina (Petitioner), the State of South Dakota (Petitioner), the State of Wyoming (Petitioner), and the United States Environmental Protection Agency (Respondent). There are currently no intervenors or amici.

(B) Rulings Under Review:

Under review in this case is a settlement agreement between EPA and the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, the City of New York, Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund. The settlement was approved by EPA on March 2, 2011 and modified on June 13, 2011.

(C) Related Cases:

In re: Murray Energy Corporation, No. 14-1112.

Dated: July 31, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I will cause to be served a true copy of the Docketing Statement, Petition for Review, and Petitioners' Provisional Certificate as to Parties, Rulings, and Related Cases via U.S. mail on the 1st day of August, 2014, upon the following:

Regina A. McCarthy, Administrator
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Office of the Administrator, 1101A
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Washington, DC 20460

United States Environmental Protection Agency
Office of General Counsel, 2310A
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Dated: July 31, 2014

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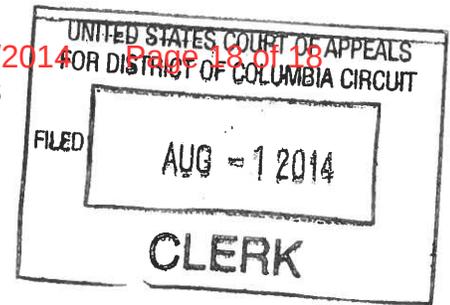
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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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AGENCY DOCKETING STATEMENT

Administrative Agency Review Proceedings (To be completed by appellant/petitioner)

1. CASE NO. 14-1146 2. DATE DOCKETED: 08-01-2014
3. CASE NAME (lead parties only) The State of West Virginia v. Environmental Protection Agency

4. TYPE OF CASE: [X] Review [] Appeal [] Enforcement [] Complaint [] Tax Court

5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED? [] Yes [X] No
If YES, cite statute

6. CASE INFORMATION:

a. Identify agency whose order is to be reviewed: Environmental Protection Agency
b. Give agency docket or order number(s): EPA-HQ-OGC-2010-1057
c. Give date(s) of order(s): March 2, 2011

d. Has a request for rehearing or reconsideration been filed at the agency? [] Yes [X] No
If so, when was it filled? By whom?

Has the agency acted? [] Yes [] No If so, when?

e. Identify the basis of appellant's/petitioner's claim of standing. See D.C. Cir. Rule 15(c)(2):
Both the proposed rule and the final rule that EPA committed to promulgating under the settlement agreement each independently harm the Petitioner States.

f. Are any other cases involving the same underlying agency order pending in this Court or any other?
[] Yes [X] No If YES, identify case name(s), docket number(s), and court(s)

g. Are any other cases, to counsel's knowledge, pending before the agency, this Court, another Circuit Court, or the Supreme Court which involve substantially the same issues as the instant case presents?
[X] Yes [] No If YES, give case name(s) and number(s) of these cases and identify court/agency:
In re Murray Energy Corp., No. 14-1112

h. Have the parties attempted to resolve the issues in this case through arbitration, mediation, or any other alternative for dispute resolution? [] Yes [X] No If YES, provide program name and participation dates.

Signature Elbert Lin MT Date 07-31-2014

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ATTACH A CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 7 calendar days by letter, with copies to all other parties, specifically referring to the challenged statement.