



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

(304) 558-2021
Fax (304) 558-0140

May 21, 2015

VIA ELECTRONIC FILING

Mr. Mark Langer
Clerk of the Court
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W. Washington, D.C. 20001

Re: *West Virginia v. EPA*, No. 14-1146.

Dear Mr. Langer,

Petitioner States submit this letter under FRAP 28(j), to notify the Court of an email from David Doniger, director and senior attorney at the Natural Resources Defense Council ("NRDC"), to EPA officials (the "Email"), which EPA recently released pursuant to a Freedom of Information Act request. Exh. A. NRDC is an intervenor in this case and a party to the settlement at issue, which committed EPA to engage in the Section 111(d) rulemaking for coal-fired power plants.

In the Email, Doniger asked EPA to respond to a comment by EPA, which had apparently implied that EPA had "no plans" for regulating existing sources under Section 111(d). Doniger expressed concerned that the comment is "[b]eing taken as a repudiation of the settlement." Exh. A. Accordingly, Doniger asked: "Can you please clarify that you are not walking away from the settlement?" *Id.*

The Email is significant in two respects.

First, the Email further refutes EPA's argument that the settlement is moot because "the deadlines in the Settlement Agreement have long since passed." ECF 1540645 at 26. Doniger sent the Email on March 27, 2012, nearly six months *after* the deadline for EPA to propose the Section 111(d) rule under the settlement. J.A. 26. Had NRDC, a party to the settlement, believed that the settlement became moot as soon as EPA failed to abide by the settlement's timeframes, the Email would have been nonsensical. As the States have explained, EPA's breach of the timing portion of the settlement did not void EPA's other settlement obligations, a sentiment that Doniger obviously shared. *See* ECF 1540535 at 57.

Second, the Email explains that on March 27, 2012—one month *after* EPA had finalized the Section 112 regulations of coal-fired power plants—it was entirely uncertain whether EPA had decided to "walk[] away" from the Section 111(d) portion of the settlement agreement, which the Section 112 rule had just rendered unlawful. Accordingly, the present challenge to the Section 111(d) portion of the settlement would have been unripe in 2012, as the States have argued. *See* ECF 1541361 at 22-23.

Dated: May 21, 2015

Respectfully submitted,

/s/ Elbert Lin

Patrick Morrissey

Attorney General of West Virginia

Elbert Lin

Solicitor General

Counsel of Record

Misha Tseytlin

General Counsel

J. Zak Ritchie

Assistant Attorney General

State Capitol Building 1, Room 26-E

Charleston, WV 25305

Tel. (304) 558-2021

Fax (304) 558-0140

Email: elbert.lin@wvago.gov

Counsel for Petitioner State of West Virginia

/s/ Andrew Brasher

Luther Strange
Attorney General of Alabama
Andrew Brasher
Solicitor General
Counsel of Record
501 Washington Ave.
Montgomery, AL 36130
Tel. (334) 590-1029
Email: abrasher@ago.state.al.us
Counsel for Petitioner State of Alabama

/s/ Timothy Junk

Gregory F. Zoeller
Attorney General of Indiana
Timothy Junk
Deputy Attorney General
Counsel of Record
Indiana Government Ctr. South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46205
Tel. (317) 232-6247
Email: tom.fisher@atg.in.gov
Counsel for Petitioner State of Indiana

/s/ Jeffrey A. Chanay

Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Chief Deputy Attorney General
Counsel of Record
120 SW 10th Avenue, 3d Floor
Topeka, KS 66612
Tel. (785) 368-8435
Fax (785) 291-3767
Email: jeff.chanay@ag.ks.gov
Counsel for Petitioner State of Kansas

/s/ Jack Conway

Jack Conway
Attorney General of Kentucky
Counsel of Record
700 Capital Avenue
Suite 118
Frankfort, KY 40601
Tel: (502) 696-5650
Email: Sean.Riley@ag.ky.gov
***Counsel for Petitioner Commonwealth of
Kentucky***

/s/ Megan K. Terrell

James D. "Buddy" Caldwell
Attorney General of Louisiana
Megan K. Terrell
Deputy Director, Civil Division
Counsel of Record
1885 N. Third Street
Baton Rouge, LS 70804
Tel. (225) 326-6705
Email: TerrellM@ag.state.la.us
Counsel for Petitioner State of Louisiana

/s/ Blake E. Johnson

Doug Peterson
Attorney General of Nebraska
Dave Bydlaek
Chief Deputy Attorney General
Blake E. Johnson
Assistant Attorney General
Counsel of Record
2115 State Capitol
Lincoln, NE 68509
Tel. (402) 471-2834
Email: blake.johnson@nebraska.gov
Counsel for Petitioner State of Nebraska

/s/ Eric E. Murphy

Michael DeWine
Attorney General of Ohio
Eric E. Murphy
State Solicitor
Counsel of Record
30 E. Broad St., 17th Floor
Columbus, OH 43215
Tel. (614) 466-8980
Email:
eric.murphy@ohioattorneygeneral.gov
Counsel for Petitioner State of Ohio

/s/ Patrick R. Wyrick

E. Scott Pruitt
Attorney General of Oklahoma
Patrick R. Wyrick
Solicitor General
Counsel of Record
P. Clayton Eubanks
Deputy Solicitor General
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel. (405) 521-3921
Email: Clayton.Eubanks@oag.ok.gov
Counsel for Petitioner State of Oklahoma

/s/ James Emory Smith, Jr.

Alan Wilson
Attorney General of South Carolina
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
Counsel of Record
P.O. Box 11549
Columbia, SC 29211
Tel. (803) 734-3680
Fax (803) 734-3677
Email: ESmith@scag.gov

***Counsel for Petitioner State of South
Carolina***

/s/ Steven R. Blair

Marty J. Jackley

Attorney General of South Dakota

Steven R. Blair

Assistant Attorney General

Counsel of Record

1302 E. Highway 14, Suite 1

Pierre, SD 57501

Tel. (605) 773-3215

Email: steven.blair@state.sd.us

***Counsel for Petitioner State of South
Dakota***

/s/ James Kaste

Peter K. Michael

Attorney General of Wyoming

James Kaste

Deputy Attorney General

Counsel of Record

Michael J. McGrady

Senior Assistant Attorney General

123 State Capitol

Cheyenne, WY 82002

Tel. (307) 777-6946

Fax (307) 777-3542

Email: james.kaste@wyo.gov

Counsel for Petitioner State of Wyoming

cc: All Counsel of Record via CM/ECF

CERTIFICATE OF SERVICE

I certify that on this 21st day of May, 2015, a copy of the foregoing Federal Rule of Appellate Procedure 28(j) Letter was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Elbert Lin

Elbert Lin

EXHIBIT A

To: Joseph Goffman/DC/USEPA/US@EPA;Michael Goo/DC/USEPA/US@EPA[]; ichael Goo/DC/USEPA/US@EPA[]
From: "Doniger, David"
Sent: Tue 3/27/2012 5:23:11 PM
Subject: Congrats! But help me out here...
ddoniger@nrdc.org
www.nrdc.org
<http://switchboard.nrdc.org/blogs/ddoniger/>

This is really terrific. You've seen our positive reax by now.

The comment about "no plans" for existing sources is kicking up a storm among reporters. Being taken as repudiation of the settlement.

Can you please clarify that you are not walking away from the settlement, that you are continuing to negotiate with a goal of coming to a solution?

David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

ddoniger@nrdc.org

on the web at www.nrdc.org

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>