ORAL ARGUMENT SCHEDULED FOR MAY 18, 2017

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

Murray Energy Corporation, et al. Petitioners, v. United States Environmental Protection Agency, Respondent.	No. 16-1127 (and consolidated cases)

RESPONDENT EPA'S MOTION TO CONTINUE ORAL ARGUMENT

Respondent United States Environmental Protection Agency ("EPA") respectfully requests that the Court continue the oral argument currently scheduled for May 18, 2017, on the petitions for review of the final rule entitled, "Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units" ("Supplemental Finding"). In light of the recent change in Administration, EPA requests continuance of the oral argument to give the appropriate officials adequate time to fully review the Supplemental Finding. EPA intends to closely review the Supplemental Finding, and the prior positions taken by the Agency with respect to the Supplemental Finding may not necessarily reflect its ultimate conclusions after that review is complete.

Counsel for EPA contacted coordinating counsel for Petitioners and Respondent-Intervenors regarding their positions on this motion. Industry Respondent-Intervenors[1]; the Non-Governmental Organization Respondent-Intervenors[2]; and, with the exception of the State of New Hampshire, the State and Local Respondent-Intervenors oppose the motion.[3] The State of New Hampshire takes no position on the motion as it did not have sufficient time to obtain management approval. Petitioners[4] support the motion.

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[1] Industry Respondent-Intervenors are: Exelon Corporation and Calpine Corporation.

[2] Non-Governmental Organization Respondent-Intervenors are: American Lung Association, American Public Health Association; Chesapeake Bay Foundation; Chesapeake Climate Action Network; Clean Air Council; Conservation Law Foundation; Citizens for Pennsylvania's Future; Downwinders at Risk; Environmental Defense Fund; Environmental Integrity Project; National Association for the Advancement of Colored People; Natural Resources Council of Maine; Natural Resources Defense Council; Physicians for Social Responsibility; The Ohio Environmental Council; and Sierra Club.

[3] State and Local Respondent-Intervenors are: Commonwealth of Massachusetts; Commonwealth of Virginia; State of California; State of Connecticut; State of Delaware; State of Iowa; State of Illinois; State of Maine; State of Maryland; State of Minnesota; State of New Mexico; State of New York; State of New Hampshire; State of Oregon; State of Rhode Island; State of Vermont; Washington, the District of Columbia; City of Baltimore; City of Chicago; City of New York; County of Erie, New York.

[4] Petitioners are: Murray Energy Corporation; ARIPPA; Michigan Attorney General Bill Schuette, on behalf of the People of Michigan; State of Alabama; State of Arizona; State of Arkansas; State of Kansas; Commonwealth of Kentucky; State of Nebraska; State of North Dakota; State of Ohio; State of Oklahoma; State of South Carolina; State of Texas; State of West Virginia; State of Wisconsin; State of Wyoming; Texas Commission on Environmental Quality; Public Utility Commission

BACKGROUND

Clean Air Act section 112 directs that EPA identify, list, and regulate emissions of hazardous air pollutants from certain stationary sources. 42 U.S.C. § 7412(b), (c)(1)-(2), (d). In addition, CAA section 112(n)(1) provides specific directives concerning the regulation of emissions from electric utility steam generating units ("power plants"). *See id.* § 7412(n)(1). In section 112(n)(1)(A), Congress instructed EPA to conduct a study of the hazards to public health, if any, resulting from emissions of hazardous air pollutants from power plants that would reasonably be anticipated to occur following imposition of the requirements of the CAA (the "Utility Study"), and to report the results of such study to Congress by November 15, 1993. *Id.* § 7412(n)(1)(A). Congress required EPA to regulate power plants under section 112 if the Administrator determined that such regulation is "appropriate and necessary," after considering the Utility Study. *Id.*

In 2000, based on the Utility Study and other studies, EPA made a finding that regulation of coal- and oil-fired power plants is appropriate and necessary and added such sources to the list of regulated sources under section 112. *See* 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000) (the "2000 finding"). In 2012, citing additional analyses in promulgating final emission standards for power plants in the Mercury and

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of Texas; and Railroad Commission of Texas; Oak Grove Management Company LLC; Southern Company Services, Inc.; Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company; Utility Air Regulatory Group.

Air Toxic Standards, EPA again determined that regulation of coal- and oil-fired plants is appropriate and necessary. *See* 77 Fed. Reg. 9304, 9310-11 (Feb. 16, 2012); *see also* 76 Fed. Reg. 24,976, 25,015-18 (May 3, 2011) (proposed rule for the Standards).

In its 2012 determination, EPA concluded that CAA section 112(n)(1)(A) did not require EPA to consider cost in making an appropriate and necessary finding. *See* 77 Fed. Reg. at 9324-27. On consolidated petitions for review before this Court, a number of petitioners challenged, among other things, EPA's interpretation of CAA section 112(n)(1)(A), arguing that the statute required EPA to consider cost when determining whether regulating power plants is appropriate and necessary. *See White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, 1236 (D.C. Cir. 2014). This Court concluded that CAA section 112(n)(1)(A)'s terms were ambiguous and that "EPA reasonably concluded it need not consider costs" for the determination. *Id.* at 1237, 1241.

In *Michigan v. EPA*, however, the Supreme Court held that "EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants." 135 S. Ct. 2699, 2712 (2015). The Supreme Court explained that "[r]ead naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost." *Id.* at 2707.

In response to the Supreme Court's decision, EPA commenced a new rulemaking to reevaluate its CAA section 112(n)(1)(A) appropriate and necessary

finding. EPA finalized its Supplemental Finding rulemaking on April 25, 2016, ultimately concluding that "a consideration of cost does not cause the agency to alter its previous conclusion that regulation of [hazardous air pollutant] emissions from [power plants] is appropriate and necessary." 81 Fed. Reg. at 24,427.

Numerous parties have challenged the Supplemental Finding in these consolidated cases. EPA filed its proof brief on January 18, 2017. The Court has scheduled oral argument in these cases for May 18, 2017. At this time, however, EPA officials appointed by the new Administration are closely reviewing the Supplemental Finding to determine whether the Agency should reconsider the rule or some part of it.

ARGUMENT

Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("*State Farm*"). EPA's interpretations of statutes it administers are not "carved in stone" but must be evaluated "on a continuing basis," for example, "in response to . . . a change in administrations." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted). *See also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (a revised rulemaking based "on a reevaluation of which policy would be better in

light of the facts" is "well within an agency's discretion," and "'[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations'") (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). The CAA complements EPA's inherent authority to reconsider prior rulemakings by providing the Agency with broad authority to prescribe regulations as necessary to carry out the Administrator's authorized functions under the statute. 42 U.S.C. § 7601(a).

EPA requests that the Court continue the oral argument currently scheduled for May 18, 2017, in these consolidated cases to allow the new Administration adequate time to review the Supplemental Finding to determine whether it will be reconsidered. This continuance is appropriate because recently-appointed EPA officials in the new Administration will be closely scrutinizing the Supplemental Finding to determine whether it should be maintained, modified, or otherwise reconsidered. The Agency needs sufficient time to complete this review in an orderly fashion because the administrative record for the Supplemental Finding not only includes recent supporting material, but also incorporates the record for the Standards, which is extensive and encompasses a large body of scientific and technical evidence. As reflected in the parties' briefs, the Supplemental Finding also implicates significant legal and policy issues about a CAA rule of national importance—issues that new EPA officials will need time to carefully review.

Continuance is also warranted to avoid holding oral argument in the midst of the new Administration's review of the Supplemental Finding. Were the Court to hold oral argument as scheduled on May 18, 2017, counsel for EPA would likely be unable to represent the current Administration's conclusive position on the Supplemental Finding. Nor would it be proper for counsel for EPA to speculate as to the likely outcome of the current Administration's review.

Moreover, on March 28, 2017, the President of the United States signed an Executive Order directing EPA to review for possible reconsideration any rule that could "potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources." Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017). For purposes of this order, the term "burden" means to "unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources." *Id.* EPA is currently reviewing the Executive Order to determine whether the Supplemental Finding is potentially subject to the review process set forth in this Executive Order. Under the Order, EPA must submit a review plan to the White House within 45 days of the Order; within 120 days of the Order, submit a draft plan with "specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production"; and a final report within 180 days. *See id.*

Finally, to the extent that EPA ultimately elects to reconsider all or part of the Supplemental Finding, continuing the oral argument would conserve the resources of the parties and the Court. Accordingly, to permit the Agency's review to proceed in an orderly fashion, EPA requests that the oral argument be continued.

CONCLUSION

WHEREFORE, EPA respectfully requests that the Court order the following: (1) that the oral argument currently scheduled for May 18, 2017 is continued; (2) that EPA is directed to file a status update in these consolidated cases within 90 days of the Court's order granting a continuance and every 90 days thereafter; and (3) that within 30 days of EPA notifying the court and the parties of any action it has or will be taking with respect to the Supplemental Finding, the parties are directed to file motions to govern future proceedings in these consolidated cases.

Dated: April 18, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,784 words, excluding the parts of the motion exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ *Stephanie J. Talbert*
STEPHANIE J. TALBERT

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Stephanie J. Talbert*
STEPHANIE J. TALBERT