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

IN RE STATE OF WEST VIRGINIA, et al.,

Petitioners.

15-1277

Case No. 15-_____

EMERGENCY MOTION TO CONSOLIDATE AND FOR EXPEDITED TREATMENT

Presently pending before this Court are three related, fully briefed, and argued cases: *In re Murray Energy Corporation*, No. 14-1112; *Murray Energy Corporation v. United States Environmental Protection Agency*, No. 14-1151 (collectively, the "*Murray* cases"); and *West Virginia, et al. v. Environmental Protection Agency*, No. 14-1146 (the "*West Virginia* case"). In these cases, the parties submitted over 300 pages of briefing on the question of whether the Section 112 Exclusion prohibits EPA from adopting the final Section 111(d) Rule.

For several reasons, consolidation of the present case with these pending cases is appropriate. In the present case, the States have filed an Emergency Petition Under The All Writs Act, seeking a stay of the deadlines in that very same final Rule. The Emergency Petition seeks relief by relying upon, *inter alia*, the same Section 112 Exclusion argument that was fully briefed and argued in the

Murray and *West Virginia* cases. Indeed, EPA's briefing in those cases and its rationale in the final Rule is strikingly similar. Consolidation of this Emergency Petition with those pending cases is thus consistent with Federal Rule of Appellate Procedure 3(b), the principles of judicial economy furthered by the Rule, and the need for prompt decision on the Emergency Petition.

Pursuant to D.C. Circuit Rule 27(f), the States request expedited action on this motion by August 20, 2015, to facilitate disposition of the States' Emergency Petition Under The All Writs Act by September 8, 2015. As explained in the Emergency Petition, relief by September 8 is necessary to prevent irreparable harm.[1]

BACKGROUND

On June 18, 2014, EPA proposed what later became the Final Rule, which purports to regulate coal-fired power plants under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d). *See* 79 Fed. Reg. 34,830 (June 18, 2014). On the same day, Murray Energy Corporation ("Murray"), filed a Petition under the All Writs Act, seeking an order halting EPA's proposed rulemaking, arguing that EPA has no authority to regulate under Section 111(d) a source category already "'regulated under [Section 112],'" and pointing out that those power plants are extensively regulated under Section 112. *See* No. 14-1112, ECF 1498341 (quoting 42 U.S.C.

[1] EPA has authorized Petitioners to state that EPA opposes this motion.

§ 7411(d)) ["Section 112 Exclusion"]. On August 15, 2014, Murray filed a petition for review, making the same Section 112 Exclusion argument, which was later consolidated with the writ action into the *Murray* cases. *See* No. 14-1151, ECF 1508071. ECF 1522086. West Virginia and 13 other States are Petitioner-Intervenors in the *Murray* cases. *See* No. 14-1151, ECF 1541358. Many of those States are also parties in the *West Virginia* case, No. 14-1146, which challenges a final settlement agreement as violating the Section 112 Exclusion. *See* No. 14-1146, ECF 1505986.

Although the procedural postures of the *Murray* and *West Virginia* cases differ, this Court recognized the fundamental legal thread running between them—the Section 112 Exclusion. The Court scheduled oral arguments on both cases on the same day, before the same panel. *See* Order, No. 14-1146, ECF 1534469; Order, Nos. 14-1112/14-1151, ECF 1534467. These oral arguments were then heard in consolidated fashion on April 16, 2015. In all, the Parties and *amici* in these cases submitted over 300 pages of briefing on the Section 112 Exclusion issue,[2] and the issue was discussed in detail at oral argument. *See* Nos. 14-1112 &

[2] *See* Murray Pet'r Final Opening Br., No. 14-1112/1151, ECF 1541126 at 15-37; EPA Final Resp. Br., No. 14-1112/1151, ECF 1541205 at 34-54; Murray Pet'r Final Reply Br., No. 14-1112/1151, ECF 1541127 at 14-27; New York, et al., Final Intervenors Br., No. 14-1112/1151, ECF 1541226 at 3-14; NRDC, et al., Final Intervenors Br., No. 14-1112/1151, ECF 1541393 at 10-32; NFIB, et al., Final Intervenors Opening Br., No. 14-1112/1151, ECF 1541273 at 5-26; NFIB, et al., Final Reply Br., No. 14-1112/1151, ECF 1541277 at 2-10; West Virginia, et al.,

14-1146, Oral Arg. Tr. 22-33, 35-46, 62-73, 85-87, 89-90, 94-100 (Apr. 16, 2015). On June 9, 2015, this Court denied the relief requested in the *Murray* and *West Virginia* cases on procedural grounds. *See In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015). Rehearing petitions are presently pending. *See* No. 14-1112, ECF 1564350; 14-1146, ECF 1564355.

On August 3, 2015, EPA finalized the Final Rule. *See* Exh. 1, Petition. Under that Rule, the States must submit initial State Plans to EPA by September 6, 2016, and, if an extension is granted by the agency, submit final State Plans by September 6, 2018. Final Rule at *38. Importantly, the Rule adopts the same interpretation of the Section 112 Exclusion that EPA advanced in the *Murray* and *West Virginia* cases. *See* Final Rule at *267; *see infra*, at 5-7.

Today, the States filed the Emergency Petition, seeking an order to prevent the irreparable harm they are experiencing from the already-running deadlines for State Plans. In that Petition, the States made two independently sufficient merits

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Final Intervenors Br., No. 14-1112/1151, ECF 1541358 at 4-15; Peabody Energy Final Intervenor Opening Br., No. 14-1112/1151, ECF 1541401 at 10-16; Peabody Energy Final Intervenor Reply Br., No. 14-1112/1151, ECF 1541402 at 2-5; West Virginia, et al., Pet'rs Final Opening Br., No. 14-1146, ECF 1540535 at 30-51; EPA Final Resp. Br., No. 14-1146, ECF 1540645 at 32-54; West Virginia, et al., Pet'rs Corrected Final Reply Br., No. 14-1146, ECF 1541361 at 2-17; New York, et al., Final Intervenors Br, No. 14-1146, ECF 1540542 at 10-25; NRDC, et al., Final Intervenors Br., 14-1146, ECF 1540820 at 1-17; Trade Assocs. Amicus Br., No. 14-1112/1151, ECF 1541215 at 1-15; Trade Assocs. Final Amicus Br., No. 14-1146, ECF 1540761 at 4-27; NYU Final Amicus Br., No. 14-1146, ECF 1540834 at 5-30.

arguments, to support their entitlement to relief. The first of these arguments is the Section 112 Exclusion, and it makes the same points and cites the same authorities that the States in the *Murray* and *West Virginia* cases relied upon in their briefing.

ARGUMENT

Consolidation of this petition with the *West Virginia* and *Murray* cases is appropriate for two independently sufficient reasons. *See generally* Fed. R. App. P. 3(b)(2), advisory comm. notes (1967) ("encourag[ing] consolidation . . . whenever feasible"); *Devlin v. Transp. Commc'ns Int'l Union*, 175 F.3d 121, 130 (2d Cir. 1999) (consolidation is proper when the "savings of expense and gains of efficiency can be accomplished without sacrifice of justice").

First, consolidation is appropriate because the Emergency Petition and the *Murray* and *West Virginia* cases involve "the same, similar, or related issues." D.C. Circuit Handbook 23 (2015). As noted above, the parties submitted over 300 pages of briefing on the Section 112 Exclusion issue in the *Murray* and *West Virginia* cases, and this Court discussed that issue at length at the April 16 oral arguments. EPA's interpretation of the Exclusion in the final Rule is taken almost word-for-word from its briefing in the *Murray* and *West Virginia* cases. *Compare* Final Rule at *267 ("the phrase 'regulated under section 112' refers only to the regulation of HAP emissions"), *with* Final Brief for Respondent EPA ("EPA Brief"), No. 14-1146, ECF 1540645 at *40 ("the ambiguous term 'regulated' can,

on its own, be reasonably interpreted as hazardous-pollutant specific"). Indeed, a comparison between EPA's briefing in the *Murray* and *West Virginia* cases with the final Rule makes the same arguments, citing the same authorities. *Compare* EPA Brief at 49 (Section 111(d) fills program "gap") *with* Final Rule at 250, 260 ("section 111(d) is designed to regulate pollutants . . . that fall in the gap"); *compare* EPA Brief at 45 ("legislative history of the 1990 Amendments . . . sought to expand EPA's regulatory authority") *with* Final Rule at 268 ("Congress's intent in the 1990 CAA Amendments was to expand the EPA's regulatory authority"); *compare* EPA Brief at 40 ("the Senate's amendment is straightforward"), *with* Final Rule at 253 ("the Senate amendment is straightforward"). It is thus unsurprising that the States here were able to draw directly upon the States' briefing in *Murray* and *West Virginia* in drafting the Section 112 Exclusion section of their Emergency Petition, without any need to go outside of the authorities in that briefing.

In short, considerations of judicial efficiency militate strongly against requiring a new panel to become familiar with these arguments. This is particularly so because the Emergency Petition seeks relief on an expedited basis. Given the extensive briefing on the Section 112 Exclusion in the *Murray* and *West Virginia* cases, and the significant overlap between EPA's briefing in those cases and in its reasoning in the final Rule, the *Murray* and *West Virginia* panel is by far

the best positioned to rule on the Emergency Petition within the requested timeframe.

Second, the Emergency Petition should also be consolidated with the *Murray* and *West Virginia* cases because the cases involve "essentially the same parties." Circuit Handbook at 23. The Emergency Petition and the *Murray* and *West Virginia* cases share many of the same States challenging EPA's unlawful actions under Section 111(d). EPA is the Respondent in all of these cases, and no other respondent is necessary to accord complete relief to the States.

CONCLUSION

For the foregoing reasons and for those stated in the States' Emergency Petition Under The All Writs Act, the Emergency Motion To Consolidate And Expedited Treatment should be granted.

Dated: August 13, 2015

Respectfully submitted,

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