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April 29, 2015

Mark J. Langer, Clerk
United States Court of Appeals for
the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: *In Re Murray Energy Corp.*, Nos. 14-1112, *et al.* &
West Virginia v. EPA, No. 14-1146

Dear Mr. Langer:

The States and organizations supporting respondent EPA in these cases respectfully submit this response to West Virginia's Rule 28(j) letter dated April 24, 2015. Petitioners' contention that the EPA Administrator's recent statements demonstrate the need for the unprecedented judicial action of halting an ongoing rulemaking is erroneous.

As in their briefs, oral argument, and two previous Rule 28(j) letters, petitioners provide no precedent for disregarding the governing statute, which authorizes review of Clean Air Act rulemakings *only after the administrative process is completed*. *See* 42 U.S.C. § 7607(b), (d); EPA Br. in 14-1112, at 17-26. After issuance of a final rule, petitioners may raise any and all challenges to that rule, including any claims that EPA exceeded its statutory authority or failed to properly consider comments. Such claims are appropriately assessed in light of the complete administrative record, *id.* § 7607(d)(7)(A), as well as the "strong presumption of regularity" holding "that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues," *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978). Until then, no lawful basis exists for judicial intervention.

Petitioners' post-briefing submissions illustrate the serious disruption their novel scheme of judicial review would portend. Rather than the bright-line test of a rule's promulgation triggering judicial review of all aspects of the rulemaking, petitioners would have the Court engage in a guessing game to divine the agency's intended final action by reviewing assorted statements from agency officials and even social media posts. *See* Letter at 2 (citing EPA "Twitter" statements); *cf. Hercules*, 598 F.2d at 123 (even on review of final rule, "it generally is not the function of the court to probe the mental processes of an agency decisionmaker"). And given that it is commonplace for rulemaking challengers--including states--to argue that an agency is exceeding its statutory authority, *see EPA v. EME Homer City Generation*, 134 U.S. 1584, 1598-99 (2014), petitioners cannot provide any limiting principle for the unprecedented form of judicial review they seek.

Respectfully submitted,

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By: /s/ Morgan A. Costello[1]

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[1] Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel hereby represents that the other parties listed in the signature blocks have consented to the filing of this brief.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to West Virginia et al.'s Federal Rule of Appellate Procedure Rule 28(j) Letter was filed on April 29, 2015 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

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