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April 24, 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; *In re Murray Energy*, Nos. 14-1112 and 14-1151 (consolidated with 14-1112).

Dear Mr. Langer,

The States opposing EPA submit this letter under FRAP 28(j), to notify the Court about further remarks by EPA Administrator McCarthy that confirm EPA has already determined conclusively that it has authority to issue a rule under Section 111(d). McCarthy posted on Twitter yesterday: "We're committed to reducing carbon pollution w/the #CleanPowerPlan," *i.e.*, the Section 111(d) rule. McCarthy's post also linked to a video entitled "EPA Head McCarthy Pledges To Get Climate Rules 'Over The Finish Line' In Obama's Term," in which McCarthy declares: "We are on track for mid-summer [to finalize the Section 111(d) rule] and we made that clear to everybody. . . . [The States] know that we are serious . . . . It's going to be very clear that States will be obligated to submit [State] Plans . . . . We are quite certain that these obligations will be required." [http://www.huffingtonpost.com/2015/04/21/mccarthy-epa-climate-change\\_n\\_7102410.html](http://www.huffingtonpost.com/2015/04/21/mccarthy-epa-climate-change_n_7102410.html).

Consistent with these statements, EPA has already expended substantial resources developing “a system modeled after TurboTax” for State Plan submissions. Ex. A.

In these circumstances, immediate judicial relief is warranted. McCarthy’s remarks follow this Court’s serious concerns at the April 16 argument that the agency has a “closed mind,” and is engaged in a “sham” rulemaking with respect to whether EPA has *any* authority to require States to regulate power plants under Section 111(d). McCarthy’s unprecedented and audacious behavior—which started with her comments on the day the agency announced the proposed rule (Pet. Br. 20)—lays bare EPA’s goal: to ensure that States sink unrecoverable resources into preparing State Plans, while delaying judicial review for as long as possible under the cover of a sham comment period. As this Court has held, where an agency has demonstrated beyond doubt that it has closed its mind on a legal issue, it makes no difference “whether the agency adopted the policy at issue in an adjudication, a rulemaking, a guidance document, or indeed by ouija board.” *Teva Pharmaceuticals USA v. Sebelius*, 595 F.3d 1303 (D.C. Cir. 2010). This Court should not permit EPA to achieve through threats and promises what it cannot do lawfully.

Dated: April 24, 2015

Respectfully submitted,

/s/ Elbert Lin

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cc: All Counsel of Record via CM/ECF

**CERTIFICATE OF SERVICE**

I certify that on this 24th day of April, 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**

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**THE LEADER IN ENERGY & ENVIRONMENTAL POLICY NEWS**

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**CLIMATE:****EPA preps 'pretty slick' system for states' Clean Power Plan filings**

Amanda Peterka, E&amp;E reporter

Published: Thursday, April 23, 2015

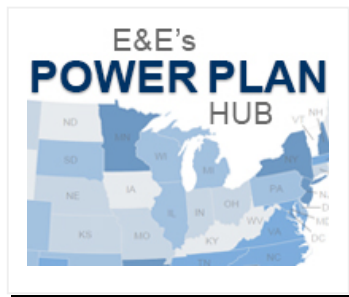
U.S. EPA is developing a system modeled after TurboTax for states to submit Clean Power Plan requirements, an agency official said yesterday.

EPA envisions states being able to check whether they're working on individual or multi-state plans and to reach guidance documents and templates with the click of a button, according to Juan Santiago, associate director of the air quality policy division in EPA's Office of Air Quality Planning and Standards.

Like TurboTax, the automated system will not let a state continue if it's missing an item.

It's "actually pretty slick," Santiago said in a presentation at a meeting yesterday of EPA's Clean Air Act Advisory Committee in Arlington, Va.

The presentation came as EPA is working toward finalizing the Clean Power Plan, which would compel states to draft plans to reduce carbon dioxide emissions from existing power plants. At the meeting yesterday, EPA acting air chief Janet McCabe confirmed that the rule would be finalized in midsummer, at the same time as requirements for new and modified power plants.



The goal of the electronic system is to not only provide a place for states to submit plans but also for them to collaborate and share information, Santiago said.

For example, if a state is depending on a neighbor to implement a certain program, it can access the forum to see what that neighboring state is planning.

"We'd like to be able to set it up in a way that it provides an environment of collaboration," Santiago said. "We would also like to provide a common forum for the staff that's working on this through EPA."

The system is currently in a "beta" stage. EPA will begin testing in a few weeks with some state partners that have volunteered, Santiago said.

He also said that the system would be used as a type of "centralized storage location" for plans and to make plans available to the public.

"That's what we're envisioning right now, a portal where the general public can see the plan," he said, though he added that the agency was still determining exactly how much of the planning process to make publicly available.

As EPA develops the system, it is concurrently figuring out the process for agency officials to review state plans, as well as putting in place a massive training program for staff and stakeholders, EPA officials said yesterday at the Arlington meeting.

EPA has determined that regions will be responsible for reviewing plans but is still working on the specific people who will be in charge of the reviews.

According to Julie Rosenberg, branch chief of state and local climate and energy programs at EPA's Office of Air and Radiation, the agency has put together a training plan that includes webinars, videos, workshops and a website. The plan has been reviewed through a formal committee that includes state regulatory agencies.

"We've put together a pretty comprehensive training program that is designed to help get other EPA folks up to speed," Rosenberg said, "as well as be a really important, rich resource for our stakeholders."

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