

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

STATE OF WEST VIRGINIA,
STATE OF ALABAMA,
STATE OF INDIANA, STATE OF KANSAS,
COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA,
STATE OF NEBRASKA,
STATE OF OHIO, STATE OF
OKLAHOMA, STATE OF
SOUTH CAROLINA, STATE OF
SOUTH DAKOTA, and
STATE OF WYOMING

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

PETITION FOR REVIEW

Case No. _____

The States of West Virginia, Alabama, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, South Carolina, and Wyoming, and the Commonwealth of Kentucky, respectfully petition this Court, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (“CAA”), for review of a final settlement agreement pursuant to which United States Environmental Protection Agency (“EPA”) committed to proposing and then finalizing a rule requiring States to regulate existing coal-fired

power plants under Section 111(d) of the CAA, *see* 42 U.S.C. § 7411(d). The settlement agreement is between EPA and various non-party States, governmental entities and private organizations who had threatened litigation against the agency. EPA published a notice of the proposed settlement agreement on December 30, 2010. *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010). Following a notice and comment period, the settlement agreement was approved as final by EPA on March 2, 2011. *See* Memorandum from Scott Jordan, Air and Radiation Law Office, to Scott C. Fulton, General Counsel (March 2, 2011). On June 13, 2011, EPA modified the settlement agreement to change certain suggested dates for EPA’s actions, without otherwise altering EPA’s commitment to propose and then to finalize a Section 111(d) existing coal-fired power plants rule. This Court has jurisdiction over final actions of EPA pursuant to the CAA, § 307(b)(1), 42 U.S.C § 7607(b)(1).

The present petition is, at a minimum, timely under the Clean Air Act’s statutory after-arising-ripeness exception. The CAA requires a petition for review to be brought “within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register.” 42 U.S.C. § 7607(b)(1). The CAA specifically recognizes an exception to the 60-day requirement for claims that are “based solely” on grounds that occur after the 60-day period. *Id.* This Court has held that under this statutory exception, a party may bring a challenge to a final agency action within 60 days of an “occurrence of an event that ripens a

claim.” *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 129 (D.C. Cir. 2012), *aff’d in part and vacated in part on other grounds by Utility Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

Petitioners’ claim challenging the legality of the settlement agreement ripened, for purposes of the exception, when EPA declared its final position that it has legal authority to propose and adopt a rule under Section 111(d) regarding coal-fired power plants notwithstanding intervening events that have rendered such a rule clearly unlawful. On June 11, 2011, the Supreme Court explained that “EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the ‘hazardous air pollutants’ program, § 7411(d) [Section 112].” *Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011). Then, on February 16, 2012, EPA finalized Section 112 regulations on “stationary sources” that included coal-fired power plants. *See* 77 Fed. Reg. 9,304 (Feb. 16, 2012). Notwithstanding the fact that these developments had rendered any Section 111(d) coal-fired power plants rule plainly unlawful, on June 2, 2014, EPA issued a legal memorandum explaining that EPA had determined that it retains the legal authority to issue just such a Section 111(d) rule.¹ Consistent with

¹ EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* (“Legal Memorandum” or “Mem.”), available at <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf>.

this legal memorandum and the settlement, on June 18, 2014, EPA announced in the Federal Register a proposed rule regarding coal-fired power plants under Section 111(d).²

In light of these developments, both elements of ripeness are now satisfied. It was not until EPA's announcement of its flawed view of its Section 111(d) authority that the "fitness of the issues" that Petitioners seek to raise against the legality of the settlement became ripe "for judicial resolution." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). In addition, the "hardship to the parties of withholding court consideration" now would be substantial because without this Court's prompt intervention, Petitioners will be forced to undertake burdensome measures in the coming months to meet the demands of the unlawful rule that EPA committed to proposing and then finalizing under the settlement agreement. *Id.*

Petitioners ask this Court: (1) to hold the settlement agreement unlawful to the extent that the settlement commits EPA to proposing a coal-fired power plant rule under Section 111(d); (2) to hold the settlement agreement unlawful to the extent that the settlement commits EPA to finalizing a coal-fired power plant rule under Section 111(d); (3) to enjoin EPA from complying with the settlement agreement by continuing the present ongoing comment period regarding EPA's

² 79 Fed. Reg. 34,830 (June 18, 2014).

proposed coal-fired power plants rule under Section 111(d); (4) to enjoin EPA from complying with the settlement agreement by finalizing a coal-fired power plants rule under Section 111(d); (5) to vacate the settlement agreement in relevant part; and (6) to grant such other relief as this Court deems appropriate.

Dated: July 31, 2014

Respectfully submitted,

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State of Oklahoma (Petitioner), the State of South Carolina (Petitioner), the State of South Dakota (Petitioner), the State of Wyoming (Petitioner), and the United States Environmental Protection Agency (Respondent). There are currently no intervenors or amici.

(B) Rulings Under Review:

Under review in this case is a settlement agreement between EPA and the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, the City of New York, Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund. The settlement was approved by EPA on March 2, 2011 and modified on June 13, 2011.

(C) Related Cases:

In re: Murray Energy Corporation, No. 14-1112.

Dated: July 31, 2014

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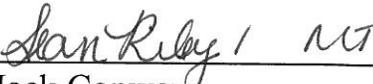
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CERTIFICATE OF SERVICE

I hereby certify that I will cause to be served a true copy of the Docketing Statement, Petition for Review, and Petitioners' Provisional Certificate as to Parties, Rulings, and Related Cases via U.S. mail on the 1st day of August, 2014, upon the following:

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Dated: July 31, 2014

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