ORAL ARGUMENT HELD APRIL 16, 2015
DECISION ISSUED JUNE 9, 2015

No. 14-1112 & No. 14-1151

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

IN RE: MURRAY ENERGY CORPORATION,

Petitioner.

MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Extraordinary Writ, and Petition to Review Proposed Rule

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RESPONSE OF RESPONDENT-INTERVENORS IN OPPOSITION TO MOTIONS FOR STAY OF THE MANDATE

Respondent-Intervenors Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club respectfully oppose the motions of West Virginia, *et al*., asking the panel to stay the mandate in these cases until the United States Environmental Protection Agency ("EPA") publishes final regulations

addressing carbon dioxide emissions from existing power plants under section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d).[1]

West Virginia, *et al*., append to their petition for rehearing a motion asking, as an alternative to rehearing, that the panel "stay the mandate in the related cases . . . until the final rule is published in the Federal Register."[2] Movants explain that they intend to petition for review of the final rule, at which point they will move for consolidation of these new petitions with the *Murray Energy* cases. Movants contend that this approach will "save this Court and the parties substantial resources," because it would allow the *Murray Energy* panel to "promptly decide" the statutory authority issue on the basis of briefing attacking the *proposal*, not the final rule. West Virginia Pet. at 14–15.

Movants' latest attempt to bypass normal judicial review procedures should be rejected. The *Murray Energy* Court lacked subject matter jurisdiction over the petitions in that case because they were not directed at a final agency action, and because petitioners lacked standing. *In re: Murray Energy Corp.*, 788 F.3d 330,

[1] Respondent-Intervenors do not herein respond to the petitions for rehearing or rehearing *en banc*. *See* Fed. R. App. P. 35(e).

[2] Pet. For Reh'g or Reh'g En Banc, or in the Alternative, Mot. For a Stay of the Mandate at 13, *In re: Murray Energy Corp.*, Nos. 14-1112 & 14-1151 (July 24, 2015) (hereinafter West Virginia Pet.). *See also* Joint Pet. of Murray Energy Corp. and Peabody Energy Corp. For Reh'g or Reh'g En Banc, or in the Alternative, Mot. For a Stay of the Mandate at 13, *In re: Murray Energy Corp.* Nos. 14-1112 & 14-1151 (July 24, 2015).

334 (D.C. Cir. 2015) ("We do not have authority to review proposed agency rules."), *id.* at 336 ("State petitioners therefore lack standing to challenge the settlement agreement."). *See also Am. Petrol. Inst. v. EPA*, 684 F.3d 1342, 1354 (D.C. Cir. 2012) ("The subject statement does not express a final agency action, and so we lack jurisdiction under the Clean Air Act, 42 U.S.C. § 7607(b), to consider the API's challenge to it."). This defect cannot be cured by issuance of the final rule. *Western Union Telegraph Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985) ("[A] challenge to now-final agency action that was filed before it became final must be dismissed."). Nor can it be cured by consolidating these cases with newly-filed challenges to the final action. *See In re Bass*, 171 F.3d 1016, 1025 (5th Cir. 1999) ("[B]efore a court can exercise its discretion to 'retain' jurisdiction over a 'related proceeding,' the court must have had jurisdiction over that proceeding in the first place."). Given the absence of jurisdiction in the *Murray Energy* cases, the Court's "only function is that of announcing the fact and dismissing the cause." *Ege v. Dep't of Homeland Security*, 784 F.3d 791, 794 n.4 (D.C. Cir. 2015) (internal formatting omitted) (quoting *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998)).[3]

[3] Movants' request to stay the mandate in No. 14-1112 (Murray Energy's All Writs Act petition) fails for a separate reason. Under this Court's rules, the judgment in No. 14-1112 is already fully effective. Circuit Rule 41(a)(3) provides: "No mandate will issue in connection with an order granting or denying a writ of mandamus or other special writ, but the order or judgment granting or denying the

Even if the Court had authority to hold on to these jurisdictionally-defective cases, Movants have not identified any good reason to do so. Movants' judicial economy argument is patently weak. Because the *Murray Energy* panel had no authority to review EPA's unfinished rulemaking, it properly declined to reach, or even discuss, the merits of petitioners' statutory challenges. The only issues the panel *did* address—relating to the law of finality and the law of extraordinary writs—will be completely irrelevant in a challenge to EPA's *final* rule.

Moreover, the *Murray Energy* panel did not have before it the massive record that will accompany the final rule, the agency's definitive explanation of its legal interpretations and its regulatory choices, or its responses to public comment. The Court emphasized that the proposed legal interpretation challenged in that case was just that: a *proposed* legal interpretation. The panel that considers EPA's final regulations will be reviewing EPA's *final* legal interpretation, which may differ from the interpretation that was briefed in the *Murray Energy* cases. Moreover, petitions for review of the final rule are likely to raise other issues that were never briefed in the *Murray Energy* cases, and involve a significant number of parties that did not participate as litigants in those cases.

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relief sought will become effective automatically 21 days after issuance in the absence of an order or other special direction of this court to the contrary." This Court's procedural order of June 9, 2015 withheld the mandate with respect to Nos. 14-1146 and 14-1151 only. *See* Dkt. No. 1556373. Thus, the mandate in 14-1112 took effect June 30, 2015, 21 days after the order denying the writ.

In short, there is no plausible basis in judicial economy for Movants' proposal to treat the litigation over the final regulations as a continuation of the *Murray Energy* litigation. Indeed, this Court has repeatedly denied motions to assign cases to prior panels even where—in contrast to the situation here—the prior panels had actually considered and decided legal issues closely related to the central substance of the new lawsuit.[4] The Court's practice of resisting such requests is consistent with its policy of promoting a "broadening of judicial exposure in meeting common problems." *Pub. Serv. Comm'n for New York v. Fed. Power Comm'n*, 472 F.2d 1270, 1273 (D.C. Cir. 1972).

As the remarkable spate of premature litigation in this Court (and others) demonstrates, EPA's rules on carbon dioxide emissions from power plants are of significant interest to many parties. But this interest only highlights why this Court should treat the petitions challenging EPA's final power plant rules according to its

[4] In *Public Citizen, Inc. v. Federal Motor Carrier Safety Administration*, this Court denied Public Citizen's motion to assign review of an agency rule to the same panel that had vacated a prior version of the rule. *See* Order Denying Pet'r's Mot., 2006 U.S. App. LEXIS 12533, at *1 (D.C. Cir. May 8, 2006). In *Verizon v. Federal Communications Commission*, Verizon challenged a Commission order that extensively discussed this Court's opinion in *Comcast Corporation v. Federal Communications Commission*, 600 F.3d 642 (D.C. Cir. 2010); the Court nonetheless denied Verizon's motion to assign the new case to the *Comcast* panel. *See* Order Denying Appellant's Mot., 2011 U.S. App. LEXIS 3470, at *1 (D.C. Cir. Feb. 2, 2011). *See also Judicial Watch v. U.S. Dep't of Energy*, 2004 U.S. App. LEXIS 22661, at *2 (D.C. Cir. Oct. 8, 2004).

regular processes. In particular, the Court should not allow parties that filed premature challenges—challenges that contravened bedrock principles of administrative law—to exploit those improper filings so as to choose how review of final rules shall proceed, which circuit judges should decide the properly filed challenges, the order in which issues should be decided, or any other matter. Procedural regularity is especially important when the stakes are high, and rewarding Movants' approach here would invite all manner of premature filings and related tactical maneuvering in future rulemakings.[5]

CONCLUSION

The motions to withhold the mandate should be denied.

[5] Movants also cite an unnamed source in a trade press asserting that EPA might seek to delay the publication of the final regulations in the Federal Register. West Virginia Pet. at 15 n.6 (citing unnamed sources in *InsideEPA*). There is absolutely no *credible* support for this speculation, which EPA has denied. Andrew Restuccia, *EPA: We Won't Wait to Send Climate Rule to Federal Register*, Politico Pro (July 29, 2015), *available at* https://www.politicopro.com/go/?wbid=58343 (behind paywall; included as addendum).

Dated: August 1, 2015

Respectfully submitted,

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Addendum

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7/29/15 7:03 PM EDT

EPA: WE WON'T WAIT TO SEND CLIMATE RULE TO FEDERAL REGISTER: The EPA on Wednesday denied rumors that the agency might wait to send its final climate rule for power plants to the Federal Register in a bid to delay legal challenges.

An agency spokeswoman told POLITICO that it will not wait to publish the rule in the Federal Register once it is unveiled. Sources said the highly anticipated regulation will be released as soon as Monday.

Industry officials and others had speculated that the agency might hold off on officially publishing the regulation for several months, perhaps as long as December, in hopes of delaying legal action until after the Paris climate negotiations.

Publication of a final rule in the Federal Register officially opens the floodgates for lawsuits.

Asked about the speculation, EPA spokeswoman Melissa Harrison said in an email, "The rumors you're hearing are not true."

— *Andrew Restuccia*

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2015, the foregoing documents were served upon all registered counsel via the Court's ECF system.

Respectfully submitted,

/s/ Sean H. Donahue

Dated: August 1, 2015