



December 17, 2018

Mark J. Langer
Clerk of the Court
U.S. Court of Appeals for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Letter Under Federal Rule of Appellate Procedure 28(j) in *Murray Energy Corp. v. EPA*, No. 15-1385 (and consolidated cases) – Oral Argument
Scheduled for December 18, 2018

Dear Mr. Langer:

Recent developments disprove two factual claims made in Industry Petitioners' and State Petitioners' briefs. First, in their Opening Brief (at 34), Industry Petitioners claimed that "revised standard will dramatically increase the number of areas designated nonattainment for the ozone [standard]," with 1,320 counties to be nonattainment. In making this estimate, Industry Petitioners relied on an ozone measurement technique EPA had never even hinted it might use. Health Int. Br. 24 n.9. Industry Petitioners' confident prediction was badly wrong: EPA has now completed all designations under the 2015 ozone standards, designating part or all of just 201 counties as nonattainment. <https://www3.epa.gov/airquality/greenbook/jnsum.html>; see 83 FR 35,136 (July 25, 2018) (making nonattainment designation); 83 FR 25,776 (June 4, 2018) (making nonattainment designations); see also 83 FR 52,157 (Oct. 16, 2018) (making corrections to designations).

Second, in their Reply Brief (at 12), State Petitioners said that "EPA has never approved a rural transport area under the 8-hour ozone [standard]." That statement is no longer true. 83 FR 25,781/3-82/1 (establishing Tuscan Buttes, CA, and Door County, WI, nonattainment areas as rural transport areas under 2015 ozone standards).

In any event, both Industry and State Petitioners' erroneous claims provided them no support because Congress addressed concerns about potential attainment difficulties in Clean Air Act provisions that deal with implementation of standards, thus demonstrating that such concerns have no place in standard-setting. *E.g.*, Health Int. Br. 18-20. Instead, under governing Supreme Court and Circuit precedent, the standards must be set based solely on the health and welfare effects caused by the pollutant in the ambient air. *Id.* 15-18 (citing and discussing cases).

Respectfully submitted,

/s/Seth L. Johnson

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2018, I have served the foregoing **Letter** on all registered counsel through the Court's electronic filing system (ECF).

/s/ Seth L. Johnson
Seth L. Johnson