EARTHJUSTICE

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: Response to Industry Petitioners' Letter in *Murray Energy Corp. v. EPA*, No. 15-1385 (and consolidated cases) – Oral Argument Scheduled for December 18, 2018

Dear Mr. Langer:

The four developments Industry Petitioners discuss in their letter provide no support for their underlying legal claim that concerns about background pollution levels can somehow override the Clean Air Act's mandate for adoption of health- and welfare-protective standards. As we have explained, Congress specified that protection of health and welfare is the exclusive consideration for the standard-setting process. Health and Environmental Intervenors Letter 1 (Nov. 30, 2016) (citing Health Int. Br. 15-27) [hereinafter Health 2016 Letter]. Congress' carefully-crafted exceptions to attainment requirements come only in the implementation phase, and thus confirm that Congress decided to make allowances for difficulties achieving standards in that phase only, with concerns about achievability having no role in the standard-setting phase. *Id.* 1-2 (citing Health Int. Br. 15-16, 18-20, 23-24, 26-28); *see also, e.g.*, State Intervenors Letter 1-2 (Dec. 7, 2018) (describing how such exceptions function); 42 U.S.C. § 7513(f) (allowing EPA to waive requirements for certain types of nonattainment areas when "anthropogenic sources" of the pollutant "do not contribute significantly to the violation" or "nonanthropogenic sources" of the pollutant "contribute significantly to the violation").

Nor does anything in Industry's letter show or even suggest that EPA acted illegally or arbitrarily in the 2015 standard under review here. The 2016 "exceptional events" rule applies only to implementing the standard, and the other

materials cited pertain only to what EPA might consider in a future review of the standard. None of these materials affects the agency action and the underlying record at issue in this case.

Instead, the record in the case under review confirms that the prior ozone standards required strengthening to meet the statutory mandate to protect public health and welfare, with even greater strengthening than the standards EPA set being fully justified under the record—and that is fatal to Industry and State Petitioners' claims here. Health 2016 Letter 2 (citing Health Int. Br. 6-15).

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
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