

ORAL ARGUMENT POSTPONED FROM APRIL 19, 2017**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Murray Energy Corporation,

Petitioner,

v.

United States Environmental
Protection Agency,

Respondent.

No. 15-1385

(Consolidated with Nos. 15-1392, 15-1490,
15-1491, 15-1494)

RESPONDENT EPA'S FINAL STATUS REPORT

Respondent United States Environmental Protection Agency (EPA) submits this final status report regarding the Agency's review of the revised national ambient air quality standards (NAAQS) for ozone issued by EPA in 2015, published at 80 Fed. Reg. 65,292 (Oct. 26, 2015) (the 2015 Rule). As discussed below, EPA has informed the undersigned counsel for the Justice Department that the appropriate EPA officials have reviewed the 2015 Rule and have determined that at this time, EPA does not intend to revisit the 2015 Rule.

1. This case involves consolidated petitions for review of EPA's revisions to the Clean Air Act's NAAQS for ozone in the 2015 Rule. Under Section 109 of the CAA, 42 U.S.C. § 7409(d), EPA is directed to review these standards every five years and revise them as the Administrator deems appropriate.

2. The parties fully briefed this case in 2016, and the Court had scheduled oral argument for April 19, 2017. But on April 11, 2017, the Court granted EPA's motion to continue the oral argument and hold this case in abeyance pending review of the rule by EPA following the Presidential transition.

3. Since then, the current Administration has been intensively considering and developing a new approach for the EPA's program for the National Ambient Air Quality Standards, as reflected by two recent, high-level directives described below.

4. On April 12, 2018, the President issued a memorandum that, among other things, directed the Administrator of EPA to evaluate whether the Agency was fully complying with applicable procedural, scientific and technical requirements pertaining to its periodic five-year NAAQS reviews under 42 U.S.C. § 7409(d). *See* Memorandum for the Administrator of the Environmental Protection Agency § 7 (dated April 12, 2018), published at 83 Fed. Reg. 16,761, 16,764 (April 16, 2018) ("Presidential Memo"). The Presidential Memo specifically directed the Administrator to evaluate compliance with provisions relating to the scope and characterization of advice received by EPA from the Agency's statutorily-created NAAQS advisory panel, the Clean Air Scientific Advisory Committee ("CASAC"), "including requirements that the Committee advise the Administrator regarding background concentrations and adverse public health or other effects that may result from implementation of revised air quality standards." *Id.*

5. Following up on the Presidential Memo, on May 9, 2018, former EPA Administrator E. Scott Pruitt issued a memorandum setting out principles to govern NAAQS reviews. *See* Memorandum: Back-to-Basics Process for Reviewing National Ambient Air Quality Standards (May 9, 2018) (“Back-to-Basics Memo”) (available at: <https://www.epa.gov/criteria-air-pollutants/back-basics-process-reviewing-national-ambient-air-quality-standards>). Among other things, the Back-to-Basics Memo stressed the Agency’s commitment to completing the periodic five-year NAAQS reviews in a timely fashion, and outlined specific steps that the Agency will take to improve the efficiency of the next ozone NAAQS review. *Id.* at 3, Principle 1.

6. One of the specific issues which the Back-to-Basics Memo identifies as needing additional attention by EPA and CASAC during review of the NAAQS is “the relative contribution of natural and anthropogenic activity,” including additional information on background concentrations of ozone and other pollutants. *Id.* at 5. The Back-to-Basics Memo goes on to specify that EPA, consistent with the provisions of Section 109(d)(2)(C), intends to solicit advice from CASAC during each NAAQS review on that question, and to ask that CASAC discuss relative proximity to background ozone concentrations in its advice on any recommended NAAQS levels.¹ *Id.* at 6.

¹ While the Back-to-Basics Memo recognizes that these questions may elicit information that is not relevant to the standard-setting process, it explains that this information provides important policy context for EPA, the public, and States. *Id.* at 7.

7. On June 26, 2018, EPA, in order to fulfill the Back-to-Basics Memo's direction to be ready to finalize any necessary revisions to the ozone NAAQS by October 2020, initiated the next review of the NAAQS for ozone by publishing a call for information in the Federal Register. "Review of the National Ambient Air Quality Standards for Ozone—Call for Scientific and Policy-Relevant Information," 83 Fed. Reg. 29785 (June 26, 2018). That same day, EPA also issued a second call for information, pursuant to Section 109(d)(2)(C), related to adverse effects which may result from various strategies for attainment and maintenance of NAAQS. "Call for Information on Adverse Effects of Strategies for Attainment and Maintenance of National Ambient Air Quality Standards," 83 Fed. Reg. 29785 (June 26, 2018). EPA intends to implement the new approach to review of the NAAQS, which is reflected in the both the Presidential Memo and the Back-to-Basics Memo, in the current review of the ozone NAAQS, and to complete that review by 2020.

8. As part of this review of the ozone NAAQS, consistent with the Back-to-Basics Memo, EPA intends to carefully consider, and solicit comment from CASAC and the public, on topics related to background ozone, including assessments of the relative contribution of natural and anthropogenic ozone to design values, which are used to determine whether areas are attaining the NAAQS.

9. Moreover, EPA notes that it may re-evaluate the extent to which the Administrator can or should consider levels of background ozone when choosing a standard. Because the rationale of the 2015 Rule focused on the factual question of

whether background ozone would interfere with attainment of the 2015 NAAQS, EPA did not resolve the question of whether raising the NAAQS to accommodate background ozone could be a permissible reading of the Clean Air Act under step two of the *Chevron* analysis.² Thus, EPA anticipates revisiting both the question of when background concentrations interfere with attainment of the NAAQS and the question of how to consider potential interference with attainment in deciding whether or how to revise the NAAQS.

10. After completing this careful review of the entire NAAQS process, with particular attention to the recently-initiated review of the ozone NAAQS and the issue of background concentrations, EPA considered how to proceed with respect to the 2015 ozone NAAQS in light of these developments.

11. Among other things, EPA considered the benefits of applying the new approach of the Back-to-Basics Memo, the need to focus resources in order to move swiftly and complete the new review by 2020, the status of implementation for the 2015 Rule, recent D.C. Circuit decisions on the ability of EPA to revoke previously-promulgated NAAQS, and the importance of certainty for States and the regulated community.

12. In light of all these considerations, while EPA officials in the current administration may have supported making different judgments about the significance

² As the Agency left that issue open, the Court need not resolve it in addressing the issues in this litigation.

of background concentrations of ozone and how to judge what standards are requisite to protect public health and welfare, the Agency at this time does not intend to revisit the 2015 Rule.

13. EPA will undertake a new review consistent with the Back-to-Basics Memo. EPA cannot pre-judge the results of this review, but it will be thorough, transparent, and consistent with the statutory requirements.

14. EPA appreciates the Court's patience in giving the Agency adequate time to consider whether to reconsider the 2015 Rule.

15. EPA notes that the Court has lifted the abeyance on these consolidated cases effective August 1, 2018 and has ordered the parties to submit motions to govern further proceedings by August 22, 2018. The Justice Department will approach the other parties to discuss the motions to govern shortly.

Dated: August 1, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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