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CITIZEN SUIT
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January 21, 2014

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

AK-14-000-4233

Gina McCarthy, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: 60-Day Notice of Intent to File Clean Air Act Citizen Suit

Dear Administrator McCarthy:

Pursuant to 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54, Murray Energy Corporation and certain of its subsidiaries and affiliates listed below (collectively "Murray Energy") hereby give notice of their intent to commence a civil action against the Administrator of the United States Environmental Protection Agency ("Administrator," "you" or "EPA") for failure to perform certain nondiscretionary duties under the Clean Air Act ("CAA"). Specifically, EPA has failed to carry out its nondiscretionary duty under CAA § 321 – entitled "Employment Effects" – to conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provisions of Chapter 85 of Title 42 of the United States Code, and applicable implementation plans.

Clean Air Act § 321(a)¹ requires the Administrator to conduct these evaluations and makes this requirement a nondiscretionary duty on the Administrator, stating that:

The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.

(Emphasis added.)

¹ 42 U.S.C. § 7621(a)

In the past five years, EPA has administered and enforced the Clean Air Act in a manner that places immense pressure on the electric generating sector—and other industries that traditionally burn coal—to reduce their consumption of coal by: (1) encouraging facilities to switch from coal to other fuels; (2) imposing costly regulations that have compelled or incentivized existing coal-burning facilities to shut down; (3) engaging in enforcement activities that discourage the repair and continued operation of existing coal-burning facilities; and (4) developing regulations and guidance that will make it more costly—and in many cases impractical—for new coal-burning facilities to be constructed.

As just a few examples, in the past five years the current administration has:

- promulgated regulations that are more onerous for facilities burning coal than facilities burning other types of fuel, *see, e.g.*, National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers: Final Rule, 76 Fed. Reg. 15554 (March 21, 2011);²
- promulgated rules that offer switching from coal to natural gas as an off-ramp to regulation, *see, e.g.*, National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (February 16, 2012);
- selectively targeted coal-fired emission sources for additional regulation, *see, e.g.*, Air Quality Designations for the 2006 24-Hour Fine Particle (PM_{2.5}) National Ambient Air Quality Standards, 74 Fed. Reg. 58688 (November 13, 2009);
- imposed regulations that encourage states to develop state implementation plans that require reductions in the consumption of coal, *see, e.g.*, Air Quality Designations for the 2010 Sulfur Dioxide (SO₂) Primary National Ambient Air Quality Standard, 78 Fed. Reg. 47191 (August 5, 2013);
- developed proposed regulations that discourage the construction of new coal-fired power plants, *see, e.g.*, New Source Performance Standards for Greenhouse Gas Emissions for New Stationary Sources, Electric Utility Generating Units, 77 Fed. Reg. 22,392 (Proposed Rule April 13, 2012); and

² Citations are to first promulgation of final rules. Several of the regulations cited in this Notice Letter were subsequently amended or supplemented, but none in ways that would eliminate the detrimental impact of EPA's administration and enforcement of the Clean Air Act on employment in the coal industry.

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Gina McCarthy, Administrator
60-Day Notice of Intent to File Clean Air Act
Citizen Suit
January 21, 2014

- engaged in enforcement initiatives that have targeted coal-fired sources, making it more expensive for them to operate and increasing the incentive for current operators to either shut down or switch to other fuels, such as EPA's New Source Review litigation against coal-fired power plants, *see, e.g., U.S. v. Oklahoma Gas & Electric Co.*, Case No. 5:13-cv-00690-D (W.D. Okla.); *U.S. v. EME Homer City Generation, L.P.*, Case No. 2:11-cv-19 (W.D. Pa.); *U.S. v. DTE*, Case No. 10-13101 (E.D. Mich.); *U.S. v. Midwest Generation, LLC*, Case No. 09-5277 (N.D. Ill); *etc.*

It would not be possible or practical to list every action EPA has taken in the past five years to administer or enforce the Clean Air Act in a way that has eliminated or discouraged coal as a fuel option for generation of electricity and made construction of new coal-fired sources cost-prohibitive, but the above serve as examples of the actions EPA has taken in the past five years to bring about an economic shift from coal to other fuels. These actions have threatened and impeded our nation's economy and the economic well-being of its citizens, both of which are heavily dependent upon the availability of lower-cost electricity fueled by our country's coal industry. EPA has taken these actions to discourage the use and production of coal without adequate evaluation and consideration of their implications for the jobs of many thousands of employees in the coal sector and many other dependent industries. This is the very reason why Congress enacted CAA § 321(a), which expressly requires EPA to continuously evaluate the employment effects of these Agency actions.

Murray Energy is the largest producer of underground coal in the United States and employs over 7,100 people in towns and cities across the country. The pressure the current administration is placing on the power sector to switch from coal to other fuels and to avoid the construction of new coal-burning facilities has threatened one of the nation's largest markets for coal and, in turn, the jobs and livelihoods of all those who work in and support our nation's coal industry, including Murray Energy's 7,100 employees. This is precisely the type of significant potential job loss that Congress mandated EPA to evaluate, continuously, in administering and enforcing the Clean Air Act.

However, we have been unable to find any indication that EPA has performed this nondiscretionary duty. When Representatives Barton and Walden asked you how EPA complies with CAA § 321, you stated in response that "EPA has not interpreted CAA section 321 to require EPA to conduct employment investigations in taking regulatory actions." McCarthy Letters to Representatives Barton and Walden, Enclosure at 3 (Jan. 12, 2010). Since then, in your confirmation hearing, you again stated that "EPA has not interpreted [CAA § 321] to require EPA to conduct employment investigations in taking regulatory actions" and gave no assurance that EPA was conducting any continuous evaluation of the employment effects of its administration and enforcement of the Clean Air Act. Gina McCarthy Confirmation Hearing, Senator Vitter Questions for the Record at 40-41 (Apr. 11.

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Gina McCarthy, Administrator
60-Day Notice of Intent to File Clean Air Act
Citizen Suit
January 21, 2014

2013).³ Moreover, when recently asked by Senator Inhofe about EPA's compliance with § 321, your answers were dilatory and nonspecific. *See* Senate Environment & Public Works Committee Recording, <http://c-spanvideo.org/program/ClimateChangePol>. These statements indicate that EPA has never conducted the evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the Clean Air Act expressly mandated by § 321(a), and that EPA is not likely to conduct these mandatory evaluations in the future without judicial intervention.

EPA's stated interpretation of CAA § 321 is at odds with the plain language of CAA § 321(a), which states that the Administrator "shall conduct continuing evaluations," as well as the legislative history of the 1977 CAA Amendments, which makes clear that § 321 imposes an affirmative duty on EPA to evaluate its administration and enforcement of the Clean Air Act for potential loss or shifts of employment. The Report by the Committee on Interstate and Foreign Commerce, for example, explains that "[u]nder this provision, the Administrator *is mandated* to undertake an *ongoing evaluation of job losses and employment shifts* due to requirements of the act." This evaluation is to include investigations of threatened plant closures or reductions in employment allegedly due to requirements of the act or any actual closures or reductions which are alleged to have occurred because of such requirements." H.R. REP. NO. 95-294, at 317 (1977).

Over the past five years, EPA has waged what can fairly be described as a war on coal, repeatedly and consistently encouraging sources to switch from coal to other fuels, to shut down coal-fired sources, and to avoid constructing new coal-fired sources, all through EPA's administration and enforcement of the Clean Air Act. You have a nondiscretionary duty under CAA § 321(a) to continuously evaluate the employment effects of these actions but have failed to do so. Your failure to fulfill this duty prevents Murray Energy from obtaining and using EPA's continuous evaluations of employment effects to address and ameliorate the devastating economic consequences of EPA's actions on the coal industry. Murray Energy is therefore providing you with this 60-day notice that it intends to commence a civil action to enforce this nondiscretionary duty unless EPA has fully performed its duty within sixty (60) days of the postmark date of this letter.

This Notice is being given by the following:

Murray Energy Corporation
46226 National Road,
St. Clairsville, Ohio 43950

Murray American Energy, Inc.
46226 National Road
St. Clairsville, Ohio 43950

American Energy Corporation
43521 Mayhugh Hill Road
Beallsville, Ohio 43716

The Harrison County Coal Company
71 Camp Run Road
Mannington, West Virginia 26582

³ Available at: http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9a1465d3-1490-4788-95d0-7d178b3dc320

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CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Gina McCarthy, Administrator
60-Day Notice of Intent to File Clean Air Act
Citizen Suit
January 21, 2014

UtahAmerican Energy, Inc.
794 "C" Canyon Road
P.O Box 910
East Carbon, Utah 8452

The Marshall County Coal Company
57 Goshorn Woods Road
Cameron, West Virginia 26033

The American Coal Company
9085 Highway 34 North
Galatia, Illinois 62935

The Marion County Coal Company
151 Johnny Cake Road
Mannington, West Virginia 26585

KenAmerican Resources, Inc.
297-A State Route 2551
Bremen, Kentucky 42325

The Monongalia County Coal Company
701 Oak Forest Road
Kuhntown, Pennsylvania 15366

OhioAmerican Energy, Inc.
34 Kelley Way, Suite 100
Brilliant, Ohio 43913

The Ohio County Coal Company
Rd 1, Box 62 A
Dallas, West Virginia 26036

The above have retained counsel to represent them in this matter. Their names and addresses are as follows:

Geoffrey K. Barnes
Squire Sanders (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114

J. Van Carson
Squire Sanders (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114

Vincent Atriano
Squire Sanders (US) LLP
2000 Huntington Center
41 South High Street
Columbus, OH 43215

We would be happy to discuss the concerns raised in this letter with you.
Please contact above-named counsel if you would like to pursue such discussions.

Sincerely,



Geoffrey K. Barnes

cc: Gary Broadbent
Michael McKown