

**U.S. Department of Justice**

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August 2, 2016

VIA ELECTRONIC FILING

The Hon. Mark J. Langer
Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
Room 5523
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Re: *Competitive Enterprise Institute v. EPA*: No. 15-1488 (and consolidated Clean Power Plan cases); EPA's Response to Petitioner's July 27, 2016 Notice of Supplemental Authority

Dear Mr. Langer:

Respondent United States Environmental Protection Agency submits this response to the July 27, 2016 Rule 28(j) letter filed by Petitioner Competitive Enterprise Institute.

Petitioner mistakenly contends that this Court's opinion in Mingo Logan Coal Co. v. EPA, No. 14-5305, supports Petitioners' arguments concerning EPA's consideration of costs. In Mingo Logan, the Court upheld EPA's action withdrawing certain areas from a Clean Water Act disposal permit, and concluded in pertinent part that appellant permittee had forfeited any argument related to costs by failing to raise the issue before EPA or the district court. Because the Court did not reach the merits of appellant's cost arguments, Mingo Logan is not a relevant new authority on cost considerations.

Mingo Logan is instructive here only inasmuch as Petitioners have similarly forfeited an argument concerning costs. As set forth in EPA's brief, EPA Br. 157-

58, Petitioners have not contested the cost analysis that EPA actually relied upon to establish carbon dioxide emission limitations for power plants. Instead, Petitioners have made irrelevant attacks on a formal monetized benefit-cost analysis that EPA conducted to satisfy Executive Order 12,866—not to establish emission limitations. See Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015) (explaining that EPA has discretion to decide *how* to account for costs and need not rely on formal benefit-cost analyses).

Even if Mingo Logan has additional relevance, Petitioner wrongly intimates that EPA failed to consider both benefits and costs as part of the analysis used to set emission limitations. In fact, in applying various factors for determining the “best system of emission reduction” under Section 111, EPA considered the Rule’s costs in light of its benefit in reducing emissions from the largest carbon dioxide sources and mitigating severe observed and projected climate change effects. See EPA Br. 157; 80 Fed. Reg. 64,662, 64,688-89, 64720-21, 64,728, 64,750-51 (Oct. 23, 2015). Petitioners have not challenged this analysis. See EPA Br. 157.

Sincerely,

/s/ Eric G. Hostetler

Eric G. Hostetler

cc: Counsel of record, via CM/ECF

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2016, I electronically filed the foregoing Rule 28(j) response letter 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.

/s/ Eric G. Hostetler

ERIC G. HOSTETLER