

BOYDEN GRAY & ASSOCIATES PLLC  
801 17TH STREET, NW, SUITE 350  
WASHINGTON, DC 20006  
(202) 955-0620

July 27, 2016

Hon. Mark J. Langer  
Clerk  
United States Court of Appeals  
for the District of Columbia Circuit  
Room 5523  
333 Constitution Avenue, NW  
Washington, DC 20001-2866

Re: Supplemental Authority in *Competitive Enterprise Institute v. EPA*, No. 15-1488 (and consolidated Clean Power Plan cases): *Mingo Logan Coal Co. v. EPA*, No. 14-5305 (D.C. Cir. July 19, 2016)

Dear Mr. Langer:

Both opinions in *Mingo Logan Coal Co. v. EPA*, No. 14-5305, support Petitioners' argument that EPA failed to adequately analyze the Clean Power Plan's costs and benefits. *See* Joint Opening Br. on Procedural and Record-Based Issues 69–71; Reply Br. on Procedural and Record-Based Issues 31–32.

This authority also supports the Competitive Enterprise Institute's proposal to allocate time to the cost-benefit issue at oral argument. *See* Dkt. No. 1610998 (Apr. 28, 2016).

In *Mingo Logan*, the only judge to reach the cost-benefit issue would have held that EPA's revocation of a mining permit "must be vacated" because EPA relied on a "one-sided analysis" that "considered *the benefits to animals* of revoking the permit" but excluded "*the costs to humans*—coal miners, . . . shareholders, local businesses, and the like." Dissenting Op. 1, 3 (Kavanaugh, J.).

It is "common sense and settled law" that "EPA must consider both costs and benefits before" taking such an action, Judge Kavanaugh wrote, noting that in *Michigan v. EPA* the Supreme Court "was *unanimous* in articulating this principle." *Id.* at 1, 5 (citing 135 S. Ct. 2699 (2015)). *Contra* EPA Br. 157.

Concluding the argument was forfeited, the *Mingo Logan* majority did not directly address EPA's cost-benefit analysis. But the panel cited with approval Judge Kavanaugh's conclusion that "reasoned decisionmaking requires assessing whether a proposed action would do more good than harm." Dissenting Op. at 5, *cited in* Majority Op. 21 ("Indeed, we do not quibble with [the dissent's] general premise—and that of the many legal luminaries he cites—that an agency should generally weigh the costs of its action against its benefits.").

Hon. Mark J. Langer

July 27, 2016

Page 2

Forfeiture is not at issue in this case. Petitioners have explicitly argued that EPA's cost-benefit analysis is invalid, identified specific costs that the Agency overlooked, and demonstrated quantitatively that the rule's domestic costs outweigh its domestic benefits. *See, e.g.*, Exhibit B (NFIB Comments). *Mingo Logan* strongly supports those arguments.

Respectfully submitted,

/s/ Adam R.F. Gustafson

C. BOYDEN GRAY

ADAM R.F. GUSTAFSON

*Counsel of Record*

DEREK S. LYONS

JAMES R. CONDE

BOYDEN GRAY & ASSOCIATES

801 17th Street NW, Suite 350

Washington, DC 20006

202-955-0620

[gustafson@boydengrayassociates.com](mailto:gustafson@boydengrayassociates.com)

cc: All counsel of record, whom the above-signed attorney certifies were served with this letter on July 27, 2016, via ECF.