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August 8, 2016

Mr. Mark Langer
Clerk of the Court
United States Court of Appeals for the
District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *State of West Virginia, et al. v. EPA, et al.*, No. 15-1363 (and consolidated cases)

Dear Mr. Langer:

Pursuant to Rule 28(j), Petitioners note the decision in *United States Sugar Corp. v. EPA*, No. 11-1108 (D.C. Cir. July 29, 2016). The petitioners there challenged, *inter alia*, a rule that barred regulated entities from complying with a Clean Air Act §129 performance standard by averaging emissions of multiple units at a single facility. Section 129 requires that EPA set “performance standards ... applicable to solid waste incineration units,” §129(a)(2), defined as “a distinct operating unit” of a “facility,” *id.* §129(g)(1). The Court held that, because §129’s plain text requires that performance standards be applicable to each operating unit at a facility, EPA lacked “statutory authority” to “allow emissions averaging of ... units in a facility.” Slip op. 74-75.

In this case, the Rule’s performance standards are based on reductions EPA believes generating facilities (regulated “sources” and non-regulated entities alike) can collectively achieve, averaged across broad multi-State regions. Core Opening Br. 15. Sources can meet these standards only by averaging their emission rates with those of lower- or zero-emitting facilities, including renewable energy facilities that are not “sources,” are not regulated under §111, and may be located far away. *Id.* 46.

Sugar Corp. reinforces our argument (Core Opening Br. 46-47) that where the statute’s text specifies a performance standard “applicable to” individual sources, EPA cannot command a standard based on averaging the regulated source’s emissions with those of other sources or non-



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sources. Even under §112, where emissions averaging is allowed because of §112(a)(1)'s definition of "major source" as "any stationary source *or group of stationary sources* located within a contiguous area," slip op. 75 n.18 (emphasis in opinion), EPA itself acknowledged that averaging can only be "among the various emitting units ... *located at that facility.*" EPA Br. 1532618 (No. 11-1108) at 54 (emphasis added). Under §111, the regulated entity is a single "stationary source," defined as a "building, structure, facility, or installation," §111(a)(3), just as the regulated entity under §129 is an operating unit. Thus, §111 prohibits standards based upon, and requiring compliance by, averaging the emissions of a regulated §111 source with that of another source or non-source.

Sincerely,

/s/ Peter D. Keisler

Peter D. Keisler

Counsel for Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American Foundry Society; American Forest & Paper Association; American Iron & Steel Institute; American Wood Council; Brick Industry Association; Electricity Consumers Resource Council; Lignite Energy Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association