

August 28, 2020

Via Electronic Filing

Mark J. Langer  
Clerk of the Court  
United States Court of Appeals  
for the D.C. Circuit  
333 Constitution Ave., N.W.  
Washington, D.C. 20001

Re: *American Lung Ass'n v. EPA*, No. 19-1140 (and consolidated cases)

Dear Mr. Langer:

Public Health and Environmental Respondent-Intervenors hereby submit the following response to Coal Petitioners' Rule 28(j) Letter (ECF No. 1856940), which references EPA's recently finalized amendments to emission standards for new sources in the oil and gas sector, EPA-HQ-OAR-2017-0757 (signed by Administrator on August 13, 2020) ("Oil & Gas Rule"). The Rule announces and adopts a new legal position concerning a predicate finding for regulation of pollutants under Section 111 of the Clean Air Act. Several Public Health and Environmental Respondent-Intervenors intend to challenge the Oil and Gas Rule once it is published and will argue that this and many other aspects of the rule are unlawful.

In any event, the Oil and Gas Rule is irrelevant to the present case. First, to the extent Coal Petitioners wished to challenge EPA's predicate finding for regulating power plants' carbon dioxide emissions, they were obligated to challenge the 2015 New Source Rule; they did not. *See* Env'tl. Resp.-Int. Br. at 17; State Resp.-Int. Br. at 12-15; EPA Br. at 162-68; EPA Resp. to Coal. Pets.' Rule 28(j) Letter, ECF 1858284 (Aug. 25, 2020).

Second, in the existing power plant rule at issue here, EPA has not purported to rely on the position newly articulated in the Oil and Gas Rule, and indeed could not do so without notice and comment rulemaking.

Finally, Coal Petitioners cannot credibly question whether fossil fuel-fired power plants "contribute[] significantly" to dangerous climate-changing air pollution. Indeed,

even the Oil and Gas Rule acknowledges “the unique CO<sub>2</sub> emissions profile of fossil fuel-fired [power plants],” which “dwarfs the amount of GHG emissions from every other source category.” Oil and Gas Rule at 76-77, n.49; *see also* 80 Fed. Reg. 64,510-64,530-31 (Oct. 23, 2015). Any serious effort to mitigate well-documented and grave dangers from greenhouse gas pollution will necessarily require steep emission reductions from this, and many other, source categories. *See Auffhammer et al. Amicus Br.* 25-28.

Respectfully submitted,

/s/ James P. Duffy  
James P. Duffy

cc: Counsel of record, via CM/ECF

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this response letter complies with the 350-word limit required by Federal Rule of Appellate Procedure 38(j) because it contains 316 words according to the count of Microsoft Word.

Dated: August 28, 2020

/s/ James P. Duffy  
James P. Duffy

## CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2020, 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 this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: August 28, 2020

/s/ James P. Duffy  
James P. Duffy