

**U.S. Department of Justice**

Environment and Natural Resources Division

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Oral Argument Held on September 6, 2019

October 15, 2019

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: *State of California, et al. v. EPA*: No. 18-1114 (and consolidated cases); EPA Response to Petitioners' October 9, 2019 Notice of Supplemental Authority

Dear Mr. Langer:

Respondent EPA hereby responds to Petitioners' October 9, 2019, 28(j) Letter, citing to a final joint EPA and NHTSA action entitled *The Safer Affordable Fuel-Efficient Vehicles Rule Part One: Joint National Program*, 84 Fed. Reg. 51,310 ("Part One Rule"). In the Part One Rule, EPA finalized the withdrawal of a 2013 waiver of preemption for California's greenhouse-gas vehicle emissions program. NHTSA simultaneously finalized regulatory text related to such preemption. The Part One Rule did not take final action on proposed revisions to federal vehicle emission standards.

Nothing in the Part One Rule bears upon the dispositive issue here that was the focus of oral argument: i.e., whether the challenged EPA April 2018 decision

to possibly revise federal standards through rulemaking was itself a “final” action. Petitioners call attention to a discussion within the Part One Rule related to EPA’s legal authority to reconsider and withdraw a previously granted preemption waiver. *See* 84 Fed. Reg. 51,331-36. As part of that discussion, EPA expresses disagreement with some commenters’ assertions that ostensible reliance interests foreclose withdrawal of EPA’s 2013 waiver action. *Id.* at 51,334-36. EPA therein points to a series of circumstances and events up through July 2019 that demonstrate the absence of reliance interests sufficient to preclude withdrawal. Among these, EPA notes that: (1) the model year 2022-2025 federal standards promulgated in 2012 included a specific commitment to revisit them through the mid-term evaluation process; (2) California prior to receiving the waiver had agreed to deem compliance with federal standards as compliance with California standards; (3) California in December 2018 had amended state law to eliminate its prior “deemed to comply” assurance; and (4) California in July 2019 had announced an agreement with four manufacturers purporting to establish a new state regulatory program departing from the program that was the subject of the 2013 waiver.

Contrary to Petitioners’ suggestion, nothing in this discussion concerning reliance on the 2013 preemption waiver bears in any respect upon whether the 2018 mid-term evaluation decision to initiate rulemaking is final. It is not, and these petitions should be dismissed.

Sincerely,

/s/ Eric G. Hostetler

Eric G. Hostetler

cc: Counsel of record, via CM/ECF

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, 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

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 28(j) because it contains 343 words according to the count of Microsoft Word and therefore is within the word limit of 350 words.

Dated: October 15, 2019

/s/ Eric G. Hostetler
Counsel for Respondent