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Oral Argument Scheduled for October 8, 2020

September 10, 2020

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: *American Lung Association, et al. v. EPA, et al.*: No. 19-1140 (and consolidated cases); EPA Response to Biogenic Petitioner's September 2, 2020 Letter

Dear Mr. Langer:

Respondents United States Environmental Protection Agency et al. (EPA) hereby address the Biogenic Petitioner's September 2, 2020, 28(j) Letter, ECF No. 1859588. This letter—like the Coal Industry Petitioners' 28(j) Letter—discusses EPA's recent Clean Air Act Section 111(b) rule regulating new sources in the oil and gas sector (the Oil and Gas Rule).

For the reasons discussed in EPA's August 25, 2020 Letter in response to the Coal Industry Petitioners' Letter, the Oil and Gas Rule does not bear upon the ACE Rule. ECF No. 1858284. Again, Section 111(d) rules like the ACE Rule do not require a "significant contribution" finding. To promulgate an existing source rule under Section 111(d), EPA need only show that it previously adopted a rule for new sources in the same source category which it did for coal-fired power

plants. *See* 80 Fed. Reg. 64,510 (Oct. 23, 2015). The predicate New Source Rule is under review in a separate proceeding. *See North Dakota v. EPA*, No. 15-1381 (D.C. Cir.).

Moreover, the Biogenic Petitioner’s invocation of the Oil and Gas Rule fails for another reason as well. Unlike the Coal Industry Petitioners, the Biogenic Petitioner did not expressly argue that Section 111 requires EPA to make a significant contribution finding for a newly regulated air pollutant, nor did it contest that CO₂ emissions from power plants “contribute[] significantly” to dangerous air pollution. Rather, the Biogenic Petitioner advanced a different argument—that EPA allegedly was required to make an endangerment finding specific to biogenic CO₂ emissions as distinct from CO₂ emissions. *See* Biogenic Br. 30-31, ECF No. 1856452 (arguing that “biogenic CO₂ emissions are considered an inherently different pollutant than fossil-based emissions”). The Oil and Gas Rule does not address the status of biogenic CO₂, and so does not bear upon this argument.

Sincerely,

/s/ Meghan E. Greenfield
MEGHAN E. GREENFIELD

cc: Counsel of record, via CM/ECF

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 28(j) because it contains approximately 332 words according to the count of Microsoft Word and therefore is within the word limit of 350 words.

Dated: September 10, 2020

/s/ Meghan E. Greenfield
MEGHAN E. GREENFIELD

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 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 the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Meghan E. Greenfield
MEGHAN E. GREENFIELD