August 30, 2019

Via eFile

Mark Langer
Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, NW
Washington, DC 20001

Re: *State of California, et al. v. EPA*, No. 18-1114 (L)

Dear Mr. Langer:

Pursuant to Federal Rule of Appellate Procedure 28(j), Intervenors respond to Petitioners' August 27, 2019 letter. Petitioners argue that *California Communities Against Toxics v. EPA*, No. 18-1085(L) (D.C. Cir. Aug. 20, 2019)—which held that an EPA guidance document was *not* final—nevertheless "supports Petitioners' case" that EPA's April 2018 Determination *is* final. Petitioners are mistaken.

CCAT reiterated that "the two-prong test in *Bennett v. Spear*, 520 U.S. 154 (1997), remains finality's touchstone." Slip op.11. *CCAT* confirms that the April 2018 Determination fails both prongs. *Bennett*'s first prong was not disputed in *CCAT*—unsurprisingly, as the challenged guidance announced "EPA's last word" on an important question of statutory interpretation. Slip op.14. The April 2018 Determination, by contrast, does not announce EPA's last word on anything, but merely its "determination ... that [emissions] standards *may* change." 77 Fed. Reg. 62,623, 62,652 (Oct. 15, 2012) (emphasis added). On *Bennett*'s second prong, the April 2018 Determination plainly fails under the very standard *CCAT* articulates: It "impose[s] no obligations, prohibitions, or restrictions," it "put[s] no party to the choice between costly compliance and the risk of a penalty," it "ha[s] no independent legal authority" (meaning any future regulations will stand or fall on their own), and regulated parties may "challenge any EPA action that [is] premised on" the views the Determination "advance[s]." Slip op.15-16. *CCAT* thus does not aid Petitioners' cause.

Nor does Judge Rogers' dissent help Petitioners. Judge Rogers believed that the challenged guidance was "an action 'from which legal consequences *will* flow'" because it "bind[s] EPA officials" to reach specified *substantive* decisions when enforcing the Clean Air Act. *Id.* at 7, 2 (Rogers, J., dissenting). The April 2018 Determination, by contrast, changes no rights or obligations and does not commit EPA to alter existing regulations at all. *See id.* at 8 (acknowledging action is not final if it does "not purport [to] bind EPA to its interpretation and ha[s] no identifiable effect on the regulated community"). Accordingly, nothing in either the majority or the dissenting opinion in *CCAT* changes the fact that these petitions must be dismissed as premature.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
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