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Oral Argument Scheduled for September 6, 2019

September 3, 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' August 7, 2019 Notice of Supplemental Authority

Dear Mr. Langer:

Respondents United States Environmental Protection Agency et al. (EPA) hereby respond to Petitioners' August 27, 2019, 28(j) Letter, ECF No. 18013940, citing to this Court's recent decision in *California Communities Against Toxics v. EPA*, Case No. 18-1085 (Aug. 20, 2019) (*CCAT*). In *CCAT*, this court considered whether an interpretive guidance memorandum issued by EPA is a final agency action. The court held that the guidance is not final, applying the two-prong test set forth in *Bennett v. Spear*, 520 U.S. 154 (1977). Slip. Op. 11-19.

For the reasons set forth in EPA's brief, EPA Br. at 23-31, the 2018 determination under review ("the Determination") likewise fails to satisfy the two-prong *Bennett* test, and nothing in the *CCAT* decision suggests otherwise. First,

EPA has not concluded its decision-making process concerning the potential revision of emission standards. EPA Br. at 23-27. That process did not end with the challenged Determination. Instead, it has continued through a rulemaking, as provided for in EPA's Evaluation Rule, 40 C.F.R. § 86.1818-12(h). Second, the Determination did not have legal consequences beyond requiring EPA to continue its decision-making process regarding the potential revision of emission standards. EPA Br. at 28-31.

Petitioners conclude their 28(j) letter with a new argument premised on the unsupported assumption that EPA "plans to 'rely on'" the Determination in a future proceeding as "independently authoritative." But EPA has no such plans and does not contend that the Determination would be "independently authoritative" in a future proceeding. EPA further recognizes that if it ultimately amends the emission standards in a final rule, then EPA must adequately explain its reasons for doing so, consistent with the Clean Air Act and precedent. EPA further notes that Petitioners have been free to include arguments concerning the January 2017 determination in their rulemaking comments. Should EPA ultimately decide to revise the standards in a final rule, Petitioners can decide to pursue judicial review and present objections which were raised with reasonable specificity during the period for public comment for the rulemaking. *See* 42 U.S.C. §7607(d)(7)(B).

Sincerely,

/s/ *Eric G. Hostetler*

Eric G. Hostetler

cc: Counsel of record, via CM/ECF

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 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 approximately 337 words according to the count of Microsoft Word and therefore is within the word limit of 350 words.

Dated: September 3, 2019

/s/ *Eric G. Hostetler*
Counsel for Respondent