August 19, 2016

Mr. Mark Langer
Clerk
United States Court of Appeals for the
District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *State of West Virginia v. EPA*, Nos. 15-1363 (and consolidated cases); Response to Rule 28(j) Letter of Chamber of Commerce of the United States of America, *et al.* (Doc. 1629224)

Dear Mr. Langer:

Environmental Respondent-Intervenors respectfully respond to petitioners' letter regarding *U.S. Sugar Corp. v. EPA*, No. 11-1108 (D.C. Cir. July 29, 2016).

As EPA explains (Doc. 1630924), *Sugar Corp.*'s interpretation of Clean Air Act Section 129 does not support petitioners' claims.

Petitioners' citation to Section 112 likewise does not support their statutory challenges to the Clean Power Plan. Sections 112 (addressing hazardous air pollutants) and 129 (incinerators) both provide that standards "shall not be less stringent" than the level achieved by the cleanest sources. 42 U.S.C. 7412(d)(3), 7429(a)(2). Both mandate even more stringent controls when necessary to reduce "risks to the individual most exposed to emissions from a source in the category." *Id*. 7412(f)(2)(A), 7429(h)(3). Section 112 (unlike Section 129) allows averaging among units at a single facility. *Sugar Corp.*, slip op. 75 n.18. But consistent with both sections' focus on localized risks of health-endangering pollutants, neither allows averaging over broad geographic areas.

Section 111, by contrast, deals with a wider range of pollutants, some with localized impact and others with regional or even global impact. In determining the "best system of emission reduction," EPA must take account of pertinent features of particular pollutants and source categories. Considering the unique characteristics of the global pollutant at issue, 80 Fed. Reg. 64,725, and of the power sector, *id*. 64,664-65, EPA found that Section 111's enumerated factors favor an approach that cost-effectively reduces aggregate carbon dioxide emissions

by allowing maximum implementation flexibility. See Envtl./Health Intervenor Br. 6-10; see also *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) (upholding analogous approach for cost-effectively reducing aggregate emissions under 42 U.S.C. 7410(a)(2)(D)(i)(I), which requires state plans to "prohibit[]…any source" from emitting pollution that interferes with other states' air quality standards).

Petitioners' reliance on *Sugar Corp.*'s discussion of means of compliance with Section 129 standards is not only misplaced, but ironic: In rulemaking comments, many petitioners urged that EPA's Section 111(d) rule should allow compliance through flexible mechanisms already in use in the power industry. See Envtl./Health Intervenor Br. 7-8; see also Br. for Amicus Dominion Resources, Inc. 12-16.

Respectfully submitted,

/s/ *Sean H. Donahue*
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CERTIFICATE OF SERVICE

I certify that on August 19, 2016, I served the foregoing Rule 28(j) response letter by filing it electronically on the Court's CM/ECF system, which will provide electronic copies to all registered counsel of record.

Sean H. Donahue