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Oral Argument *En Banc* Scheduled for September 27, 2016

August 17, 2016

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 West Virginia, et al. v. EPA*: No. 15-1363 (and consolidated Clean Power Plan cases); EPA's Response to Petitioners' August 8, 2016 Notice of Supplemental Authority

Dear Mr. Langer:

Respondent Environmental Protection Agency ("EPA") submits this response to Petitioners' August 8, 2016 letter citing U.S. Sugar Corp. v. EPA, No. 11-1108 (D.C. Cir. July 29, 2016). Sugar Corp. largely upheld Clean Air Act ("CAA") emission standards covering over 200,000 boilers and waste combustors, and correctly applied the deferential Chevron standard to EPA statutory interpretations, and the deferential arbitrary-and-capricious standard to Agency judgments concerning energy requirements, costs and achievability. Slip Op. 29-30, 41-42 50-51, 100.

Petitioners focus on a discussion addressing the solid waste incinerators program at 42 U.S.C. § 7429. Id. at 74-75. The cited discussion is irrelevant to the

Section 7411(d) program at issue, as Section 7429 is materially distinct. Section 7429 requires "numerical" standards for "distinct operating unit[s]," "based on methods and technologies for removal or destruction of pollutants." 42 U.S.C. § 7429(a)(3), (a)(4), (g)(1). Such standards cannot be "less stringent than the emissions control that is achieved in practice" by "the best performing 12 percent of units in the category." Id. § 7429(a)(2). Sugar Corp. petitioners sought a compliance option allowing a facility's emissions to be averaged across units. EPA correctly determined that such averaging for purposes of compliance was precluded because it did not achieve the minimum degree of regulatory stringency for distinct units required by Section 7429.

Section 7411(d) standards are not similarly based on per-unit performance with strict floors. Instead, they are premised on the application of the "*best system of emission reduction*" "adequately demonstrated," considering various factors. 42 U.S.C. § 7411(a)(1) (emphasis added). Consistent with that more flexible direction, the Rule applies the "best system" for reducing CO_2 from existing power plants, and incorporates proven measures to increase utilization of cleaner forms of power generation. EPA Br. 29-34. Power plants may (but are not required to) comply with standards through cost-effective emission-credit or allowance trading mechanisms. Such mechanisms are consistent with Section 7411 and have been utilized in numerous CAA regulatory programs. See EPA Br. 32-34, 47-48. Petitioners concede these mechanisms may be used to comply with Section 7411(d) standards. Pet. Core Legal Reply Br. 19.

Sincerely,

/s/ *Eric G. Hostetler*

Eric G. Hostetler

cc: Counsel of record, via CM/ECF

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2016, 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