U.S. Department of Justice

Environment and Natural Resources Division

Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986

Telephone (202) 514-6187
Facsimile (202) 514-8865
brian.lynk@usdoj.gov

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
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Re: State of West Virginia, et al. EPA, No.15-1363 (and consolidated Clean Power Plan cases); Citation of supplemental authority under Fed. R. App. P. 28(j)

Dear Mr. Langer:

Under Federal Rule of Appellate Procedure 28(j), EPA writes to inform the Court of pertinent authority issued after briefing. On August 8, 2016, the United States Court of Appeals for the Seventh Circuit rejected arguments that energy efficiency standards promulgated by the Department of Energy were arbitrary because Energy had considered the standards' "global benefits to the environment but only . . . national costs." Zero Zone, Inc. v. United States Dept. of Energy, Case No. 14-2147, Slip Op. 43 (attached). The court also found that Energy's "determination of the SCC [Social Cost of Carbon] was neither arbitrary nor capricious." Slip Op. 41. Petitioners here similarly contend that EPA's regulatory impact analysis for the Clean Power Plan is flawed because it "assesses domestic costs against global benefits" and relies on the SCC. Pet. Record Br. 69-70 and Record Reply Br. 31-32.

The Zero Zone petitioners argued that the Energy Policy and Conservation Act "only concerns 'national energy and water conservation.'" Slip Op. 43 (quoting 42 U.S.C. § 6295(o)(2)(B)(i)(VI)). Nevertheless, the Seventh Circuit found reasonable Energy's explanation that "climate change 'involves a global externality,'" and that these global effects "are an appropriate consideration when looking at a national policy." Id. 43. It further noted that petitioners had not identified any "global costs" that Energy should have considered. Id. 43-44. The court concluded that "[Energy] acted reasonably when it compared global benefits to national costs." Id. 44.

Here, Petitioners failed to challenge the cost analysis that EPA actually relied upon to establish emission limitations for power plants, instead challenging a monetized benefit-cost analysis that EPA used to satisfy Executive Order 12,866, not to establish emission limitations. EPA Br. 157-58. Even if Petitioners' critique were relevant, however, the reasoning in Zero Zone would apply equally here—Petitioners similarly argue that the Clean Air Act only concerns "the quality of the *Nation's* air resources," Pet. Record Br. 70, but EPA (like Energy) reasonably explained why its monetized benefit-cost analysis accounted for global benefits. EPA Br. 159. Furthermore, EPA used a slightly updated version of the government-wide SCC upheld in Zero Zone. See https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-tsd-final-july-2015.pdf.

Respectfully submitted,

/s/ Brian H. Lynk

Brian H. Lynk
Environmental Defense Section

cc: Counsel of Record (via the Court's ECF Filing System)