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May 11, 2007

Cathy Catterson, Clerk/Court Executive  
U.S. Court of Appeals for the Ninth Circuit  
P.O. Box 193939  
San Francisco, CA 94110-3939

Re: Federal Rule of Civil Procedure Rule 28(j) Letter in *Our Children's Earth Foundation, et al. v. U.S. Environmental Protection Agency, et al.*, Case No. 05-16214

Date of the Oral Argument: February 13, 2007

Panel Members: Hon. J.C. Wallace, D.W. Nelson and M. McKeown

Dear Ms. Catterson:

Appellants-Petitioners hereby alert the Court to recent supplemental authority, *Massachusetts v. EPA*, 127 S. Ct. 1438 (April 2, 2007). See Ninth Circuit Rule 28(j). *Massachusetts* set aside the U.S. Environmental Protection Agency ("EPA")'s denial of a petition requesting EPA to promulgate rules regulating greenhouse gas emissions under Clean Air Act (CAA) section 202(a)(1), 42 U.S.C. § 7521(a)(1). Two holdings of *Massachusetts* are relevant to the above-referenced case: (1) litigants alleging statutory procedural rights deprivation have standing to challenge agency action contravening these rights

(see 127 S. Ct. at 1453) and (2), an agency's "reasons for action or inaction *must* conform to the authorizing statute." *Id.* at 1462 (emphasis added).

*Massachusetts* addressed CAA section 202(a)(1)'s mandate that EPA regulate the automotive emissions of any air pollutant "which in [the Administrator's] judgment cause, or contribute to, air pollution. . . ." The Supreme Court rejected EPA's contention that by leaving the regulation of pollutant emissions to EPA's "judgment," CAA section 202(a)(1) allowed EPA to decline to promulgate greenhouse gas emissions regulations because EPA preferred voluntary measures and other policy responses. 127 S. Ct. at 1462-63. The Court held instead that CAA section 202(a)(1) precluded EPA from foregoing promulgating such regulations. *Id.*

*Massachusetts* supports Appellants' argument that EPA may not decline to promulgate new or revised Clean Water Act (CWA) effluent guidelines and limitations based on EPA's policy judgment that water pollution is preferably addressed by voluntary industry action and other policy approaches. Just as Congress' CAA design is for EPA to restrict all air pollutant emissions by regulation, Congress' CWA design is for EPA to establish and keep updated a uniform floor of technology-based effluent guidelines and limitations based on what feasible pollution-reducing technologies are currently "available." See 33

U.S.C. § 1314(b).

To adhere to this CWA design, EPA must consider whether technologies allowing for greater pollutant reduction are available before determining whether to adopt new or revise existing effluent guidelines and limitations. *Id.*

(Congressional design constraining EPA's policy prerogatives must be respected); *see* Appellants' Opening Brief at 27-42.

Respectfully submitted,

Dated: May 11, 2007

*Christopher a. sproul*

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