



U.S. Department of Justice

Environment and Natural Resources Division

A.Brabender  
90-5-1-4-17324

Appellate Section  
P.O. Box 23795  
L'Enfant Plaza Station  
Washington, DC 20026-3795

Telephone (202) 514-5316  
Facsimile (202) 353-1873

February 9, 2007

Ms. Cathy Catterson  
Clerk of Court  
U.S. Court of Appeals for the Ninth Circuit  
95 Seventh & Missions Streets  
San Francisco, CA 94103-1526

Re: *Our Children's Earth, et al. v. EPA, et al.*  
Ninth Circuit Number: 05-16214  
*Oral Argument Scheduled for Feb. 13, 2007*

Dear Ms. Catterson:

Appellees ("EPA") respectfully submit this letter in response to Appellants' ("OCE") February 7, 2007, submission, under the authority of Fed. R. App. P. 28(j) and Ninth Cir. R. 28-6. The relevant question before this Court is which court, if any at all, has jurisdiction to review the substance or adequacy of EPA's effluent limitations guidelines reviews and planning processes. In this respect, *Riverkeeper* provides a good example of judicially reviewable final agency action. Unlike OCE's broad programmatic challenge to iterative and non-binding reviews and planning processes, the plaintiffs in *Riverkeeper* challenged a specific final rule promulgated by EPA.

Moreover, even if this matter should proceed to a merits review upon resolution of the jurisdictional questions currently on appeal, *Riverkeeper* will not be found to support OCE's arguments. *Riverkeeper* involves an EPA rule governing cooling water intake promulgated pursuant to 33 U.S.C. § 1326(b), CWA § 316(b). As such, it will not assist this Court in resolving the merits of the instant case, which involves an entirely separate regulatory mechanism under CWA § 304(b) governing pollutant discharges. To the extent *Riverkeeper* references CWA §§ 301 and 304 as guidance in interpreting the requirements of § 316(b), OCE, with its 28(j) submission, continues to confuse EPA's annual *review* obligation with the revision or promulgation of its rules or guidelines. *Riverkeeper* correctly states that EPA must consider technology when promulgating or revising a rule under §§ 301 and 304 (\*9-\*10), but it does not address the question at issue here – whether EPA has a mandatory duty to consider technology in its annual *review* in the absence of any specific requirement from Congress.

Feb. 9, 2007  
EPA Response

Please forward this response to the merits panel. Oral argument is scheduled for February 13, 2007 in San Francisco. Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Allen M. Brabender", with a long horizontal flourish extending to the right.

Allen M. Brabender  
*Counsel for Federal Defendants/Appellees*

cc: Counsel of Record

## CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the 28(j) Letter dated February 9, 2007, to be served by Federal Express Overnight, this 9th day of February 2007, upon the following counsel of record:

Christopher A. Sproul  
Environmental Advocates  
5135 Anza Street  
San Francisco, CA 94121

Michael W. Graf  
227 Behrens Street  
El Cerrito, CA 94530

Fredric P. Andes  
Carolyn Sue Hesse  
David T. Ballard  
Barnes & Thornburg LLP  
One North Wacker Drive  
Chicago, IL 60606

David W. Burchmore  
Jill A. Grinham  
Joseph A. Meckes  
Squire, Sanders & Dempsey LLP  
127 Public Square  
4900 Key Tower  
Cleveland, OH 44114-1304

Nicole E. Granquist  
Downey Brand LLP  
555 Capitol Mall  
Sacramento, CA 95814-4686

  
Allen M. Brabender