



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

May 18, 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

Dear Ms. Catterson:

Appellees ("EPA") respectfully submit this letter in response to Appellants' ("OCE") May 11, 2007, submission, under the authority of Fed. R. App. P. 28(j) and Ninth Cir. R. 28-6. Please forward this response to the merits panel.

The supplemental authority cited by OCE in its 28(j) submission, *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), relating to the Clean Air Act ("CAA"), provides no assistance in answering the relevant question before this Court. That 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 under the Clean Water Act ("CWA"). Moreover, even if this matter should proceed to a merits review upon resolution of the jurisdictional questions currently on appeal, *Massachusetts* will not be found to support OCE's arguments. In that case, the Supreme Court held, among other things, greenhouse gases are air pollutants within the Clean Air Act definition, and that EPA's decision not to regulate those pollutants was not based on the clear statutory criteria. *Id.* at 1462-63. These holdings were based on the unique language of the CAA and the administrative record before the Supreme Court. *Id.* As this Court is well-aware, the instant litigation involves entirely different statutory provisions in the CWA, requiring EPA to annually review its effluent limitations guidelines and revise them "if appropriate," and will involve an entirely different administrative record.

Sincerely,

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 May 18, 2007, to be served by United States Mail, this 18th day of May 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