

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**AMERICAN CHEMISTRY COUNCIL,
et al.**

Petitioners,

V.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,**

Respondents.

Docket No. 11-1141
(and consolidated cases)

**OPPOSITION TO REMEDY REQUESTED IN EPA’S TWO MOTIONS
ADDRESSING INADEQUACIES WITH EPA’S RULEMAKING
METHODOLOGY AND MOTION FOR AFFIRMATIVE RELIEF¹**

The American Forest & Paper Association (“AF&PA”), American Wood Council (“AWC”), American Chemistry Council (“ACC”), National Association of Manufacturers (“NAM”), and Society of Chemical Manufacturers and Affiliates (“SOCMA”) (collectively, “Petitioners”)² hereby respond to two coordinated motions filed by Respondent U.S. Environmental Protection Agency (“EPA” or

¹ This response to EPA's motions includes a motion for affirmative relief pursuant to Fed. R. App. P. 27(a)(3)(B).

² AF&PA, AWC, ACC, and NAM are petitioners and intervenor-respondents in case No. 11-1141. SOCMA is an intervenor-respondent in case No. 11-1141. For purposes of simplification, the organizations are collectively referred to as “Petitioners” in this filing.

“Agency”). In the first motion, EPA’s Motion for Partial Voluntary Remand Without Vacatur (Doc. 1482092) (hereinafter “Remand Motion”), EPA requests that the Court (1) remand the maximum achievable control technology (“MACT”) standards in the Area Source Boiler Rules that were developed with nine or fewer data points using the Upper Prediction Limit (“UPL”) methodology to assess variability (hereinafter “UPL Standards”);³ and (2) provide that the initial briefing deadline established by the Court’s January 31, 2014 order (Doc. 1477843) be moved to 30 days after the Court grants the Remand Motion or the current deadline of April 11, 2014, whichever is later. Remand Motion at 7-8. In a second motion filed the same day (Doc. 1482096) (hereinafter “Briefing Suspension Motion”), EPA moves to suspend the current briefing schedule pending this Court’s ruling on the Remand Motion.

As this Court is aware, case No. 11-1141 is related to three other cases (case Nos. 11-1108, 11-1125, and 11-1189).⁴ At EPA’s request, the Court ordered that the four cases would be heard by the same panel. Order at 2 (Oct. 16, 2013) (Doc.

³ The requested remand would apply to all MACT standards in the Area Source Boiler Rules because they were all calculated in this manner. Remand Motion at 5-6 & n.3.

⁴ Until January 31, 2014, the non-hazardous secondary materials rules (“NHSM Rules”) litigation was consolidated under lead case No. 11-1148. After the Court granted petitioners’ voluntary dismissal of case Nos. 11-1148 and 13-1167, however, lead case No. 11-1189 was assigned to the NHSM Rules litigation. Order (Jan. 31, 2014) (Doc. 1477808).

1461582) (granting Doc. 1445602). On the same day that EPA filed the Remand Motion and Briefing Suspension Motion in this case, EPA filed procedural motions in two of the three cases related to case No. 11-1141.

In case No. 11-1108, the litigation concerning Clean Air Act (“CAA”) § 112 emission standards for major source boilers (“Major Source Boiler Rules”), EPA filed a remand motion requesting that the Court (1) remand the record of the Major Source Boiler Rules for 60 days so that EPA can provide further justification for its general use of the UPL methodology in assessing MACT standard variability; (2) remand without vacatur a series of both new and existing source MACT standards developed using nine or fewer data points under the UPL methodology (*i.e.*, the same types of standards of which the EPA seeks remand in case No. 11-1141); and (3) stay briefing of all issues in case No. 11-1108 until 90 days after the Court grants the motion. EPA also filed a motion requesting stay of the litigation proceedings until resolution of the remand motion.

In case No. 11-1125, the litigation concerning CAA § 129 standards for commercial and industrial solid waste incinerator units (“CISWI Rules”), EPA filed a remand motion and briefing suspension motion identical in scope to the

motions filed in case No. 11-1108.⁵ EPA requests no action in case No. 11-1189, the NHSM Rules litigation.

Petitioners are filing coordinated responses in opposition to the remedy requested by EPA's three sets of motions (and accompanying motions for affirmative relief) in case Nos. 11-1141, 11-1108, and 11-1125.

SUMMARY OF ARGUMENT

As explained herein, in light of this Court's decision in *National Association of Clean Water Agencies v. EPA*, 734 F.3d 1115 (D.C. Cir. 2013) ("*NACWA*"), Petitioners do not oppose EPA's request for an opportunity to review the UPL Standards. But, if EPA's request to remand the UPL Standards were granted by the Court, those methodologically flawed standards would inequitably remain in effect while EPA undertakes further rulemaking on them. Thus, Petitioners oppose the motion to remand the UPL Standards and request instead that those standards be severed from this litigation and vacated during the pendency of EPA's further regulatory action.

⁵ EPA seeks a general remand of the record on the UPL methodology in case Nos. 11-1108 and 11-1125 but not in this case because in those two other cases EPA also used the UPL methodology to develop MACT standards based on *greater* than nine data points. See EPA's Motion for Remand of the Record, for Partial Voluntary Remand Without Vacatur, and for Revision of the Briefing Schedule at 4 n.2, case No. 11-1108 (Doc. 1482091); EPA's Motion for Remand of the Record, for Partial Voluntary Remand Without Vacatur, and for Revision of the Briefing Schedule at 4 n.2, case No. 11-1125 (Doc. 1482093).

Petitioners also oppose EPA's request to adjust the initial briefing deadline to be 30 days after the Remand Motion is granted or April 11, 2014, whichever is later. Any delay in briefing heightens the economic hardship and regulatory uncertainty faced by Petitioners. Briefing on all non-UPL Standards issues should proceed on the schedule already established by the Court. Similarly, Petitioners oppose EPA's Briefing Suspension Motion.

ARGUMENT

I. Petitioners Do Not Oppose EPA's Request to Reassess the UPL Standards.

As EPA explains in its Remand Motion, this Court remanded last year a rule establishing MACT emission standards for sewage sludge incinerators under CAA § 129 because of the Court's concern with EPA's UPL methodology. *NACWA*, 734 F.3d at 1151. The Area Source Boiler Rules also used the UPL methodology in MACT standard-setting. As EPA explains, even though the Rules were issued under CAA § 112 rather than § 129, MACT standard-setting is essentially the same under both sections. Remand Motion at 4 n.2.

In light of *NACWA*, EPA requests the opportunity to reassess the UPL Standards to make sure that the Agency uses a suitable standard-setting method for subcategories with nine or fewer data points. Petitioners do not oppose that aspect of the Remand Motion.

II. The UPL Standards Must Be Severed from Case No. 11-1141 and Vacated.

While Petitioners do not oppose EPA's request for the opportunity to reassess standards based on nine or fewer data points, Petitioners staunchly oppose EPA's inequitable request that those standards remain in effect during the pendency of the rulemaking needed to accomplish the reassessment. By asking for a voluntary remand, EPA is effectively conceding that the methodology used to calculate the UPL Standards is flawed. *See* Remand Motion at 5 (admitting "statistical anomaly" whereby "the UPL methodology resulted in the calculation of a new source MACT standard less stringent than the MACT standard for existing sources"), 6 (indicating that EPA "expects to conduct additional notice and comment rulemaking" to deal with methodological issues).

Remand of the UPL Standards *without* vacatur – the relief requested by EPA – would require Petitioners to spend time and money complying with standards that, by EPA's own admission, were calculated in a legally indefensible manner while EPA undertakes additional rulemaking of indeterminate duration and outcome. If the UPL Standards do significantly change through the further rulemaking, the inequity would be compounded, because affected sources would have been subject to different standards in the short term than in the long term. Such bifurcated standard-setting is wholly inconsistent with the regulatory scheme set out in CAA § 112(d).

The D.C. Circuit has a well-established framework for evaluating whether an inadequately supported rule warrants vacatur or remand; application of that framework to the facts of this case supports vacatur. The Court is to consider (1) “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly)” and (2) “the disruptive consequences of an interim change that may itself be changed.” *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (quoting *Int’l Union, UMW v. FMSHA*, 920 F.2d 960, 967 (D.C. Cir. 1990)) (internal quotation marks omitted). In short, the Court must consider and weigh the equities of vacatur relative to remand.

With regard to the first *Allied-Signal* factor, it is near certain that the Agency’s methodology for developing the UPL Standards is flawed. EPA does not assert that it can simply add more explanation to justify use of the UPL methodology to calculate standards based on small datasets. *Cf. Allied-Signal*, 988 F.2d at 151 (finding it “conceivable” that rule might not change because vague statements by agency could be further supported on remand). Instead, EPA’s careful parsing in its Remand Motion between those standards that are based on greater than nine data points and those that are not demonstrates that EPA has already evaluated its methodology and identified a break point between data sets where application of its UPL methodology is appropriate and those where it is not.

Remand Motion at 9-10.⁶ This “serious” methodological flaw of all MACT standards in the Area Source Boiler Rules (because they are all based on nine or fewer data points)⁷ therefore warrants vacatur. *See EME Homer City Generation LP v. EPA*, 696 F.3d 7, 37 (D.C. Cir. 2012) (vacatur appropriate where there is “no doubt” that the Agency acted incorrectly).

With regard to the second *Allied-Signal* factor, the “delay and trouble [remand] would cause are severe” for regulated entities relative to vacatur. *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993 (9th Cir. 2012). If the UPL Standards are remanded, regulated entities will be forced to comply with methodologically flawed standards that may change significantly if standards finalized after remand rulemaking differ from the UPL Standards. By contrast, vacatur would prevent significant and irreparable wastefulness and unfair imposition of requirements that are subject to change through further rulemaking.

Consistent with application of the *Allied-Signal* factors to this case, the Court should sever the UPL Standards from case No. 11-1141 and vacate them.

⁶ Petitioners note that EPA has similarly requested remand of the new source MACT limits for electric utility steam generating units, all based on small datasets using the UPL methodology. *See EPA’s Unopposed Motion for Partial Voluntary Remand*, case No. 13-1200 (Doc. 1482442). In that motion, EPA also represents that it “expects to conduct additional notice and comment rulemaking” to address the problem. *Id.* at 5.

⁷ *See supra* note 3.

III. Petitioners Oppose EPA's Request to Delay Briefing on Issues Unrelated to the UPL Standards.

Petitioners have consistently emphasized the need for expeditious briefing and decision on all issues presented by this case (and related case Nos. 11-1108, 11-1141, and 11-1189).⁸ More specifically, Petitioners requested briefing and rapid resolution of the issues in advance of the existing source compliance date of March 21, 2014 in the Area Source Boiler Rules. *See* 78 Fed. Reg. 7488, 7489 (Feb. 1, 2013).⁹ With the compliance date about to pass, and compliance obligations to begin, resolution of as many issues as possible must occur as quickly as possible to minimize time and expense complying with standards and other regulatory requirements that may be found to be unlawful.

Continued delay in resolving outstanding issues exacerbates existing uncertainty and budgeting related to compliance planning and results in additional and otherwise avoidable costs and complexity for affected parties. Swift and

⁸ *See, e.g.*, Response of Petitioners Council of Industrial Boiler Owners, et al., to Respondent U.S. Environmental Protection Agency's Motion to Govern Further Proceedings at 4-5, case No. 11-1141 (Doc. 1452102); *see also* Response of Petitioners American Forest & Paper Association, et al., to Respondent U.S. Environmental Protection Agency's Motion to Have Cases Heard by the Same Panel at 3-4, case No. 1108 (Doc. 1447406) (explaining "expeditious compliance deadlines" in related rules); Response of Petitioners American Forest & Paper Association, et al., to Respondent U.S. Environmental Protection Agency's Motion to Have Cases Heard by the Same Panel at 3-4, case No. 1125 (Doc. 1447410) (same).

⁹ For new sources, the deadline is March 20, 2011, or upon startup, whichever is later. *Id.*

timely resolution of at least all non-UPL Standards issues would reduce regulatory uncertainty and, thus, enable better compliance planning and minimize wasteful expense to comply with requirements that the Court may deem to be unlawful.

Stay of briefing for 30 days after the Court's issuance of the an order on this Remand Motion would inject further unreasonable delay into the resolution of all issues presented in this litigation. While time is, and always has been, of the essence for Petitioners, EPA apparently has felt no sense of urgency to address UPL issues. What EPA fails to explain in either the Remand Motion or the Briefing Suspension Motion is that the *NACWA* decision was issued by this Court almost seven months ago, on August 20, 2013. So, while true that EPA did not know of the decision when it finalized the Area Source Boiler MACT standards, it has known about the decision for *months* before filing its motions. Petitioners should not be the victim of EPA's delay.

In the time since the *NACWA* decision, EPA could have potentially conducted a full expedited rulemaking to address the UPL Standards. But EPA inexplicably took no action to respond to the decision.¹⁰

¹⁰ Shortly after the decision was issued, Alaska Oil & Gas Association, et al., petitioners in the related CISWI litigation, consolidated under lead case No. 11-1125, filed a 28(j) letter with the Court on August 28, 2013 to bring the *NACWA* decision to EPA's attention for its potential relevance to the small, remote incinerator standards. Doc. 1453907. In a September 9, 2013 response, EPA indicated that it "is not currently engaged in any administrative reconsideration

At a minimum, when EPA and the other parties to this litigation filed a joint briefing proposal in this case in November 2013 (more than *three* months after the decision), *see* Doc. 1467923, EPA knew, or should have known, whether further administrative action would be necessary to deal with UPL issues. EPA's failure to raise these issues at that time and propose a suitable briefing schedule and format is inexplicable.

In sum, briefing on all issues other than the severed and vacated UPL Standards should proceed on the already established briefing schedule. There is no basis for further delay.

IV. EPA's Motion To Suspend Briefing Pending Decision on EPA's Remand Motion Should Be Denied.

For all the reasons identified above, Petitioners request that briefing proceed on all non-UPL Standards issues according to the current briefing schedule in order to provide enhanced regulatory certainty, allow for effective compliance planning, and prevent wasteful expense of resources. EPA's Briefing Suspension Motion, which would (if granted) stay the briefing of all issues pending this Court's decision on the Remand Motion, should therefore be denied.

process to address AOGA's issue and that its issue is ripe for review." Doc. 1455446.

Because issues related to the UPL Standards would no longer be part of this litigation if Petitioners' requested relief is granted, there is no basis for delaying briefing on all other issues.

WHEREFORE, with regard to EPA's Remand Motion, Petitioners respectfully and affirmatively request severance and vacatur of the UPL Standards, and therefore oppose EPA's requested remand of the standards without vacatur. Moreover, Petitioners oppose any delay in briefing on all other issues. Briefing of non-UPL Standards issues should proceed on the schedule already issued by the Court. The parties also respectfully request that the Court deny EPA's Briefing Suspension Motion.

Dated: March 13, 2014

Respectfully submitted,

/s/ David M. Friedland

David M. Friedland

U.S. Court of Appeals, D.C. Circuit Bar
No.: 40270

Beveridge & Diamond, P.C.

1350 I Street NW, Suite 700

Washington, DC 20005

(202) 789-6000

*Counsel for the American Chemistry
Council*

/s/ James W. Conrad, Jr.

James W. Conrad, Jr.

Conrad Law & Policy Counsel

/s/ William L. Wehrum, Jr.

William L. Wehrum, Jr.

Hunton & Williams LLP

2200 Pennsylvania Ave., NW

Washington, DC 20037

(202) 955-1637

wwehrum@hunton.com

*Counsel for American Forest & Paper
Association and American Wood
Council*

805 15th Street NW, Suite 501
Washington, DC 20005-2242
(202) 822-1970
(202) 822-1971 (fax)
jamie@conradcounsel.com

*Counsel for the Society of Chemical
Manufacturers and Affiliates (SOCMA)*

Of Counsel:

Jan Poling
Vice President, General Counsel &
Corporate Secretary
American Forest & Paper Association
1101 K Street, NW
Suite 700
Washington, DC 20005
(202) 463-2590

Leslie A. Hulse
Assistant General Counsel
American Chemistry Council
700 2nd Street, NE
Washington, DC 20002-4308
(202) 249-6131 (phone)
(202) 478-2583 (fax)

Linda E. Kelly
Quentin Riegel
Patrick Forrest
National Association of Manufacturers
733 10th Street, NW
Suite 700
Washington, DC 20001
(202) 637-3000

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that on this 13th day of March 2014, I caused the foregoing Opposition to Remedy Requested in EPA's Two Motions Addressing Inadequacies with EPA's Rulemaking Methodology and Motion for Affirmative Relief to be served on all ECF-registered counsel.

/s/ William L. Wehrum, Jr. _____