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)**

REPLY IN SUPPORT OF MOTION FOR AFFIRMATIVE RELIEF OF VACATUR AND IN RESPONSE TO EPA'S OPPOSITION TO THAT MOTION

Petitioners American Forest & Paper Association, American Wood Council, National Association of Manufacturers, and American Chemistry Council (collectively, "Industry Petitioners") hereby respond to Respondent U.S. Environmental Protection Agency's ("EPA" or "Agency") opposition (Doc. 1487286) (hereinafter "EPA Opp.") to Industry Petitioners' motion for affirmative relief (Doc. 1483896) (hereinafter "Indus. Mot.").[1] In that motion, Industry

[1] The Court granted EPA's request for an extension of time to respond to Industry Petitioners' motion for affirmative relief. Order at 1 (Doc. 1485565). On April 7, 2014, Industry Petitioners separately filed a reply in support of their motion that responded to Environmental Petitioners' earlier filed opposition. *See* Doc. 1487301 (corrected Apr. 11, 2014, Doc. 1488105).

Petitioners request vacatur of all maximum achievable control technology ("MACT") standards developed using the Upper Prediction Limit ("UPL") methodology in the Area Source Boiler Rules because all such standards were based on nine or fewer data points (hereinafter "≤9 UPL Standards").

The Agency has admitted that it must undertake further rulemaking to decide what to do with the ≤9 UPL Standards. Contrary to EPA's assertions in its opposition, Industry Petitioners do suffer inequitable harm from the continued effectiveness of the indefensible standards.

ARGUMENT

I. EPA Has Conceded that the ≤9 UPL Standards Are Indefensible on the Current Record.

As explained in Industry Petitioners' motion, EPA has conceded that the UPL methodology as applied to small datasets is not defensible on the current record. Indus. Mot. at 6. In response, EPA postures that it has not conceded anything. *See, e.g.,* EPA Opp. at 4 ("Contrary to AFPA's assertions, EPA has not determined that these standards are 'methodologically flawed.'"). But EPA intends to undertake wholesale reconsideration of the ≤9 UPL Standards. EPA's actions speak louder than its words.

In its opposition, EPA cites *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994). EPA Opp. at 3-4. EPA asserts that this case stands for the proposition that "[t]his Court has long held that where the Court cannot adequately discern an

agency's rationale, the proper course is to remand the case to the agency for further explanation without vacatur." EPA Opp. at 3. The portion of the decision on which EPA relies is not the per curiam holding of the Court in that case. Rather it is a separate opinion filed by a single judge on the panel – Judge Silberman. The opinion is therefore not the view of the panel and does not constitute binding circuit law.

In any event, Judge Silberman is merely stating that the Court should be reluctant to hold an agency decision unlawful when the agency might provide adequate explanation on remand. *See Checkosky*, 23 F.3d at 463-64. That situation is not what we have here. Here, the Agency is admitting that a whole new round of rulemaking is needed to decide whether the ≤9 UPL Standards can be salvaged or, alternatively, must be replaced using some other method of assessing variability. The Court can therefore "declare with confidence that the agency action was arbitrary and capricious" because the Agency's requested relief indicates that to be the case. *See id.* at 463.

This case also fundamentally differs from the decision in *National Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115 (D.C. Cir. 2013) ("*NACWA*"), where EPA notes that the Court remanded rather than vacated the standards. EPA Opp. at 4. In *NACWA*, EPA defended its standards developed using the UPL methodology, including those for small datasets. Here, in contrast, EPA admits that it must

undertake new rulemaking to decide whether to keep, revise, or replace the ≤9 UPL Standards. Given EPA's admission, *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993), is applicable.[2]

II. Industry Will Be Harmed If the ≤9 UPL Standards Are Not Vacated.

As Industry Petitioners explain in their motion for affirmative relief, application of the *Allied-Signal* factors dictates vacatur is the required course of action. Indus. Mot. at 6-8. EPA attempts to downplay the financial hardship and uncertainty that Industry Petitioners present in their motion for affirmative relief by citing to a part of the response to EPA's remand motion that was filed by the Council of Industrial Boiler Owners ("CIBO") and the American Petroleum Institute ("API"). EPA Opp. at 5. CIBO and API represent that their members "have already done the work to comply with the existing source standards by [March 21, 2014, the existing source compliance deadline]." Doc. 1483891 at 2 (hereinafter "CIBO Resp."). This is no great surprise. One would hope that a regulated source would have taken steps to comply with the Area Source Boiler Rules far before March 13, 2014 (when the CIBO response was filed).

Yet EPA suggests that that statement shows that Industry Petitioners have "no ground for [their] claim of uncertainty as to what standards have to be met or of injury from allowing these standards to remain in place." EPA Opp. at 5. This

[2] EPA contends that *Allied-Signal* does not apply because there is no finding that "the standards are unsupported or unlawful." EPA Opp. at 3.

suggestion is completely belied by the sentences in the CIBO response that immediately follow the statement onto which EPA latches:

> Petitioners have already done the work to comply with the existing source standards by this date, yet EPA now proposes to change numerical limits for certain units. Revisions to numerical limits to be proposed and finalized after the compliance date will result in *substantial additional effort and cost for compliance*. Each day that passes *increases the uncertainty* faced by CIBO and API members in planning and executing a plan for compliance with the rule that will reflect compliance with all applicable standards beginning later this month, even as EPA is announcing that some of those standards may change.

CIBO Resp. at 2-3 (emphases added).

EPA fails to appreciate that compliance costs do not end on the day that a standard goes into effect. Even though whatever capital projects needed by existing sources to comply with the Area Source Boiler Rules presumably have been implemented by now, the ongoing operating costs associated with compliance alone are substantial. Continued imposition of these ongoing costs is inequitable and unwarranted in light of EPA's request to review all of the ≤9 UPL Standards.[3]

[3] EPA estimates that the total national annualized cost of the existing source standards in the Area Source Boiler Rules is $487 million. EPA, Regulatory Impact Analysis: National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters at 3-6 (Feb. 2011) (cost analysis conducted for the 2011 Area Source Boiler Rule), Doc. ID No. EPA-HQ-OAR-2006-0790-2335; 78 Fed. Reg. 7488, 7489 (Feb. 1, 2013) (explaining that costs of the 2013 Area Source Boiler Reconsideration Rule did not change relative to the 2011 Area Source Boiler Rule). Although EPA does not provide a breakdown of annual capital costs versus annual operating costs, annual

EPA also attempts to downplay the harm to Industry Petitioners by contending that it has no reason to believe the ≤9 UPL Standards will change much if it conducts additional rulemaking. *See* EPA Opp. at 5-6 ("EPA . . . has no reason to believe that the promulgated standards will change significantly because of that review. In particular, EPA has no reason to believe that the standards would change in a way that would require major changes in compliance strategies . . . ."). But EPA has no way to know how the standards will change numerically, if at all. That would be prejudgment, and run contrary to the very principle of reasoned agency decision-making that notice-and-comment rulemaking promotes. After the ≤9 UPL Standards are reevaluated, the MACT limits could go up or down, significantly or insignificantly. There is no way for anyone, including EPA, to know. *Any* time and expense (which will total millions and millions of dollars) required to comply with standards that are indefensible is fundamentally inequitable.

Dated: April 17, 2014

Respectfully submitted,

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operating costs are expected to be a significant fraction of the total annualized costs.

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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 17th day of April 2014, I caused the foregoing Reply in Support of Motion for Affirmative Relief of Vacatur and in Response to EPA's Opposition to That Motion to be served on all ECF-registered counsel.

/s/ William L. Wehrum, Jr.