ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES SUGAR CORPORATION, et al.,	)	
Petitioners,	)	
v.	)	**Docket No. 11-1108**
	)	**(and consolidated cases)**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondents.	)	

REPLY IN SUPPORT OF MOTION FOR AFFIRMATIVE RELIEF

Petitioners American Forest & Paper Association, American Wood Council, Biomass Power Association, National Association of Manufacturers, National Oilseed Processors Association, Rubber Manufacturers Association, Southeastern Lumber Manufacturers Association, United States Sugar Corporation, and American Chemistry Council (collectively, "Industry Petitioners") hereby respond to Respondent U.S. Environmental Protection Agency's ("EPA" or "Agency") opposition (Doc. 1487283) (hereinafter "EPA Opp.") to Industry Petitioners' motion for affirmative relief (Doc. 1483894) (hereinafter "Indus. Mot."). In that motion, Industry Petitioners request vacatur of all maximum achievable control technology ("MACT") standards developed using the Upper Prediction Limit

("UPL") methodology and nine or fewer data points ("≤9 UPL Standards"). Industry Petitioners also request that the Court order EPA to supplement the record regarding the UPL methodology in the same rulemaking in which the Agency revisits the ≤9 UPL Standards. Finally, Industry Petitioners request that the Court order briefing on all non-UPL issues to proceed.

Contrary to EPA's assertions in its opposition, Industry Petitioners would suffer harm from any delay in briefing, including during a remand of the record period. The Agency has admitted that its UPL methodology requires supplementation and that it must undertake further rulemaking to decide what to do with the ≤9 UPL Standards. Coordinated rulemaking to address both of those issues – the relief requested by Industry Petitioners – would minimize the harm faced by Industry Petitioners, and, therefore, is the equitable remedy.

ARGUMENT

I. Suspension of Briefing While EPA Supplements the Record Would Be Inequitable.

EPA has admitted that its UPL methodology, as used in the Major Source Boiler Rules, requires supplementation in light of this Court's holding in *National Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115 (D.C. Cir. 2013) ("*NACWA*"). In other words, EPA has conceded that the current record does not support its use of the UPL approach in the Major Source Boiler Rules.

EPA contends that Industry Petitioners' requested remedy of an order to conduct further rulemaking is not supportable "because the case has not been briefed on the merits and the Court has no basis to enter a judgment or order a remand." EPA Opp. at 10. This makes no sense. No briefing on the merits is needed at this point – EPA itself has conceded that it cannot defend its use of the UPL methodology on the record as it stands. With that concession, the only issue left for this Court to decide is the appropriate remedy.

In developing their requested remedy, Industry Petitioners have sought to minimize the inequity posed by EPA's failure to adequately support its rules. Under EPA's proposed approach, Industry Petitioners would be doubly harmed. First, the current case would be delayed for months while EPA undertakes its requested "remand of the record," unreasonably delaying resolution of many other issues wholly unrelated to the UPL methodology. Second, uncertainty about the ≤9 UPL Standards would persist for many more months beyond that as EPA completes its new rulemaking. Industry Petitioners' remedy would at least eliminate the first harm by allowing briefing of all non-UPL issues to proceed on the current expeditious briefing schedule.

EPA contends that it has not been "dilatory" in addressing the UPL issues raised by the *NACWA* decision. EPA Opp. at 11. Setting aside whether EPA should have acted sooner after the August 2013 *NACWA* decision to assess its

impact on the instant rules, EPA had clearly decided by January 9, 2014 that something must be done. On that date, EPA sought petitioners' input on its remand motion. EPA ultimately did not file the motion until two months later. Surely EPA could have used that time to determine what supplementation is needed. Yet, it still asserts that it needs another 60 days after a decision on the remand motion to do the work that it should have done by now. This delay cannot be justified.

II. 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 methodology as applied to the small datasets used to calculate the ≤9 UPL Standards is not defensible on the current record. Indus. Mot. at 6. Throughout its opposition to Industry Petitioners' motion for affirmative relief, EPA postures that it has not conceded anything. *See, e.g.,* EPA Opp. at 11 n.1 ("EPA is only requesting an opportunity to provide a more detailed explanation of its rationale for these standards, and has not conceded error…."). But EPA's attempts at rhetorical finesse cannot hide the wholly different actions it seeks to take based on the size of the MACT datasets: mere "amplification" of its support for MACT standards based on more than nine points but wholesale reconsideration with regard to the ≤9 UPL Standards.

In its response, EPA cites *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994). EPA Opp. at 6, 13-14. 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 13. 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 *NACWA* decision, 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 this admission, *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993), is applicable.[1]

III. 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 7-8. It would be highly inequitable to require industry to comply with costly standards that by EPA's own admission are legally indefensible.

EPA contends that it has no reason to believe the ≤9 UPL Standards will change much if it conducts additional rulemaking. *See* EPA Opp. at 15 ("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

[1] EPA contends that *Allied-Signal* does not apply because there is no finding that "the standards are unsupported or unlawful." EPA Opp. at 13.

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.

EPA attempts to pass the buck to Industry Petitioners to prove how much they will be prejudiced if/when the MACT limits change. *See, e.g., id.* (noting that Industry Petitioners have not "demonstrat[ed]" that compliance strategies will change when standards are repromulgated). Just as EPA cannot know what the new standards will be, Industry Petitioners cannot know either. We do not assert that it is the incremental difference between compliance strategies before and after the ≤9 UPL Standards are revisited that is the inequity. It is the fact that *any* time and expense (which will total millions and millions of dollars) required to comply with standards that are indefensible is fundamentally inequitable.[2]

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Respectfully submitted,

/s/ Timothy S. Bishop
Timothy S. Bishop
Kevin G. Desharnais
Chad M. Clamage
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606

/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

[2] EPA's suggestion that Industry Petitioners could simply get one-year compliance extensions is misleading. EPA Opp. at 15. Compliance extensions are only available under certain circumstances and must be filed consistent with enumerated procedures. *See* 40 C.F.R. § 63.6(i).

(312) 782-0600

Counsel for United States Sugar Corporation

Counsel for American Forest & Paper Association, American Wood Council, Biomass Power Association, National Oilseed Processors Association, Rubber Manufacturers Association, and Southeastern Lumber Manufacturers Association

/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

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

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

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)

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 to be served on all ECF-registered counsel.

I further certify that I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

Jeffrey John Ward
Sugar Cane Growers Cooperative of Florida
1500 West Sugarhouse Road
Belle Glade, FL 33430

/s/ William L. Wehrum, Jr.