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.	)	

OPPOSITION TO ENVIRONMENTAL PETITIONERS' CROSS-MOTION FOR REMAND OF THE CASE

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 Environmental Petitioners' Cross-Motion for Remand of the Case (Doc. 1485843) (hereinafter "Envtl. Mot."). Environmental Petitioners maintain that all maximum achievable control technology ("MACT") standards developed using the Upper Prediction Limit ("UPL") methodology in the Major Source Boiler Rules

should be remanded without vacatur for further rulemaking. This remedy is not appropriate.

Environmental Petitioners maintain that the MACT standards should be remanded rather than vacated because of alleged harm that would occur if they are vacated. Environmental Petitioners rely heavily on EPA's benefits estimates for the 2011 Major Source Boiler Rule – twice invoking the avoided health problems that EPA attributed to full implementation of that rule. Envtl. Mot. at 5, 15-16. Tellingly, Environmental Petitioners fail to explain that EPA determined in the final 2011 rule that it was unable to quantify any benefits that may be attributable to the hazardous air pollutant ("HAP") emissions reductions predicted to be achieved by the rule. 76 Fed. Reg. 15608, 15651 (Mar. 21, 2011). Instead, virtually all of the quantified benefits calculated by EPA were attributable to predicted incidental emissions reductions of fine particulate matter ("$PM_{2.5}$"), a non-HAP criteria pollutant. *Id.* at 15651-52; *see also* 78 Fed. Reg. 7138, 7156-57 (Jan. 31, 2013) (final 2013 Major Source Boiler Reconsideration Rule).

Criteria pollutants are not within EPA's authority to regulate under Clean Air Act ("CAA") § 112, 42 U.S.C. § 7412. EPA and the states have a wholly separate mandate under the CAA to implement emissions control measures necessary to attain and maintain attainment with the National Ambient Air Quality Standards for $PM_{2.5}$. It would be incongruous, at best, to keep the standards in

place during the pendency of further rulemaking because of asserted reductions in non-HAP criteria pollutant emissions that are not the target of the Major Source Boiler Rules and that are subject to comprehensive, mandatory standards under other parts of the CAA.

Instead, as Industry Petitioners have explained in their own motion for affirmative relief, application of the *Allied Signal* factors to this case clearly establishes that vacatur of the UPL standards based on nine or fewer data points is required. *See* Opposition to Remedy Requested in EPA's Two Motions Addressing Inadequacies with EPA's Rulemaking Methodology and Motion for Affirmative Relief at 7-8 (Doc. 1483894) (hereinafter "Indus. Mot.") (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). Vacatur prevents significant and irreparable wastefulness and unfair imposition of requirements that are subject to change through further rulemaking. Data from the forest products industry indicates that there are at least 65 boilers covered by the UPL standards for which EPA seeks remand (i.e., those based on nine or fewer data points). It will take several months, at a minimum, for EPA to conduct additional rulemaking to address those standards. Thus, the revised standards will be finalized just before the compliance date for the now existing standards. It makes no sense for boiler owners to invest the time and resources to comply with existing standards when those standards could change on the eve of

the current compliance deadline. The standards for which EPA seeks remand (i.e., those UPL standards based on nine or fewer data points) should therefore be vacated rather than remanded.

In further rulemaking, EPA can redevelop standards and also supplement its justification for the UPL methodology generally. *See* Indus. Mot. at 12-13. In the meantime, litigation on all other issues, including arbitrary and capricious challenges to the UPL MACT standards based on more than nine data points, can and should proceed.

Dated: April 10, 2014

Respectfully submitted,

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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 10th day of April 2014, I caused the foregoing Opposition to Environmental Petitioners' Cross-Motion for Remand of the Case 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:

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