ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES SUGAR CORPORATION,	)	
Petitioner	)	**Case No. 11-1108 (including consolidated cases)**
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent	)	

RESPONSE OF INDUSTRY PETITIONERS AND INDUSTRY INTERVENOR-RESPONDENTS TO U.S. ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR REMAND OF THE RECORD AND FOR PARTIAL VOLUNTARY REMAND WITHOUT VACATUR, AND FOR REVISION OF THE BRIEFING SCHEDULE

In accordance with Fed. R. App. P. 27 and D.C. Circuit Rule 27, Council of Industrial Boiler Owners (CIBO) and American Municipal Power, Inc. (AMP) ("Industry Petitioners and Intervenor-Respondents") respectfully take these positions in response to EPA's Motion for Remand of the Record and for Partial Voluntary Remand Without Vacatur: 1) support for remand of the record; 2) opposition to staying all briefing in the case pending completion of the remand of the record; 3) opposition to any amendment to the briefing schedule other than the

date upon which briefing would recommence should this Court order that briefing in this case be stayed.

Industry Petitioners and Intervenor-Respondents support EPA's effort to address deficiencies in its rulemaking record that arise from an intervening judicial decision that calls into question some portion of the record of its final rule. However, EPA's motion introduces chaos in an already complicated proceeding and would compel sources to continue planning for compliance with standards that EPA admits may change. EPA's proposal also unnecessarily upsets the carefully coordinated briefing of three interrelated cases. Industry Petitioners and Intervenor-Respondents remain concerned about compliance with certain and achievable Clean Air Act standards and sufficient time to design and build control systems feasibly and with certainty that compliance can be achieved.

I. Briefing in this case should not be suspended pending completion of remand of the record.[1]

The Clean Air Act provision applicable to this case provides a minimum of three years from the final rule to compliance so that sources have adequate time to plan and execute their compliance strategies, which could include equipment order, construction, and installation; alteration of operations, system testing, personnel training and other costly and time-consuming preparations. CAA §112(i)(3)(A).

[1] In a separate motion, EPA has sought a suspension of briefing pending the Court's disposition of EPA's Motion for Remand.

For this rule, existing sources must comply by January 2016. 78 Fed. Reg. 7143 (Jan. 31, 2013). Design and construction of a compliant control system can only commence once the set of applicable standards to a given affected unit are certain and this period generally requires three full years to complete reasonably. Without certainty as to the entire set of standards, design is guesswork that needs to be repeated if any standard is changed.

Each additional administrative delay with no corresponding relief in the compliance date erodes this critical period for source compliance development. Already, EPA is reconsidering several major elements of the rule, which have been severed from the main case and are still pending administrative resolution. ECF No. 1461576. Now, EPA seeks to remand the record and some -- but not all -- of the numeric standards. Thus, with the compliance development period almost half over for the rule at issue in this case, the entire final rule is in litigation, with major elements under reconsideration and now other major elements about to be made effectively un-final. This further erodes the compliance period and puts sources in the untenable situation of needing to make compliance decisions based on emission limits that are "final" in name only.

EPA's current proposal is likely to push briefing in this case well into 2015, putting in serious doubt the resolution of litigation on this rule before the

compliance date. And that briefing would include only a portion of the rule because this Court has already severed several issues from each of the three cases.

EPA heavily relies on this Court's decision in *National Association of Clean Water Agencies v. EPA*, 734 F.3d 1115 (D.C. Cir. 2013) (*NACWA*) to support the need for a remand and a suspension of the briefing schedule. ECF No. 1482095 at 2 (Feb. 28, 2014). But *NACWA* was decided on August 20th, 2013. Even though *NACWA* was decided six days before EPA filed a reply in support of their motion to sever the reconsideration issues, EPA did not mention *NACWA* in that reply. ECF No. 1453611. EPA specifically acknowledged that *NACWA* would be a part of this litigation in the Joint Motion to Set Briefing Format and Schedule. ECF No. 1467922 at 4 (Nov. 25, 2013). ("Specifically, Environmental Petitioners intend to challenge several different aspects of EPA's floor methodology (as well as different approaches that EPA used in setting floors for different pollutants"). *See National Ass'n of Clean Water Agencies v. EPA*, __F.3d __ 2013 WL 4417438 at *12-*31 (D.C. Cir. August 20, 2013)."). Yet EPA waited three months after this acknowledgment to file these motions. And it is now almost seven months after the *NACWA* decision.

This Court should not reward EPA for this needless delay. EPA has had almost seven months to develop a response to the *NACWA* decision and judicial

review of the many other issues in this case should not be held hostage to EPA's dilatory response to a judicial decision relating to only one issue in this case.

Therefore, although Industry Petitioners and Intervenor-Respondents support remand of the record so that any misgivings raised in *NACWA* can be addressed in this case in advance of judicial review[2], Industry Petitioners and Intervenor-Respondents oppose staying the briefing schedule. This Court has already severed several issues from this case pending EPA's completion of reconsideration of those issues and the remand of the record should not now trigger any delay in briefing other issues in the case.

II. If this Court stays briefing in this case, the Court should order that briefing recommence according to the case sequencing and timing intervals of the existing scheduling order, tolled to a new start date.

This Court has adopted a briefing schedule covering the three interrelated Clean Air Act cases [ECF No. 1477836] and ordered that the cases be heard by the same judicial panel. ECF No. 1461576.[3] That briefing schedule was developed by

[2] Industry Petitioners and Intervenor-Respondents take no position here on EPA's request for voluntary remand without vacatur.

[3] This case is one of four cases challenging interrelated EPA rules. Three of the cases address EPA action under the Clean Air Act (CAA). The fourth case — *Solvay USA, Inc. v. EPA*, No. 11-1189 (D.C. Cir.) — addresses EPA action under the Resource Conservation and Recovery Act (RCRA). EPA's proposed remand and suspension of briefing relate only to the three CAA cases. Industry Petitioners and Intervenor-Respondents do not oppose EPA's proposal to proceed with briefing of the RCRA case separately from the three CAA cases. The RCRA case was the third of the four cases to be briefed, according to the current schedule. It

all parties – including EPA – over the course of many months. With this set of motions, EPA disassociates this case from the other two Clean Air Act cases that are interdependently covered in the briefing schedule. This needlessly complicated revision of the briefing schedule just one month before briefing begins in the first of the three cases turns upside down months of careful planning by the parties. This is unnecessary. Instead, if the Court suspends briefing in this case, recommencement of briefing should be coordinated with the other cases as set forth in the January 31, 2014 scheduling order. ECF No. 1477836.

Adhering to the previously established sequencing and intervals between briefs to be filed in the three interrelated cases is in the interest of justice. The previously established order is manageable for all parties, considering that many petitioners are also intervenors and will be filing briefs in all three cases at all times. The cases were deliberately ordered and timed in a way that would best provide appropriate context to the Court considering the interrelated nature of the rules. Finally, adhering to the previous ordering and schedule is in the interest of judicial economy. It would avoid unnecessary duplication of arguments, would avoid the Court reconsidering the ordering and timing of the rules, and would allow the Court to establish a new schedule with minimal use of court resources.

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may be appropriate to adjust the briefing schedule to reflect the coordinated briefing of only three cases rather than four.

III. CONCLUSION

For the foregoing reasons, Industry Petitioners and Intervenor-Respondents support remand of the record for EPA to address the *NACWA* decision and cure any EPA-identified deficiencies; oppose suspending the briefing schedule pending a remand of the record; and oppose any amendment of the current briefing schedule for the three interrelated cases other than adjustment of the date for re-commencing briefing as necessitated by any stay of briefing this Court may order.

Dated: March 13, 2014

Respectfully submitted,

/s/ Lisa Marie Jaeger

Lisa Marie Jaeger
Sandra Y. Snyder
BRACEWELL & GIULIANI LLP
2000 K Street, N.W., Suite 500
Washington, D.C. 20006-1872
(202) 828-5844 (Telephone)

Counsel for Council of Industrial Boiler Owners

With permission of and on behalf of:

Douglas A. McWilliams
SQUIRE, SANDERS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
(216) 479-8332 (Telephone)
(216) 479-8776 (Facsimile)

Counsel for American Municipal Power, Inc.

CERTIFICATE OF SERVICE

I certify that the foregoing Response to EPA's Motion for Remand of the Record and for Partial Voluntary Remand Without Vacatur, and for Revision of the Briefing Schedule was electronically filed with the Clerk of Court on March 13, 2014, using the CM/ECF system and thereby served upon 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:

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

Dated: March 13, 2014

/s/ Lisa Marie Jaeger

Lisa Marie Jaeger
Sandra Y. Snyder
BRACEWELL & GIULIANI LLP
2000 K Street, N.W., Suite 500
Washington, D.C. 20006-1872
(202) 828-5844 (Telephone)