ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

REPLY TO THE RESPONSES TO EPA'S MOTION FOR REMAND OF THE RECORD, FOR PARTIAL VOLUNTARY REMAND WITHOUT VACATUR, AND FOR REVISION OF THE BRIEFING SCHEDULE AND OPPOSITION TO REQUESTS FOR AFFIRMATIVE RELIEF

Respondents United States Environmental Protection Agency, et al., (collectively "EPA") hereby submit this reply to the responses to EPA's motion for (1) a remand of the record to EPA for 60 days so that EPA can supplement the record 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*"), in order to provide further explanation of the analysis of variability used in setting the numeric standards; and (2) voluntary remand without vacatur of specifically identified

numeric standards so that EPA can review the appropriateness of applying that variability analysis to limited data sets in light of the *NACWA* decision. ECF No. 1482091 ("Remand Motion"). The motion also requested that briefing be stayed pending completion of the remand of the record and resume 30 days thereafter. (The Court has stayed the briefing schedule pending resolution of this motion.) EPA also hereby responds to the requests for affirmative relief incorporated into the responses.

Three responses to the motion were filed. Petitioners Council of Industrial Boiler Owners and American Municipal Power, Inc. (collectively "CIBO") support the motion for remand of the record, take no position on the motion for remand of the standards based on limited data sets, oppose staying the briefing, and request that, if the briefing is stayed, the Court retain the order and timing of the briefs in this case, *American Forest & Paper Ass'n v. EPA*, No. 11-1125, and *American Chemistry Council v. EPA*, No. 11-1141, contained in the current briefing schedule. ECF No. 1483888. Petitioners Sierra Club, et al. ("Sierra Club") oppose the motion for a remand of the record and seek affirmative relief in the form of remand without vacatur of all of the numeric emission standards in the rule. ECF No. 1485843. Sierra Club does not separately address the motion for voluntary remand without vacatur of the standards based on limited data sets. *Id.*

Petitioners American Forest & Paper Association, et al. ("AFPA") do not oppose a remand of the numeric standards based on limited data sets, but seek affirmative relief in the form of vacatur of those standards. ECF No. 1483894 at 4. Although AFPA does not oppose EPA's request to supplement the record for the remaining numeric standards, it does oppose staying of the briefing while EPA supplements the record. AFPA further requests that EPA be instructed to address these issues in the same proceeding as the standards based on limited data sets. *Id.* at 4-5. AFPA does not seek vacatur of the standards for which EPA has sought a remand of the record. *Id.* The remaining parties in the case did not submit responses to EPA's motion.

ARGUMENT

I. THE MOTION FOR REMAND OF THE RECORD SHOULD BE GRANTED

EPA seeks a remand of the record to amplify the explanation of the variability analysis, including the Upper Prediction Limit ("UPL") methodology, used by EPA in establishing the maximum achievable control technology ("MACT") standards in the rule under review. As explained in the motion, the methodology used in this rule was also used in establishing the standards for sewage sludge incinerators at issue in *NACWA*. In fact, both rules were issued on the same day. In *NACWA*, the Court found that EPA had not adequately explained how the use of its variability analysis implemented the statutory requirement that

the standards for existing sources be no less stringent than the average emissions limitation achieved by the best performing 12 percent of sources. 734 F.3d at 1142-43. The Court specifically did not find that the use of the UPL methodology was unlawful, stating "This is not to say that the upper prediction limit, which EPA applied to the average of the emissions levels recorded while testing the best-performing 12 percent, would violate the statutory standard established in § 129." *Id.* at 1143.

Instead, the Court held that EPA had not provided sufficient explanation for its use of this methodology, and rather than attempt to elucidate a more comprehensive explanation itself, the Court remanded the rule to EPA, *without vacatur*, to allow the Agency to provide the required further explanation. The purpose of the requested remand of the record in this case is to allow EPA to provide a more detailed explanation, based on the existing record, of its variability analysis, including use of the UPL methodology, in a manner that allows judicial review of the rule, including the MACT standards, to proceed as efficiently as possible. In other words, EPA seeks merely to better explain its use and application of the UPL methodology in a manner that will more fully address the portions of its original explanation that the *NACWA* Court found to be unclear. EPA will not be adding new data to the record.

Sierra Club opposes the remand of the record on the grounds (1) that the remand of the record would allow EPA to insert new factual information and statutory interpretation into the record without an opportunity for public comment, and (2) that Sierra Club would be precluded from addressing EPA's explanation without first seeking administrative reconsideration. Neither of these objections has merit.

Sierra Club's objections are based on serious misunderstandings both of what EPA stated in its motion and what this Court held in *NACWA*. EPA has not conceded that the major-source boiler standards are "legally defective" as Sierra Club asserts in its response at 7. To the contrary, as EPA stated in its motion, it is seeking a limited 60-day remand of the record solely for the purpose of supplementing the explanation of the variability analysis that the *NACWA* Court found to be too cryptic, not because the Agency believes that the standards are legally defective. Remand Motion at 7-8. EPA is seeking a remand of the record of these standards because it believes that its use of the UPL methodology in setting the standards is reasonable and supported by the record, but that a more detailed explanation of the Agency's rationale is necessary in light of the Court's decision in *NACWA*.

Sierra Club's characterization of the Court's opinion in *NACWA*, Sierra Club Response at 6, is similarly erroneous. The Court did not reject EPA's

statutory interpretation. To the contrary, as discussed above at p. 4, the Court held that it might well be reasonable, but that the Agency had not adequately explained its rationale for applying this statistical methodology. *See also* 734 F.3d at 1151 ("To sum, while we determine that EPA's use of the upper prediction limit may be lawful, we are remanding this portion of the rulemaking for further explanation . . ."). Such a remand is consistent with this Court's precedents. *See e.g., Checkosky v. SEC*, 23 F.3d 452, 462-63 (D.C. Cir. 1994) (explaining that "reviewing courts will often and quite properly pause before exercising full judicial review and remand to the agency for a more complete explanation" of an agency's action, and that doing so is not a determination that the agency's action is arbitrary, capricious or unlawful). The *NACWA* Court remanded the standards to EPA without vacatur to provide further explanation. The purpose of the requested remand of the record is to do exactly that – to provide a fuller explanation of the Agency's rationale, which will provide a proper basis for judicial review.

Sierra Club misrepresents EPA's intent when it asserts that EPA intends to add new factual information or a new statutory interpretation to the record. As stated in the Motion:

> EPA requests that the Court remand the record to EPA for 60 days to provide a further explanation of the variability analysis. At the end of that period, EPA will supplement the administrative record with that further explanation. EPA does not intend to make any other changes to the record or the standards as a result of the remand of the record.

Remand Motion at 6. To reiterate, EPA will not be adding any new factual information during the remand of the record. Nor will it be creating a new statutory interpretation. Rather, it will simply be providing a more clearly articulated explanation of the analysis of variability used in establishing the standards. It will not be changing the methodology.

The requested remand of the record is not, as Sierra Club asserts, inconsistent with the Clean Air Act or notice and comment requirements. Indeed, under Sierra Club's reasoning, a court may never direct or allow an agency to remand for further explanation without a full remand involving new opportunities for notice and comment. But that clearly is not the case. This Court's rules make a distinction between a remand of the *record* to an agency (or to a court) and a remand of the *case*. D.C. Cir. Rule 41(b). In a remand of the case, the case is closed and any judicial review of the result of the remand requires a new petition for review. In a remand of the record, however, the Court retains jurisdiction and judicial review proceeds after the remand of the record of the record is complete. A remand of the record is more limited than a remand of the case and is used to allow the agency to provide further explanations. *See, e.g., Dunlop v. Bachowski*, 421 U.S. 560, 574-75 (1975) ("Where the statement inadequately discloses his reasons, the Secretary may be afforded opportunity to supplement his statement . . . ."). That is what EPA seeks here in its proposed remand of the record.

The Court in *NACWA* remanded the UPL methodology to EPA for further explanation. The remand of the record in this case will provide that further explanation. Interested parties have already commented on EPA's use of the UPL in response to the proposed rule. While EPA responded to those comments in the final rule, the *NACWA* decision indicates that the explanation was unclear. And EPA certainly could not have directly addressed the concerns expressed in the *NACWA* decision itself at the time the rule was issued, since *NACWA* substantially post-dated the rule. The remand of the record process allows EPA to provide a fuller explanation so that meaningful judicial review can occur. Because neither the factual information in the record nor EPA's statutory interpretation will change, that process is consistent with the Clean Air Act's procedural requirements. The case has not been briefed on the merits and the Court has no basis to enter a judgment or order a remand of the case. For the same reasons, the Court has no grounds to grant AFPA's request that it order EPA to address the record issue through notice and comment rulemaking. *See* AFPA Response at 12.

There is also no basis to Sierra Club's claim (Sierra Club Response at 12-13) that the remand of the record would require a petition for administrative reconsideration before the court could consider its challenges to the numeric MACT standards. This Court has already addressed this issue. *See, e.g., Public Service Comm'n v. FERC*, 2004 WL 222900 (D.C. Cir. 2004), where the Court

remanded the record to FERC for 120 days to provide further explanation and stated, "Petitioners are not required to seek administrative rehearing of FERC's explanation on remand unless FERC decides to abandon or modify its current approach to calculating the rate of return and issues a new order to that effect." EPA is requesting the remand of the record solely to provide further explanation of its variability analysis, and will not be abandoning or modifying that approach.

The issue of whether EPA's UPL methodology is consistent with the statutory requirements was raised in comments on the proposed rule and addressed by EPA in the final rule and supporting documentation. Thus, it is not a new issue being raised for the first time on judicial review that the Agency has not had a chance to address. Accordingly, the requirement of Clean Air Act section 307(d)(7)(B), 42 U.S.C. § 7607(d)(B), and the Court's case law that EPA be given the first chance to address an issue before it is subject to judicial review is inapplicable because EPA *has* addressed the issue. The remand of the record would not change that fact. It would simply allow for a more detailed explanation that the Court can consider in its review of petitioners' claims, which is the purpose of a remand of the record as provided for in the Court's rules.

II. BRIEFING SHOULD BE STAYED PENDING COMPLETION OF THE REMAND OF THE RECORD

In the Remand Motion, EPA requested that briefing be stayed during the requested 60-day period for remand of the record and that petitioners' briefs be due

30 days after that period ends. AFPA does not object to EPA's supplementation of the record, but objects to the requested stay of briefing, requesting instead that the issues related to the UPL methodology be severed and held in abeyance while EPA conducts the remand process it has requested for the standards based on limited data sets. AFPA Response at 9-12. CIBO does not oppose the request for a remand of the record but opposes staying briefing on the other issues in the case during the remand of the record period. CIBO Response at 1.

As discussed above at p. 8, the Court has no basis to grant AFPA's request that the numeric standards for which EPA is seeking a remand of the record be remanded to the Agency for notice and comment rulemaking because the case has not been briefed on the merits and the Court has no basis to enter a judgment or order a remand. There is also no merit to AFPA's claim that briefing on other issues should proceed while EPA conducts the remand of the record. While AFPA asserts that its proposal is intended to accelerate resolution of this case, it provides no concrete explanation of how the 90-day delay in briefing requested in the Remand Motion would prejudice its members.

Moreover, AFPA's suggested approach, *i.e.*, deferring resolution of the issues associated with all of the numeric standards until EPA has addressed the standards based on limited data sets, will *increase* the time that the challenges to those standards remain pending. The remand of the record requested by EPA is

intended to address the concerns raised by the *NACWA* decision while allowing the challenges to most of the numeric standards to be resolved as expeditiously as possible. To that end, EPA has requested a 90-day delay in the briefing (60 days for the administrative remand and another 30 days to allow petitioners time to consider EPA's additional explanation before filing their opening briefs). In contrast, as stated in the Remand Motion, EPA intends to engage in a notice and comment process to review the methodology for calculating standards based on limited data sets. This process will take far longer than 90 days. Addressing the broader issues of the methodology for assessing variability in that context would thus mean that it will take far longer to resolve than if the Court grants EPA's request for the remand of the record. Meanwhile the numeric standards will remain in place[1] and the current challenges to them will remain pending throughout that period, greatly lengthening the period of uncertainty about the ultimate content of the standards that AFPA asserts prejudices its members.

There is also no basis for AFPA's claim that EPA has been dilatory in seeking to supplement the record to address the issues identified by the Court in *NACWA*. While the Court's decision was issued August 20, 2013, EPA had to

[1]While AFPA requests that the "specified standards" for which EPA has sought a full remand (the standards based on limited data sets) be vacated, AFPA motion at 4, it makes no such request for the numeric standards for which EPA has requested a remand of the record, *id.* at 4-5. Furthermore, because EPA is only requesting an opportunity to provide a more detailed explanation of its rationale for these standards, and has not conceded error, there is no basis for vacatur.

analyze the decision and determine whether there would be requests for rehearing. Before deciding on a course of action, EPA had to review the extensive record for these rules, a process that was seriously disrupted by the government shutdown in October, and then engage in its internal decision-making process. Given these circumstances, the time required for EPA to determine that a remand of the record is an appropriate way to address the issue was reasonable.

Finally, severing and briefing the other issues in the case while conducting the remand of the record for the variability analysis, as requested by CIBO, would be a highly inefficient use of the Court's and the parties' resources. It would require two separate rounds of briefing and oral argument separated by only 90 days. Petitioners present no concrete reason why resolution of the other issues 90 days sooner would avoid significant hardship, particularly where the issues related to the numeric standards would not be resolved until the second round of briefing and argument. Thus, there is no basis to deny EPA's request to stay briefing on all issues until the remand of the record is complete and then proceed with a single round of briefing and argument.

III. THERE IS NO BASIS TO VACATE THE STANDARDS THAT ARE BASED ON LIMITED DATA SETS

AFPA has moved to vacate the standards based on limited data sets for which EPA sought a voluntary remand without vacatur. No other petitioners, including ones with members at least as affected by the standards based on limited

data sets, have made a similar request. AFPA's motion should be denied. There has been no determination that those standards are "methodologically flawed," AFPA Response at 4. AFPA has presented no evidence that its members will be prejudiced by allowing the standards to remain in place, and vacatur would eliminate the environmental protections provided by the standards.

AFPA bases its request on the factors articulated by the Court in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993), for determining whether to vacate an agency action where the Court has found that the agency's decision is not adequately supported by the agency's rationale, or is otherwise unlawful. AFPA Response at 7-8. That analysis is inapplicable to this case because the Court has not found that the standards are unsupported or unlawful. Instead, the Court in *NACWA* held that it could not determine whether the standards are supported by the Agency's rationale. This 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. *Checkosky v.SEC*, 23 F.3d 452, 462-64 (D.C. Cir. 1994). As Judge Silberman explained, if agency action must be vacated in all cases where the agency has not adequately explained its reasoning, "even when the reviewing court is unsure of the agency's reasoning," it "would fundamentally alter the role of the judiciary vis-à-vis administrative agencies by forcing courts to

decide that the agency's action is either lawful or unlawful on the first pass, even where judges are unsure as to the answer because they are not confident that they have discerned the agency's full rationale." *Checkosky*, 23 F.3d at 462.

In this case, neither the Court nor EPA has determined that the standards based on limited data sets are unlawful, and thus there is no basis for the Court to vacate them. The Court in *NACWA* considered the application of the UPL to a limited data set and remanded the question to EPA to provide further explanation. 734 F.3d at 1144-45. The Court held that it could not rule on the question of the efficacy of the UPL methodology without a better understanding of the Agency's rationale. Thus, there has been no judicial determination that the standards based on limited data sets are flawed, and the Court has no basis to vacate the standards.

Contrary to AFPA's assertions, EPA has not determined that these standards are "methodologically flawed." Rather, EPA is asking for the remand of these standards only because EPA intends to conduct additional notice and comment rulemaking on those standards, which will take longer than providing a more detailed explanation of EPA's approach to variability in general. Remand Motion at 9 ("While EPA believes that it can adequately explain why the Agency's use of the UPL in general is consistent with Clean Air Act requirements through a remand of the record for a limited time, the question of whether the UPL is an appropriate statistical method for small data sets requires more analysis.") EPA has made no

determination that these standards are invalid or that they will need to be modified. The Agency simply believes that a notice and comment process will assist its analysis of the appropriateness of its methodology for assessing variability in cases with limited data sets. EPA's request for a remand does not create a presumption that the standards will be modified and provides no basis for the Court to vacate the standards.

Furthermore, AFPA has provided no factual basis for its assertion that its members will be injured if the standards are not vacated. New sources have been required to comply with the standards since the date of startup or publication of the rule in the Federal Register, whichever was later. Existing sources have until January 31, 2016 to comply with the standards in the rule, and sources can obtain up to an additional year to comply based on a demonstration that additional time is necessary for the installation of controls. 42 U.S.C. § 7412(i)(3)(B); 40 C.F.R. § 63.6(i); EPA has requested a remand to review the application of its variability methodology for standards based on limited data sets. 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. Nor has AFPA demonstrated that this would occur. Moreover, if EPA does decide that

it is necessary to revise the standards, it will consider at that time whether a change in the compliance date would be appropriate.

Thus, AFPA's assertion that its members would be prejudiced by having the standards remain in place during the remand is entirely speculative. Furthermore, AFPA's claim is further belied by its position with regard to the much larger group of standards for which EPA is seeking a time-limited remand of the record. In that instance, AFPA is requesting that EPA address those standards in a rulemaking process that would take much longer than the 60 days EPA has requested for the remand of the record. Yet, those standards would remain in effect during that remand. AFPA has not argued that those standards be vacated and would have no grounds to do so. AFPA has provided no explanation of why it would be prejudiced by allowing the standards that are based on limited data sets to remain in effect during the remand, but would not be prejudiced by having the rest of the standards remain in place during remand. The challenges to both sets of standards would remain unresolved, and the alleged problems of uncertainty would be the same in both cases.

Finally, even in those cases where the Court has found agency action to be flawed, which is not the case here, the Court retains discretion to determine that remand without vacatur is appropriate, particularly where vacatur would undermine the environmental protection values of the statute. *North Carolina v.*

EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (noting that remand without vacatur may "at least temporarily preserve the environmental values" that may have been achieved by a remanded rule); *Environmental Defense Fund v. Administrator*, 898 F.2d 183, 190 (D.C. Cir. 1990) (remand appropriate where vacatur would "at least temporarily defeat petitioner's purpose, the enhanced protection of the environmental values covered by the PSD provisions"). That principle is relevant here because vacatur of the standards would leave these facilities subject to no standards for these toxic pollutants, contrary to the intent of the statute. Vacatur would be particularly inappropriate here where neither the Court nor EPA has determined that the standards are flawed and AFPA's claim of prejudice is entirely unsupported.

IV. EPA DOES NOT OPPOSE CIBO'S REQUEST TO RETAIN THE CURRENT RELATIONSHIP BETWEEN THE BRIEFING SCHEDULES IN THIS CASE AND CASES NO. 11-1125 AND 11-1141

As noted in the Remand Motion, this Court has ordered that this case be heard by the same panel as *American Forest & Paper Ass'n v. EPA*, No. 11-1125; *American Chemistry Council v. EPA*, No. 11-1141; and *Solvay USA, Inc. v. EPA*, No. 11-1189; and has adopted a consolidated briefing schedule for the four cases. The Court has stayed briefing in this case and Nos. 11-1125 and 11-1141 pending resolution of the Remand Motions in these cases. In the Remand Motion, EPA proposed that briefing proceed in accordance with the Court's original schedule in

No. 11-1189 (which is not affected by the Remand Motions), that the briefing schedule in this case recommence 30 days after completion of the remand of the record, that briefing in No. 11-1125 recommence 60 days after completion of the remand of the record, and that briefing in No. 11-1141 (for which no remand of the record is requested) recommence 30 days after the Remand Motion is resolved. CIBO has requested that the sequence and timing of the briefs in this case and Nos. 11-1125 and 11-1141 from the Court's original schedule be preserved. EPA does not oppose this request provided that the combined briefing schedule begins 30 days after completion of the remand of the record.

CONCLUSION

EPA's motion for remand without vacatur of the identified standards and to remand the record for 60 days should be granted, and Sierra Club's and AFPA's requests for affirmative relief should be denied.

Respectfully submitted,

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April 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2014, I caused a copy of the foregoing document to be served by the Court's CM/ECF system on all counsel of record in this matter.

/S/ Norman L. Rave, Jr.
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