

## ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN FUEL & PETROCHEMICAL		)	
MANUFACTURERS, et al.,		)	
		)	
Petitioners,		)	No. 12-1249
		)	Consolidated with
v.		)	12-1330
		)	
ENVIRONMENTAL PROTECTION AGENCY,		)	
et al.,		)	
		)	
Respondents.		)	
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UNOPPOSED MOTION FOR VOLUNTARY PARTIAL REMAND AND STAY

Respondents the United States Environmental Protection Agency and Bob Perciasepe, Acting Administrator (“EPA”) move for a voluntary remand of one of EPA’s determinations at issue in this case. Specifically, EPA requests this relief so that it may reevaluate and revise as appropriate its May 22, 2012, decision to deny a petition to reconsider the 2011 renewable fuel standard for cellulosic biofuel. Because EPA’s reevaluation may moot or otherwise resolve the remaining issues in this case, EPA also moves to stay the litigation pending EPA’s final action on remand. No party opposes the relief sought in this motion.

In support of this motion, EPA states as follows:

1. This petition seeks review of a final action of EPA regarding the renewable fuel standard program under section 211(o) of the Clean Air Act, 42 U.S.C. § 7545(o). EPA's final action responded to two administrative petitions, one seeking reconsideration of the 2011 renewable fuel standards for cellulosic biofuel and for advanced biofuel, and one seeking a waiver of the 2011 standard for cellulosic biofuel.

2. In *American Petroleum Institute v. EPA*, No. 12-1139 (D.C. Cir. Jan. 25, 2013), the Court reviewed EPA's decision to adopt renewable fuel standards for cellulosic biofuel and for advanced biofuel for 2012. Although the Court upheld several aspects of EPA's method for determining the cellulosic biofuel standard the Court held that because EPA "did not take neutral aim at accuracy," EPA's method for determining the cellulosic biofuel standard was "an unreasonable exercise of agency discretion." Slip op. at 4. The Court therefore vacated and remanded the 2012 cellulosic biofuel standard to EPA for further proceedings. The Court upheld EPA's determination regarding the advanced biofuel standard.<sup>1</sup>

3. EPA used basically the same method for determining the cellulosic biofuel standard for 2011 as it did for 2012, and the petitions for reconsideration of

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<sup>1</sup> The Solicitor General of the U.S. Department of Justice has not yet made a decision whether or not to seek further review of the court's decision in the No. 12-1139.

the 2011 standard raised the same argument that the Court addressed in *API*, No. 12-1139, *i.e.*, that EPA cannot set a cellulosic biofuel standard with a tilt for promoting growth in the cellulosic biofuel industry.

4. This Court possesses ample discretion to grant a voluntary partial remand to EPA. Courts have a “tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision into question . . . [and] commonly grant such motions [for remand] . . . rather than wasting the courts’ and the parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete.” *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). When EPA established the 2011 cellulosic biofuel standard that is at issue in this case, EPA used basically the same method for projecting cellulosic biofuel production as EPA used when it established the 2012 standard. Under these circumstances, voluntary remand is particularly appropriate as it is unlikely that upon reevaluation EPA would simply re-affirm the 2011 cellulosic biofuel standard without further analysis or explanation. *See Allied-Signal, Inc. v. United States Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (in determining whether remand is appropriate, the court should consider “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed”).

5. The Court should stay the litigation during the remand. Petitioners also challenge EPA's decision not to waive the 2011 cellulosic biofuel standard, but EPA's decision on remand could render moot the need for a waiver. The Court should therefore withhold consideration of the remaining issues pending further action by EPA.

6. Undersigned counsel for Respondents has sought the position on this motion from counsel for Petitioners American Fuel & Petrochemical Manufacturers, Western States Petroleum Association, and American Petroleum Institute, and from counsel for Intervenor Advanced Biofuels Association, Advanced Ethanol Council, American Coalition for Ethanol, Biotechnology Industry Organization, Growth Energy, National Biodiesel Board, and Renewable Fuels Association. No Petitioner or Intervenor objects to the relief sought in this motion.

Wherefore, EPA respectfully requests the Court to remand to EPA the decision to deny the petition to reconsider the 2011 renewable fuel standard for cellulosic biofuel, and to stay this litigation while EPA reevaluates that decision, with status reports due every 90 days.

Respectfully submitted,

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April 3, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2013, I electronically filed the foregoing with the Court by using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

/s/ Daniel Dertke  
Daniel Dertke