

**ORAL ARGUMENT HELD DECEMBER 3, 2015
DECISION ISSUED JULY 29, 2016**

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

No. 11-1108 (and consolidated cases)

UNITED STATES SUGAR CORPORATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

**On Petition for Review of Final Action of the
United States Environmental Protection Agency**

EPA'S PETITION FOR PANEL REHEARING AS TO REMEDY

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INTRODUCTION

Pursuant to Fed. R. App. P. 40, Respondent United States Environmental Protection Agency (“EPA”) seeks panel rehearing of the Court’s vacatur of emission standards “for all major boiler subcategories that would have been affected had the EPA considered all sources included in the subcategories.” Slip op. at 84. EPA is not seeking rehearing of the merits of the decision, but rather just seeking rehearing as to the remedy. Specifically, EPA is requesting that the major boiler standards be remanded to EPA without vacatur for the Agency to conduct rulemaking to determine which standards are “affected” and to modify them in accordance with the Court’s opinion. Remand without vacatur is justified because: (1) the Environmental Petitioners sought only remand, not vacatur, of the standards (and Industry Petitioners did not challenge these standards on this basis); (2) vacatur of the standards during the period required to address the Court’s remand would eliminate the environmental benefits achieved by the existing standards (which Petitioners challenged as being insufficiently stringent), contrary to the intent of the statute and the interests the Environmental Petitioners sought to vindicate in bringing this challenge; (3) a remand would not create undue hardship for source operators because the standards have been in effect since January 31,

2016, existing sources and new sources that have commenced operation¹ have already made whatever capital investments are necessary for compliance,² and any new sources not yet constructed will have adequate time to prepare for compliance; and (4) vacatur would be disruptive because it would mean that some sources would be subject to standards while others were not, and some boilers would be subject to standards for some pollutants but not for others.

BACKGROUND

This case involves consolidated petitions for review of emission standards established by EPA under section 112 of the Clean Air Act (“CAA” or “the Act”), 42 U.S.C. §7412, for hazardous air pollutants (“HAPs”) emitted by industrial, commercial and institutional boilers and process heaters (collectively “Boilers”) located at “major” sources. EPA promulgated these regulations through two rulemakings: “National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial and Institutional Boilers and Process Heaters,

¹ A “new source” is “a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source.” 42 U.S.C. § 7412(a)(4).

² Clean Air Act section 7412(i)(3)(B) provides that an existing source can apply for an extension of up to one year if necessary for the installation of controls. 42 U.S.C. § 7412(i)(3)(B). Any source that obtained such an extension should be at least well under way to installing the needed controls to meet the maximum extension date of January 31, 2017.

Final Rule,” 76 Fed. Reg. 15,608 (March 21, 2011) (“2011 Rule”); and EPA’s final action on reconsideration of the 2011 Rule, 78 Fed. Reg. 7138 (January 31, 2013) (“2013 Rule”) (referred to collectively as the “Major Boilers Rule.”).³

Section 7412 requires EPA to establish national emission standards for designated categories and subcategories of both new and existing major sources of HAPs that “require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable)” that the Administrator determines is achievable based on existing technology, taking cost and other specific factors into consideration. 42 U.S.C. §7412(d)(2); Slip op. at 5-8. Accordingly, section 7412 emission standards are referred to as “maximum achievable control technology” or “MACT” standards.

The establishment of MACT standards is essentially a two-step process and is different for new sources and existing sources. Slip op. at 6-8. Section 7412(d)(3) first specifies the absolute minimum level of emission reductions covered sources must achieve. For new sources, this MACT standard “shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator.” 42 U.S.C.

³ Aspects of the Rule not relevant to this petition for rehearing were subsequently amended in response to administrative petitions for reconsideration. 80 Fed. Reg. 72,790 (Nov. 20, 2015).

§7412(d)(3). Emission standards for existing sources in subcategories with 30 or more sources may not be less stringent than “the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emission information).” *Id.* Where there are fewer than 30 sources in a category or subcategory, EPA is to set the standard based on the best performing five sources. *Id.* This minimum level of emission control required for both new and existing sources is called the “MACT floor.”

The Major Boilers Rule establishes numeric MACT standards for 18 subcategories each of new and existing Boilers for four different pollutants: HAP metals⁴; hydrogen chloride (“HCl”); mercury (“Hg”); and carbon monoxide as a surrogate for organic HAPs (“CO”). 40 C.F.R. Part 63 Subpart DDDDD Tables 1, 2, and 3.

The subcategories in the Rule are generally based on the primary fuel the source is designed to burn, e.g., coal or biomass. However, in order to accommodate boilers combusting more than one fuel and to ensure that all mixed-fuel boilers are subject to numeric emissions limits, subcategories are generally defined based on whether a boiler burns greater than a specified percent of the relevant type of fuel. *See Slip op.* at 133-36. For example, the subcategory

⁴ The Rule provides that the HAP metals standard can be met by testing for either total selected metals (“TSM”) or particulate matter. 40 C.F.R. Part 63 Subpart DDDDD Table 2.

of units designed to burn biomass includes any boiler that burns at least ten percent biomass, in combination with other fuels, on an annual basis.

When identifying the best-performing sources in each subcategory in the first step of the floor-setting process, EPA only considered emissions data from sources that were burning at least ninety percent of the subcategory fuel during the emissions test for existing sources, and one hundred percent of the subcategory fuel for new sources, because it did not consider other sources to be representative of the sources in the source category. *See* Slip op. at 81-84. Environmental Petitioners challenged this aspect of EPA's methodology, and the Court granted that aspect of their petition. Although the Environmental Petitioners had only sought remand of the standards, the Court, without any analysis of remedy, vacated "the MACT standards for all major boiler subcategories that would have been affected had the EPA considered all sources included in the subcategories." Slip op. at 84.

ARGUMENT

The Court has repeatedly recognized that in granting a petition for review of agency action, it has equitable discretion to remand the action to the agency without vacatur. Slip op. at 81; *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008). In particular, the Court has remanded without vacatur where vacating a rule would "at least temporarily defeat . . . the enhanced protection of the

environmental values covered by [the EPA rule at issue],” *North Carolina*, 550 F.3d at 1178, quoting *Env’tl. Def. Fund, Inc. v. Adm’r of the United States EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990), or “would have serious adverse implications for public health and the environment,” *North Carolina*, 550 F.3d at 1178 (Rogers, J., concurring in granting rehearing in part); *Davis County Solid Waste Management v. EPA*, 108 F.3d 1454, 1458 (D.C. Cir. 1997). That principle clearly applies here. Vacatur of the affected standards would eliminate the Rule’s limitations on emissions of hazardous air pollutants, thus allowing greater emissions of them until EPA can complete a rulemaking and put replacement standards into effect. This result is directly contrary to that sought by the Environmental Petitioners, as recognized by the Court. Slip op. at 84 (“For this reason, an unusually high-performing source should be considered; indeed its performance suggests that a more stringent MACT standard is appropriate.”)

In determining whether to vacate or remand without vacatur, the Court has also utilized a two-part test where it looks at the likelihood of a cure on remand and the likelihood that a substantial disruptive effect would result from vacatur. Slip op. at 81. That test is also met here. There is no question that EPA can promulgate revised standards in accordance with the Court’s opinion. Furthermore, vacatur will result not only in adverse environmental consequences, but will be disruptive in that sources will be subject to standards for some

pollutants, but not others, with the mix varying depending on the particular subcategory a source falls in.

A. Remand without Vacatur Is Appropriate to Avoid Adverse Environmental Impacts.

The Major Boilers Rule established four numeric MACT standards, i.e., for mercury, HCl, CO, and HAP metals, for new and existing sources in each of 18 subcategories, for a total of 66 subcategory/numeric standard combinations. 40 C.F.R. Part 63 Subpart DDDDD Tables 1 and 2.

EPA has tentatively determined that the Court's opinion would result in the vacatur of 11 of the 33 numeric standards applicable to existing sources, and 9 of the 33 numeric standards for new sources. Declaration of Panagiotis E. Tsirigotis ("Tsirigotis Decl.") at ¶ 9.⁵

⁵ For the numeric standards that EPA has tentatively determined would not be vacated, there were either no excluded sources or including the excluded sources in the MACT floor analysis would not change the standard. EPA understands the Court's opinion to require vacatur of those standards for which the MACT floor would have been different had EPA included all sources for which it had valid emissions information in its MACT floor analysis. Environmental Petitioners' briefs did not identify specific standards being challenged, but rather facially challenged EPA's methodology. *Env't. Pets. Br.*, ECF No. 1537229, at 29-32; *Env't. Pets. Reply Br.*, ECF No. 1537231, at 8-13. The Court's Order similarly does not identify specific standards, but vacates "the MACT standards for all major boiler subcategories that would have been affected had the EPA considered all sources included in the subcategories." Slip op. at 84. EPA is seeking to have all the numeric standards remanded to the Agency, in part so that the Agency can determine through rulemaking which standards are "affected" and thus require revision consistent with the Court's opinion. If the Court denies rehearing, EPA

In short, the vacatur required by the Court's opinion would eliminate many of the emission controls required by the Rule, a result not intended by the Environmental Petitioners, and EPA believes not intended by the Court. Furthermore, the vacated standards represent a disproportionately large percentage of the emission reductions anticipated from the Rule. EPA has not calculated the emission reductions associated with all of the standards that would be vacated. However, EPA has determined that vacatur of the HCl and mercury standards for existing sources in the existing solid fuel subcategory alone, which would apply to 1,100 sources, could increase emissions of HCl by 37,000 tons, emissions of sulfur dioxide (which is a collateral benefit of the Rule) by 570,000 tons per year, and emissions of mercury by 0.5 to 1.5 tons per year.⁶ Tsirigotis Decl. at ¶ 10. EPA also anticipates that vacatur would result in the loss of 120 tons per year in

requests that the Court confirm that EPA has properly understood the scope of the vacatur.

⁶ EPA believes that vacatur of these standards, i.e. HCl and mercury for all solid fuel subcategories, is particularly inappropriate because these standards are responsible for a large percentage of the decrease in emissions from the Rule, and EPA's preliminary analysis is that including the formerly excluded sources in the MACT floor analysis would result in the standards becoming more stringent by approximately 4 percent for mercury and 10 percent for HCl. Tsirigotis Decl. at 10. Affected sources are already required to be in compliance with the existing standards, and thus have already installed whatever control equipment they believe necessary to meet those standards, and the anticipated changes to these standards would generally not require facilities to incur capital expenses to install additional capital equipment. *Id.*

reductions in emissions of non-mercury HAP metals, as well as 15,800 tons of reductions in fine particulate matter that are another collateral benefit of the Rule.

Id. at ¶ 11.

Environmental Petitioners did not request vacatur, but rather specifically requested that the standards be remanded to EPA for revision. *Env't. Pets. Br.*, ECF No. 1537229, at 52; *Env't. Pets. Reply Br.*, ECF No. 1537231, at 27. Moreover, vacatur of the existing standards exacerbates, rather than ameliorates, the injury that Environmental Petitioners sought to remedy, i.e., exposure to the emissions of HAPs from boilers. Remanding the standards without vacatur thus provides the Environmental Petitioners with a more effective remedy than does vacatur. Counsel for Environmental Petitioners have represented that they support the remedy sought in this petition for rehearing.

Furthermore, remand without vacatur would not prejudice covered sources. The existing standards became effective on January 31, 2016, and thus existing sources are already required to be in compliance with the standards. Moreover, the industry petitioners did not challenge these standards on this basis. A remand will simply require them to continue doing what they are already doing. Once EPA completes action on the remand, after notice and comment rulemaking, existing sources will have a reasonable time to come into compliance with any revised standards. New sources that commence operation prior to proposal of revised

standards will have been planning to comply with the current new source standards and should be able to comply with them. Subsequent new sources will have adequate time to enable them to comply with the revised new source standards once they commence operation.

Accordingly, remand without vacatur fits well within the Court's established practice of declining to vacate environmental standards as too lax when doing so would further decrease the environmental benefits the statute is intended to achieve. *North Carolina*, 550 F.3d at 1178; *Env'tl. Def. Fund*, 898 F.2d at 190; *Davis County*, 108 F.3d at 1458.

B. Remand Without Vacatur Is Appropriate under the *Allied Signal* Factors.

The Court in this case remanded other provisions of the Rule without vacatur after consideration of the factors articulated in *Allied-Signal v. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993). Slip op. at 81, citing *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197-98 (D.C. Cir. 2009). As the Court explained, remand without vacatur is appropriate “where there is a likelihood of (1) cure on remand, and (2) a substantial disruptive effect that would result from vacatur.” *Id.* Those factors favor remand without vacatur of the numeric MACT standards as well.

There is no question that EPA on remand can cure the problem the Court found with the Rule. This is not an issue of whether EPA has authority to regulate

these sources or authority to regulate emissions of these pollutants. Rather, the issue is solely how EPA calculated the particular numeric standards in the Rule. On remand, the Agency will recalculate and repromulgate the affected standards in accordance with the Court's holding, using notice and comment rulemaking. That will cure the problem identified by the Court. Significantly, as discussed above, vacatur of the standards exacerbates the problem that the Environmental Petitioners sought to address.

Vacatur would also cause substantial disruption. First, as discussed above, vacatur will disrupt the statutory scheme by eliminating most of the emission standards regulating emissions of HAPs from boilers. It may also cause disruption to States that have been relying on the reductions to be achieved by the Rule in their planning to meet the 2010 revised National Air Quality Standard for sulfur dioxide. EPA, Guidance for 1-Hour SO₂ Nonattainment Area SIP Submissions, available at https://www.epa.gov/sites/production/files/2016-06/documents/20140423guidance_nonattainment_sip.pdf. Second, it will create confusion for covered sources, which have been required to comply with the Rule since January 31, 2016, because sources will be subject to some but not all requirements of the Rule, and sources in different subcategories will be subject to different combinations of standards. Thus, all sources will continue to be subject

to the work practices in the Rule, including those for startup and shutdown, but will be subject to either no numeric standards or some subset of them.

Moreover, as discussed above, remand without vacatur will not impose an unreasonable burden on sources. Existing sources covered by the Rule have been required to be in compliance since January 31, 2016, and thus should already have installed whatever control and monitoring equipment is necessary for compliance. It is not unreasonable for covered sources to continue to comply with the statutorily-mandated standards while EPA conducts the revised analysis required by the Court's opinion.

CONCLUSION

This petition for rehearing should be granted, and the vacatur of the numeric standards converted to a remand without vacatur to avoid the environmental consequences of vacatur.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2016, 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.
Norman L. Rave, Jr.