DECIDED ON JULY 14, 2015

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

ENERGY FUTURE COALITION, *et al.*,	)	
Petitioners,	)	
v.	)	No. 14-1123
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	
Respondents.	)	

MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF PETITION FOR PANEL REHEARING

Petitioners respectfully request leave to file the attached Reply in support of their Petition for Panel Rehearing. Counsel for Respondents United States Environmental Protection Agency and Gina McCarthy ("EPA") has advised that EPA does not consent to this Motion. On September 23, 2015, Counsel for Petitioners asked Counsel for Intervenors American Fuel & Petrochemical Manufacturers and American Petroleum Institute ("Petroleum Intervenors") whether they would consent. As of the time of filing, Counsel for Petroleum Intervenors has not indicated whether they consent.

In support of this Motion, Petitioners declare the following:

1. On September 4, 2015, this Court ordered EPA and the Petroleum Intervenors to respond to the Petition for Panel Rehearing.

2. On September 21, 2015, EPA and the Petroleum Intervenors duly filed their Responses.

3. A Reply is warranted to elucidate EPA's agreement with key points of the Petition for Panel Rehearing, to address the limited points of disagreement that remain, and to explain why limited panel rehearing is necessary.

4. In particular, a Reply is warranted to explain why, contrary to the arguments of EPA and the Petroleum Intervenors, footnote 3 of the Court's opinion will not avoid the harms that will flow from the Court's statements, which EPA discounts as dicta, that the "commercially available" criterion "implements" and is, at the very least, "rooted in" 42 U.S.C. § 7525(h). *Energy Future Coal. v. EPA*, 793 F.3d 141, 143, 146 (2015).

5. A Reply is also warranted to answer the Petroleum Intervenors' suggestion that Petitioners "waived" their argument—agreed to by EPA—that 42 U.S.C. § 7525(h) does not require equivalence between test fuels and current market fuel, even though EPA did not rely on that provision in its brief or in the rulemaking proceeding and disclaims it now as a source of authority for the challenged rule. EPA Response 5.

WHEREFORE, Petitioners respectfully request that this Motion be granted, and that the Court permit Petitioners to file the attached Reply.

Respectfully submitted,

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September 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

/s/ Adam R.F. Gustafson
September 24, 2015 Adam R.F. Gustafson

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On Petition for Review from the Environmental Protection Agency

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REPLY IN SUPPORT OF PETITION FOR PANEL REHEARING

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INTRODUCTION

Although EPA ostensibly opposes panel rehearing, the agency's Response actually supports the Petition. This Court should amend its opinion to clarify that, as the principal parties agree, 42 U.S.C. § 7525(h) imposes no limitation on EPA's discretion to approve forward-looking test fuels.

ARGUMENT

A. EPA Agrees that the Court's Reference to § 7525(h) Is Unnecessary Because § 7525(h) Does Not Govern Test Fuel Content, and EPA Does Not Object to an Amended Opinion.

EPA agrees with all of the key points of the petition for panel rehearing. The agency agrees with Petitioners that "EPA did not promulgate the challenged rule pursuant to 42 U.S.C. § 7525(h)," EPA Response 5, and that "the Court's references to § 7525(h)" therefore "are not necessary to the result," *id.* at 6; *see id.* at 3. EPA also agrees with Petitioners that the agency retains discretion "to approve an alternative test fuel that is not currently on the market" and that the agency may base such a decision on "*future* market projections." *Id.* at 7 n.3 (emphasis added). Furthermore, EPA agrees that the "actual current driving *conditions*" requirement of § 7525(h) does not limit test fuel *content*, since the agency interprets that statute, as Petitioners suggested, to govern the attendant circumstances of driving and fueling, including the test

procedure regulations that Petitioners identified. *Compare* Pet'n for Panel Reh'g 9-10 (citing, *inter alia*, 40 C.F.R. § 86.132-96(b)(1), (c), (f)(1), (j)(2)(iv); *id.* § 86.129-94(d)(1)), *with* EPA Response 5 n.1 (citing 61 Fed. Reg. 54852 (Oct. 22, 1996), which applied the above-cited regulations to the revised federal test procedure at §§ 86.132-00 and 86.001-21(b)(10)(iii)).

Critically, EPA "does not object if the Court wishes to re-affirm . . . that the Court's opinion is not interpreting § 7525(h)" to require test fuels to mirror current market fuels "or otherwise purporting to address issues that were not before the Court." *Id.* at 6 n.2. And there is no dispute that § 7525(h) formed no part of the agency's rationale in the rulemaking proceeding. *See* Pet'n for Reh'g 4, 5.

B. Footnote 3 Reserved the Question of EPA's Interpretive Discretion Under § 7525(h), Not the Threshold Question Whether that Statute Applies in the First Place.

EPA and the Petroleum Intervenors both suggest that footnote 3 of the Court's opinion obviates rehearing. That footnote reserves the question whether EPA might interpret § 7525(h) sufficiently broadly to permit the use of test fuels that are not currently available in commerce. *Energy Future Coal. v. EPA*, 793 F.3d 141, 147 n.3 (2015). But the footnote assumes—as the surrounding text clearly concludes—that § 7525(h) governs test fuel content and that EPA therefore may approve forward-looking test fuels only if it can

do so "consistent with th[at] statute." *Id.* Indeed, the opinion finds that limiting test fuels to existing market fuels is "[c]onsistent with [§ 7525(h)'s] directive," 793 F.3d at 146, and thus identifies § 7525(h) (together with the "sub-sim" statute requiring market fuel to be substantially similar to an existing test fuel) as the cause of any catch-22 blocking innovation in fuel content.[1]

Under the logic of footnote 3, even if the commercial availability "requirement" were merely "rooted in" and not "compelled by" § 7525(h), EPA could "relax" that "requirement"—which the agency already denies is required at all, *see* EPA Response 3 n.7—only if EPA could do so without violating § 7525(h)'s "actual current" standard, as applied to fuel content. *Id.* at 147 n.3.[2] That is precisely the circumstance Petitioners seek to avoid, because it is inconsistent with the Clean Air Act's structure and with EPA's

[1] EPA says the Court "reject[ed] Energy Future's assertion that the regulation would be impossible for vehicle manufacturers to satisfy," EPA Response 1, but that is the very question the Court reserved, finding that whether "a so called catch-22 exists . . . has been neither established nor conceded." 793 F.3d at 147.

[2] EPA gamely asserts that the Court "was not offering a definitive or binding interpretation of 42 U.S.C. § 7525(h)," EPA Response at 2, but the opinion states, without limitation, that under the Clean Air Act, "EPA's test fuel regulations must 'reflect the actual current driving conditions . . . relating to fuel,' " 793 F.3d at 147 (quoting 42 U.S.C. § 7525(h)). The clear implication is that the relevant "test fuel regulations" include the regulation at issue here, relating to fuel content.

interpretation of § 7525(h) to refer to driving and fueling *conditions*, not fuel *content*. An automaker requesting a forward-looking test fuel should not have to argue that the statutory phrase "*actual current* driving conditions" embraces *projected future* driving conditions as well. That phrase is simply not relevant to the question of test fuel *content*.

C. An Amended Opinion Is Necessary To Avoid Undermining EPA's Discretion and the Purposes of the Clean Air Act.

Petitioners appreciate EPA's confidence that such a bold interpretation of the words "actual" and "current" will prevail, thereby preserving the agency's "ample discretion to . . . approve an alternative test fuel that is not currently on the market." EPA Response at 7 n.3. But this very case demonstrates that not every interested party will share EPA's view. *See* Petroleum Br. 13 (endorsing comments on "the impropriety of EPA's 'forward-looking' approach" to test fuels); *id.* at 25-27.

Likewise, Petitioners are in no position to dispute EPA's suggestion that the opinion's discussion of § 7525(h) can be disregarded as dicta. *See* EPA Response 5. But others will likely disagree. *Cf. Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 673 (D.C. Cir. 2013) ("Where . . . there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is *obiter dictum*, but each is the judgment of the

court, and of equal validity with the other." (quotation marks and brackets omitted)).

EPA's discretion will be preserved more robustly if the opinion is amended to clarify that § 7525(h)'s "actual current" standard governs fuel-related driving *conditions* but not fuel *content*—or, at the very least, to defer that question to a future case.

D. Petitioners Did Not Waive this Argument, Because EPA Did Not Rely on § 7525(h) in its Rulemaking or Briefing.

Instead of responding to Petitioners' statutory argument, Petroleum Intervenors claim it is "waived," because Petitioners' reply brief did not address the citation of § 7525(h) on page 25 of the Intervenors' brief. That argument fails for three reasons.

First of all, not even the Petroleum Intervenors argued that the "commercially available" criterion is required by § 7525(h). That theory originated with the Court. The Intervenors asserted only that "[t]he 'commercially available' criterion . . . is *consistent* with . . . § 7525(h)," and speculated that testing with novel fuels "would not *necessarily* reflect actual current driving conditions relating to fuel." Petroleum Br. 25 (emphases added). Until the Court's decision, Petitioners' had no reason to dispute the proposition that the challenged rule "implements" § 7525(h), or is "rooted in"

or "compelled by" that statute. *Energy Future Coal. v. EPA*, 793 F.3d 141, 143, 146 (D.C. Cir. 2015).

Second, even if the Intervenors had articulated the Court's theory of § 7525(h), that theory formed no part of EPA's reasoning in the Tier 3 rulemaking proceeding. Such *post hoc* justifications, as Petitioners argued in their reply brief, are not properly before the Court. Pet. for Reh'g 4, 5; *accord* EPA Response at 6 n.2 (agreeing that § 7525(h) was "not before the Court"). Under *SEC v. Chenery Corp.*, 313 U.S. 80, 87 (1943), the Court may not consider an intervenor-proposed rationale for agency action that was not part of the agency's own reasoning. *See S. Cal. Edison Co. v. FERC*, 603 F.3d 996, 1001 (D.C. Cir. 2010). And the requirement that agency action be affirmed only on the basis of the agency's own reasoned decisionmaking cannot be waived by the parties. *See Gen. Chem. Corp. v. United States*, 817 F.2d 844, 853 (D.C. Cir. 1987).

Finally, even if Petitioners had forfeit their argument concerning § 7525(h), this Court should exercise its discretion to consider it. This Court has discretion to consider forfeit arguments, especially in "extraordinary situations in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process." *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 427 (D.C. Cir. 1992). The extraordinary

circumstances in this case include the purely legal nature of the question; the absence of § 7525(h) from the agency's rulemaking rationale and briefing, *see* Petition for Panel Reh'g 5-6; the conflict between the Court's legal theory and EPA's recent practice, *see id.* at 7-8; the conflict between EPA's briefing and its own oral argument, *see id.* at 6 n.3; the opinion's potential to limit EPA's discretion to approve those fuels; the necessity of forward-looking test fuels for other provisions of the Clean Air Act to function, *see id.* at 10-12; and the harmful environmental and health effects that would result from a dysfunctional Clean Air Act. These circumstances would justify the court's review even if Petitioners had somehow forfeit their argument concerning § 7525(h).

Moreover, before filing their reply brief, Petitioners sought leave to exceed the word limit, based on "the complexity of this case, the number of issues including new issues raised in the two Respondents' briefs, and the combined length of the two Respondents' briefs." Motion for Leave to Exceed the Page Limit 5, ¶ 13. Indeed, Petitioners stated that they could not "adequately reply to the two Respondents' briefs in this case and their different approaches to the challenged rule in 7,000 words," *id.* at 4, ¶ 8, in part because "Intervenors do not adopt the Government's new interpretation of the challenged rule," *id.* at 5, ¶ 12. The Court denied Petitioners' motion as moot

after Petitioners filed a 7,000-word reply brief on the night it was due. Due to space constraints, Petitioners' reply brief necessarily focused on EPA's view of its legal authority, rather than the Petroleum Intervenors' view. Under these circumstances, it would be appropriate for the Court to consider Petitioners' arguments concerning § 7525(h), even if they had technically been forfeit.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their petition for panel rehearing and amend the opinion.

Respectfully submitted,

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September 24, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Calisto MT 14-point font.

/s/ Adam R.F. Gustafson
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September 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

/s/ Adam R.F. Gustafson
September 24, 2015 Adam R.F. Gustafson