

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES SUGAR)	
CORPORATION, <i>et al.</i> ,)	
)	
<i>Petitioners,</i>)	
)	
v.)	Docket No. 11-1108
)	(and consolidated cases)
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
<i>Respondents.</i>)	
AMERICAN FOREST & PAPER)	
ASSOCIATION, <i>et al.</i> ,)	
)	
<i>Petitioners,</i>)	
)	
v.)	Docket No. 11-1125
)	(and consolidated cases)
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
<i>Respondents.</i>)	
AMERICAN CHEMISTRY)	
COUNCIL, <i>et al.</i> ,)	
)	
<i>Petitioners,</i>)	
)	
v.)	Docket No. 11-1141
)	(and consolidated cases)
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
<i>Respondents.</i>)	

ECO SERVICES OPERATIONS LLC,)	
<i>et al.</i> ,)	
<i>Petitioners</i> ,)	
)	
v.)	
)	Docket No. 11-1189
U.S. ENVIRONMENTAL)	(and consolidated cases)
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
<i>Respondents</i> .)	
)	

MOTION TO CALENDAR ORAL ARGUMENT IN THE ABOVE-CAPTIONED CASES THIS TERM

On October 16, 2013, this Court granted EPA’s request for the same panel to hear oral argument in four related cases: (1) the Industrial Boiler Major Source (“Major Source Boiler”) Rule litigation, Case No. 11-1108 and consolidated cases; (2) the Industrial Boiler Area Source (“Area Source Boiler”) Rule litigation, Case No. 11-1141 and consolidated cases; (3) the Commercial/Industrial Solid Waste Incinerators (“CISWI”) Rule litigation, Case No. 11-1125 and consolidated cases; and (4) the Nonhazardous Secondary Materials (“NHSM”) Rule litigation, Case No. 11-1189 and consolidated cases.¹ The NHSM Rule establishes which combustion materials are solid waste. Combustion units that burn solid waste are regulated as incinerators under the CISWI Rule, while those that do not are

¹ Order (Oct. 16, 2013), Doc. 1461576 (Case No. 11-1108), Doc. 1461579 (Case No. 11-1125), Doc. 1461582 (Case No. 11-1141), Doc. 1461584 (Case No. 11-1189).

regulated as boilers under either the Major Source Boiler Rule or the Area Source Boiler Rule (depending on the source's level, or potential level, of hazardous air pollutant emissions). The Court has not yet scheduled oral argument in the cases concerning these rules.

Movants² respectfully request that the Court schedule oral argument in all four cases before the end of this term. Scheduling oral argument this term will enable the Court to issue its decisions in these related cases before the existing source compliance date of January 31, 2016 in the Major Source Boiler Rule and will also avoid undue delay between conclusion of briefing and decision in the NHSM Rule litigation.

At a minimum, Movants request that the Court schedule oral argument in the NHSM Rule litigation (Case No. 11-1189) before the end of this term. As discussed further below, prompt resolution of the NHSM Rule litigation before the end of this term will provide the parties with additional certainty as to the Clean Air Act rule that applies to a source. This certainty would avoid, or at least minimize, the occurrence of situations where owners and operators have worked to comply with a given rule (either one of the boiler rules or the CISWI Rule) only to discover they have worked towards compliance with the wrong regulation.

² Movants are listed, by case number, in the signature blocks to this motion.

Respondents take no position on this motion provided that all four cases are heard by the same panel. The following parties also take no position on the motion: Association of American Railroads (Petitioner in Case No. 11-1189) and JELD-WEN, inc. (Petitioner and Intervenor-Respondent in Case No. 11-1108; Intervenor-Respondent in Case No. 11-1189). Environmental Petitioners take no position on this motion but request that oral argument not be scheduled in Case No. 11-1125 (CISWI Rule case) or Case No. 11-1141 (Area Source Boiler Rule case) between May 7, 2015 and May 15, 2015. All other parties contacted do not oppose the motion. Counsel for American Forest & Paper Association (“AF&PA”) *et al.* in Case No. 11-1189 also requests that oral argument not be scheduled between April 14 and 16, 2015.

PROCEDURAL HISTORY

Movants have consistently sought expeditious resolution of these cases. In a motion filed on July 8, 2013, EPA requested that the same panel hear all four cases and also requested that oral argument in these cases be held “on the same day, or on consecutive days” given the relationship between the cases.³ A number of petitioners, including some signatories to this motion, opposed EPA’s motion out of concern that assigning all four cases to a single panel could delay the resolution

³ Respondent EPA’s Motion to Have Cases Heard by the Same Panel at 2, 4-5 (July 8, 2013), Doc. 1445600 (Case No. 11-1108), Doc. 1445601 (Case No. 11-1125), Doc. 1445602 (Case No. 11-1141), Doc. 1445603 (Case No. 11-1189).

of some or all of the cases. Petitioners highlighted the regulatory uncertainty that litigation posed to impending compliance obligations, and indicated the need to resolve issues raised in each case as expeditiously as possible.⁴ On reply, EPA dismissed petitioners’ “primary objection”—“their belief that assigning these cases to the same panel would delay their resolution”—as “speculation.”⁵ The Court granted EPA’s motion. *See supra* note 1.

Movants next committed substantial time and resources to the development of joint briefing proposals in each of the four related cases. The proposed schedules were carefully interwoven to allow for expeditious briefing of all four cases, but in a manner that did not unduly burden parties involved in briefing multiple cases.⁶ On January 31, 2014, the Court issued briefing schedules in the four related cases.⁷ As proposed by the parties, briefing was to occur in a

⁴ Response of AF&PA *et al.*, to Respondent EPA’s Motion to Have Cases Heard by the Same Panel at 3-4 (July 18, 2013), Doc. 1447406 (Case No. 11-1108), Doc. 1447410 (Case No. 11-1125), Doc. 1447422 (Case No. 11-1189).

⁵ Respondent EPA’s Reply in Further Support of Motion to Have Cases Heard by the Same Panel at 3 (July 29, 2013), Doc. 1448945 (Case No. 11-1108), Doc. 1448947 (Case No. 11-1125), Doc. 1448951 (Case No. 11-1189).

⁶ Joint Motion to Set Briefing Format and Schedule (Nov. 25, 2013), Doc. 1467922 (Case No. 11-1108), Doc. 1467921 (Case No. 11-1125), Doc. 1467923 (Case No. 11-1141), Doc. 1467908 (Case No. 11-1189).

⁷ Order (Jan. 31, 2014), Doc. 1477836 (Case No. 11-1108), Doc. 1477840 (Case No. 11-1125), Doc. 1477843 (Case No. 11-1141), Doc. 1477853 (Case No. 11-1189).

staggered fashion, with briefing across all four cases complete by October 14, 2014.

Less than a month after the briefing orders were issued, on February 28, 2014, EPA filed motions in the Major Source Boiler Rule, Area Source Boiler Rule, and CISWI Rule cases seeking leave to undertake further administrative proceedings. As to the Major Source Boiler Rule and CISWI Rule litigation, EPA requested that the Court: (1) remand the record of the rules for 60 days so it could provide further justification for its general use of the Upper Prediction Limit (“UPL”) methodology; (2) remand without vacatur a series of both new and existing source maximum achievable control technology (“MACT”) standards developed using nine or fewer data points under the UPL methodology; and (3) stay all briefing until 90 days after the Court granted the motions.⁸ EPA further requested that the Court suspend the already issued briefing schedules in the two cases until it ruled on the aforementioned motions.⁹

⁸ Respondent EPA’s Motion for Remand of the Record, for Partial Voluntary Remand Without Vacatur, and for Revision of the Briefing Schedule (Feb. 28, 2014), Doc. 1482091 (Case No. 11-1108), Doc. 1482093 (Case No. 11-1125).

⁹ Respondent EPA’s Motion to Suspend the Briefing Schedule Pending Resolution of EPA’s Motion for Remand of the Record and for Partial Voluntary Remand Without Vacatur (Feb. 28, 2014), Doc. 1482095 (Case No. 11-1108), Doc. No. 1482097 (Case No. 11-1125).

In the Area Source Boiler Rule litigation, EPA filed a motion requesting remand of all MACT standards because they were all developed using the UPL methodology with nine or fewer data points.¹⁰ In the motion, EPA further requested that briefing proceed on remaining issues 30 days after the Court's action on the remand motion on the schedule established by the Court's January 31, 2014 briefing order or April 11, 2014, whichever was earlier. EPA also filed a briefing suspension motion.¹¹ EPA requested no delay in briefing of the NHSM Rule litigation.¹²

Some of the signatories to this motion opposed EPA's motions out of concern that the relief EPA sought would delay resolution of the cases.¹³ These

¹⁰ Respondent EPA's Motion for Partial Voluntary Remand Without Vacatur (Feb. 28, 2014), Doc. 1482092 (Case No. 11-1141).

¹¹ Respondent EPA's Motion to Suspend the Briefing Schedule Pending Resolution of EPA's Motion for Partial Voluntary Remand Without Vacatur (Feb. 28, 2014), Doc. 1482096 (Case No. 11-1141).

¹² Briefing in that case was delayed slightly because Environmental Petitioners requested, and were granted on May 8, 2014, an extension of certain briefing deadlines. Order, Doc. 1491980 (Case No. 11-1189). Further, during the course of briefing, certain issues were severed from litigation and held in abeyance pending administrative reconsideration. On October 15, 2014, the Court issued an order permitting parties to adjust their already filed briefs to remove references to severed issues. Order, Doc. 1517186 (Case No. 11-1189).

¹³ AF&PA *et al.*, Opposition to Remedy Requested in EPA's Two Motions Addressing Inadequacies with EPA's Rulemaking Methodology and Motion for Affirmative Relief (Mar. 13, 2014), Doc. 1483894 (Case No. 11-1108), Doc. 1483895 (Case No. 11-1125), Doc. 1483896 (Case No. 11-1141). Some industry parties supported aspects of EPA's requests for judicial economy reasons, all the while expressing that they were "deeply concerned" about delay in litigation given

parties explained in their opposition filed in the Major Source Boiler Rule litigation that existing sources face a January 31, 2016 compliance deadline. AF&PA *et al.*, Opposition to Remedy Requested in EPA’s Two Motions Addressing Inadequacies with EPA’s Rulemaking Methodology and Motion for Affirmative Relief at 9 (Mar. 13, 2014), Doc. 1483894 (Case No. 11-1108). They explained that affected parties have already begun to take action to ensure they will meet the Major Source Boiler Rule standards by the deadline and that continued delay in resolving the issues before the Court exacerbates existing uncertainty and results in otherwise avoidable costs. *Id.* at 9-10.

impending compliance obligations. *See* Response of Certain Industry Petitioners and Industry Intervenor-Respondents in Support of EPA’s Briefing Suspension Motion at 2 (Mar. 13, 2014), Doc. No. 1483889 (Case No. 11-1108), Doc. 1483893 (Case No. 1125), Doc. 1483891 (Case No. 11-1141). Even parties who filed such responses in “support” urged briefing to continue on all issues not affected by EPA’s requested remands of the record on previously established sequencing and intervals. *See* Response of Certain Industry Petitioners and Industry Intervenor-Respondents to EPA’s Motion for Remand of the Record and for Partial Voluntary Remand Without Vacatur, and for Revision of the Briefing Schedule at 5 (Mar. 13, 2014), Doc. 1483888 (Case 11-1108); Response of Council of Industrial Boiler Owners (“CIBO”) to EPA’s Motion for Remand of the Record and for Partial Voluntary Remand Without Vacatur, and for Revision of the Briefing Schedule at 5 (Mar. 13, 2014), Doc. 1483892 (Case No. 11-1125); *see also* Response of CIBO to EPA’s Motion for Partial Voluntary Remand Without Vacatur at 1 (Mar. 13, 2014), Doc. 1483890 (Case 11-1141) (requesting that briefing continue without adjustment, other than the date upon which briefing would recommence if the Court granted EPA’s briefing suspension motion).

The Court nonetheless granted EPA's requests, and the briefing schedules were modified.¹⁴ The modified schedules differed significantly from the original schedules issued on January 31, 2014.

Litigation	Originally scheduled conclusion of briefing (Jan. 31, 2014 order)	Actual conclusion of briefing
Major Source Rule Litigation (Case No. 11-1108)	September 9, 2014	February 11, 2015
Area Source Rule Litigation (Case No. 11-1141)	September 22, 2014	February 18, 2015
CISWI Rule Litigation (Case No. 11-1125)	October 14, 2014	March 6, 2015
NHSM Rule Litigation (Case No. 11-1189)	October 14, 2014	November 12, 2014

As a result, the NHSM Rule litigation, originally scheduled to be one of the last of the related cases to complete briefing, was ultimately the first to complete briefing. Briefing in that case concluded more than two months ago. Oral argument has still not been scheduled in that case, or in any of the other cases.

ARGUMENT

Movants ask this Court to schedule oral argument in these cases before the end of this term or, at a minimum, schedule oral argument in the NHSM Rule litigation before the end of this term. This is important for two reasons. First,

¹⁴ Order Granting Suspension of Briefing Schedule (Mar. 21, 2014), Doc. 1484727 (Case No. 11-1108), Doc. 1484730 (Case No. 11-1125), Doc. 1484739 (Case No. 11-1141); Order Granting Remand as Requested (May 15, 2014), Doc. 1493171 (Case No. 11-1108), Doc. 1493180 (Case No. 11-1125), Doc. 1493182 (Case No. 11-1141).

scheduling oral argument in this term for these related cases will preserve the possibility that a decision (or decisions) in the cases will be issued by Fall 2015 and therefore before the Major Source Boiler Rule's compliance date of January 31, 2016 for existing sources. Moreover, it will provide regulatory certainty for affected sources that have made the determination that their unit is a boiler or an incinerator, as determined by the NHSM Rule, and taken action to ensure compliance with either the Major/Area Source Boiler Rules or the CISWI Rule. Scheduling oral argument in this term will prevent affected parties from incurring further costs to comply with standards in the potentially incorrect Clean Air Act rule. Second, unless oral argument is held this term, the decision in the NHSM Rule litigation would be unreasonably delayed.

I. Prompt Resolution of the Major Source Boiler Rule Litigation Is Necessary to Determine Compliance with the Correct Clean Air Rule and Eliminate Compliance Uncertainty and Associated Potentially Unnecessary Capital Expenditures Between Now and the Existing Source Compliance Date.

As Movants have argued in prior filings,¹⁵ the existing source compliance deadline under the Major Source Boiler Rule is January 31, 2016. Existing sources have engaged in compliance planning since publication of the final NHSM Rule on February 7, 2013 (which established whether a source would be regulated as an incinerator or a boiler) and the final Major Source Boiler Rule on January 31, 2013

¹⁵ See, e.g., *supra* pp. 7-8.

(which established the relevant standards for boilers). Affected sources under the Major Source Boiler Rule continue to make necessary investments so as to comply with the rule by January 31, 2016. The number of existing sources subject to the January 31, 2016 deadline is significant. EPA projects that the Major Source Boiler Rule, as published in 2013, applies to more than 14,000 existing units, with capital costs for those units totaling more than \$4.7 billion. 78 Fed. Reg. 7138, 7155-56 (Table 5) (Jan. 31, 2013).

This litigation has created significant uncertainty as to what these sources' compliance obligations will ultimately be after resolution of this litigation. Both Industry Petitioners and Environmental Petitioners have raised fundamental questions about EPA's approach to standard-setting in the Major Source Boiler Rule litigation.¹⁶ The level or type of standards established in the Major Source Boiler Rule affects the types of controls or processes that will be installed or adopted by the owner or operator of an existing unit. Should those obligations change as a result of litigation, and any ensuing remand or vacatur, the capital investments that sources are making now, and will continue to make between now and the compliance date, could be useless and therefore wasteful.

¹⁶ *E.g.*, Final Opening Brief of Industry Petitioners (Feb. 11, 2015), Doc. 1537220 (Case No. 11-1108) (Argument III: challenging EPA's failure to account for malfunctions in standard-setting); Final Opening Brief for Environmental Petitioners (Feb. 11, 2015), Doc. 1537229 (Case No. 11-1108) (Argument II: challenging various aspects of EPA's MACT floor approach, including the UPL methodology).

Moreover, a unit's classification might change as a result of the NHSM Rule litigation. If the NHSM Rule is held invalid in whole or part that could effect a change in the emissions standards and other obligations applicable to an affected source, and potentially could place a large number of facilities into noncompliance.

Petitioners who own and operate major source boilers with an impending compliance deadline have particular concern about the risk of unnecessary capital investment given the prior litigation history of the Major Source Boiler Rule. In 2007, after review of the predecessor versions of the Major Source Boiler Rule, Area Source Boiler Rule, and CISWI Rule, this Court vacated all of the rules and sent them back to EPA for remand proceedings (which resulted in the versions of those three rules and the NHSM Rule that are now before the Court). *Natural Res. Def. Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007) (“*NRDC*”).

The Court in that case issued its opinion on June 9, 2007, only three months prior to the compliance deadline of September 13, 2007 for major source boilers. *See* 40 C.F.R. § 63.7495(b) (as promulgated at 69 Fed. Reg. 55218, 55254 (Sept. 13, 2004)). By that time, most sources were in the final stage of implementing compliance measures that cost hundreds of millions of dollars—measures whose need was vacated by the Court.

With that background in mind, owners and operators of existing major source boilers have a genuine concern that history could repeat itself. In the

previous round of litigation in *NRDC*, oral argument was held three-and-a-half months before the Court issued a decision. Assuming the same period of time between oral argument and issuance of a decision, if oral argument were held this term, there is a strong possibility that a decision could be issued by the Court by Fall 2015—four or more months before the January 31, 2016 compliance date. Those months would give existing sources at least some time to adjust compliance planning and capital investments accordingly. If oral argument is deferred until the next term, there is a significant possibility that the Court would not issue its decision until after, or on the eve of, the January 31, 2016 compliance date. At that point, all affected sources will have completed the projects needed to comply with the rule. For this reason, Movants request that the Court hold oral argument this term in the Major Source Boiler Rule litigation and three related cases.

II. Deferring Oral Argument in the NHSM Rule Litigation Beyond This Term Would Create Unreasonable Delay in the Resolution of That Case.

As noted above, briefing in the NHSM Rule litigation was unaffected by the remand and/or remand of the record that EPA requested in the three other related cases. As a result, the carefully sequenced four-case briefing schedule agreed to by the parties and ordered by this Court was disrupted. Although NHSM briefing was originally scheduled for the latest completion date, it actually concluded months

before briefing concluded (or is scheduled to conclude) in the three remaining cases.

As indicated in this Court’s Handbook of Practice and Internal Procedures, “[i]n civil cases, parties may receive notice of the date for oral argument at the time the briefing schedule is set or after briefing has started.”¹⁷ This sentence suggests that oral argument will generally be scheduled before the end of briefing. Briefing concluded in the NHSM Rule litigation more than two months ago but oral argument has still not been scheduled.

If oral argument were not held until the next term (*i.e.*, Fall 2015), parties to the NHSM litigation could have to wait a full year after the close of briefing for argument, and will likely wait at least a few more months after that before a decision is issued. That would be an unreasonable delay for the Movants. As such, it is necessary that oral argument in the NHSM Rule litigation be held this term.

* * * * *

WHEREFORE, Movants respectfully request that the Court schedule oral argument in Case Nos. 11-1108, 11-1125, 11-1141, and 11-1189 before the end of this term or, at a minimum, schedule oral argument in 11-1189 before the end of this term. As indicated above, Movants further request that argument in Case Nos.

¹⁷ U.S. Court of Appeals for the D.C. Circuit, Handbook of Practice and Internal Procedures 48 (as amended through Nov. 12, 2013).

11-1125 and 11-1141 not be scheduled between May 7, 2015 and May 15, 2015 and that oral argument in Case No. 11-1189 not be scheduled between April 14 and 16, 2015.

Dated: February 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that on this 19th day of February 2015, I caused the foregoing Motion to Calendar Oral Argument in the Above-Captioned Cases This Term to be served on all ECF-registered counsel in Case Nos. 11-1108, 11-1125, and 11-1141.

/s/ William L. Wehrum, Jr.

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that on this 19th day of February 2015, I caused the foregoing Motion to Calendar Oral Argument in the Above-Captioned Cases This Term to be served on all ECF-registered counsel in Case No. 11-1189.

/s/ Douglas H. Green