No. 12-1100 (and consolidated cases)

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

WHITE STALLION ENERGY CENTER, LLC, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Final Agency Action
77 Fed. Reg. 9,304 (Feb. 16, 2012)

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GLOSSARY OF TERMS

ACI	Activated Carbon Injection
APA	Administrative Procedure Act
CAA	Clean Air Act
BTFL	Beyond-the-Floor Limit
CFB	Circulating Fluidized Bed
EGU	Electric Utility Steam Generating Units
EPA	United States Environmental Protection Agency
HCl	Hydrogen Chloride
ICR	Information Collection Request
J.A.	Joint Appendix
LO	Liquid Oil-Fired
LOC	Liquid Oil-Fired, Continental Unit
LONC	Liquid Oil-Fired Non-Continental Unit
LULO	Limited-Use Liquid Oil-Fired Unit
MACT	Maximum Achievable Control Technology
MATS	Mercury and Air Toxics Standards
MMBtu	Million British Thermal Units
MWh	Megawatt Hour
NPRM	Notice of Proposed Rulemaking
NSPS	New Source Performance Standards
OG	Oak Grove
PM	Particulate Matter

SO_2	Sulfur Dioxide

SUMMARY OF ARGUMENT

MATS[1] imposes arbitrary and unlawful requirements on certain unconventional EGUs and public power entities. The Court should remand MATS and require EPA to remedy these issues.

ARGUMENT

I. A CFB SUBCATEGORY IS NECESSARY.

Although EPA has discretion in determining whether to create subcategories under §112, that discretion is not boundless. By refusing to create a subcategory for CFBs, EPA abused its discretion because it ignored the fundamental distinguishing characteristics of CFBs: (1) CFBs minimize emissions through combustion management and limestone injection; and (2) CFBs are designed and located to combust specific fuel sources. The *coalescence* of these factors distinguishes CFBs from conventional EGUs and prevents many CFBs from meeting the MATS HCl limit.

EPA concedes that "there are design and operation differences between conventional [coal]-fired EGUs" and CFBs. EPA Br. at 92 (quoting 77 Fed. Reg. at 9,397 (J.A. ___)). For these reasons, EPA determined that a separate CFB subcategory was necessary under Boiler MACT. *Id.* at 93. EPA downplays these facts, arguing that CFBs were not subcategorized for HCl in Boiler MACT. *Id.* EPA ignores the fundamental point: *by establishing a subcategory for CFBs*, EPA recognized

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[1] 77 Fed. Reg. 9,304 (Feb. 16, 2012) (J.A. __).

that CFBs are distinct from other combustion technologies and warrant separate standards. In Boiler MACT, there was no need to establish a distinct HCl limit for CFBs because the HCl limit is *ten times higher* than the HCl limit in MATS.

EPA insists that, if its refusal to subcategorize CFBs forces many CFBs to shutdown, this is because §112 compels standards that force the closure of obsolete units. *See* EPA Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards (Dec. 2011) at 7-8 (J.A. ___). However, CFB technology is certainly not obsolete. CFBs are among the best performers in limiting key pollutants. The Nucla CFB facility, for example, has the lowest mercury emissions of any coal-fired plant. *See, e.g.*, Memorandum from Cole to Maxwell (Sept. 9, 2011), EPA-HQ-OAR-2009-0234-19978 (J.A. ___). Yet Nucla cannot meet the MATS HCl (or alternate SO_2) standard. *See* Tri-State Comments, EPA-HQ-OAR-2009-0234-17730 at 17 (J.A. ___).

Similarly, the record documents that coal-refuse-fired CFBs achieve low mercury emissions, yet many cannot meet the HCl or SO_2 limit. Their inability to meet these limits is predetermined by their fuel supply. Coal-refuse-fired CFBs were located *for the specific purpose* of combusting nearby coal-refuse piles. CFB technology cannot achieve the HCl (or SO_2) limit *if the sulfur or chlorine concentration of the dedicated fuel is naturally elevated.* Indeed, EPA has separately recognized that "coal refuse from some piles will have sulfur contents at such high levels . . . they present potential economic and technical difficulties in achieving the same SO_2 standard" achievable for "higher quality coals." 70 Fed. Reg. at 9,716 (J.A. ___). Therefore, EPA

established a separate SO_2 limit under the NSPS for EGUs, determined to be "achievable for the full range of coal refuse piles", *id.,* for facilities combusting primarily coal refuse. *See* 40 C.F.R. §60.43a(j). EPA acknowledges that fuel source is an appropriate basis for subcategorization under MATS, 77 Fed. Reg. at 9,378-79 (J.A. __) (establishing unique mercury limits for units combusting low-rank coal), but arbitrarily refuses to do so for coal refuse.

EPA next contends that coal-refuse-fired CFBs can reduce HCl through sorbent injection, without detrimental effect on the ash byproduct, which is beneficially used to reclaim abandoned mines. EPA Br. at 95. This assertion is not only unsupported but contradicted by the record. A study commissioned by EPA identifies the probable adverse effect on ash from sodium-based sorbents. 77 Fed. Reg. at 9,412 (J.A. __).

EPA's argument that coal-refuse-fired CFBs can simply increase limestone injection to achieve the HCl limit is likewise unsupported. The record shows that CFBs are constrained in introducing additional limestone into the combustion zone, and that increased limestone injection would likely increase mercury emissions, defeating the primary objective of MATS. ARIPPA Comments, EPA-HQ-OAR-2009-0234-17754 at 22 (J.A. __).

II. THE MERCURY STANDARDS FOR LIGNITE-FIRED EGUS ARE UNLAWFUL.

EPA must set a Beyond-the-Floor-Limit ("BTFL") that is *achievable* "under the most adverse conditions which can reasonably be expected to recur." *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 431 n.46 (D.C. Cir. 1980). EPA's mercury BTFL for lignite units is not achievable. EPA claims that the BTFL can be met if sources just inject more activated carbon ("ACI"), EPA Br. at 81, but the record refutes this claim. Oak Grove's parent company spent over $35 million testing ACI and other sorbent technology on all its units, and its OG1 unit was the *single source* used to establish the BTFL. OG Comments, EPA-HQ-OAR-2009-0234-17904 at 38 (J.A. ___). Yet EPA's BTFL is not even achievable at OG1. Industry-Specific Br. at 10.

EPA incorrectly concluded that lignite units were not using ACI to its "fullest extent" during the ICR testing because they had no incentive to maximize mercury control. EPA Br. at 81. EPA cites no authority for this claim. Regardless, it is irrelevant because the record demonstrates a point of diminishing return for ACI injection, especially for lignite units. As detailed in the record, carbon adsorption is greater at lower temperatures, but lignite boilers have higher temperatures by design. OG Comments, EPA-HQ-OAR-2009-0234-17904 at 38, 41 (J.A. ___, ____). Therefore, increasing ACI injection rates will not achieve corresponding mercury reductions at the higher lignite boiler temperatures. *Id.* at 40 (J.A. ____). EPA

ignores the science in the record and continues simply to "believe[]" that more ACI will somehow achieve the BTFL (76 Fed. Reg. at 25,046 (J.A. __)).

The BTFL is also unachievable because lignite is naturally low in chloride, and low chloride fuel increases the ratio of elemental mercury during combustion, which is more difficult to remove than oxidized mercury. *See* EPA-HQ-OAR-2009-0234-0103 at 6 (J.A. ___); OG Comments, Exhibit 1, at 240 (J.A. ____). Furthermore, ACI effectiveness is greatly impacted by plant operations. OG Comments at 42 (J.A. ___). EPA has continually ignored the record evidence on these roadblocks and offers no evidence to the contrary. EPA's "Beyond-the-Floor" memos do not address these concerns but simply assert without analysis that more ACI results in less mercury. EPA-HQ-OAR-2009-0234-2924 (J.A. __); EPA-HQ-OAR-2009-0234-20130 (J.A. __).

III. THE STANDARDS FOR PETCOKE-FIRED EGUS ARE UNLAWFUL.

First, petcoke is neither coal nor oil, and EPA did not include petcoke-fueled EGUs in the coal- and oil-fired EGU source category when it was created. Accordingly, EPA lacks authority to regulate petcoke-fired EGUs under MATS. Neither EPA's purported 2000 finding nor its 2002 Listing Decision refer to petcoke- or solid oil-derived-fueled EGUs. The single petcoke EGU in the Utility Study, which "fires a combination of coal and pet coke," was included for the sole purpose of *distinguishing* it from coal- or oil- fueled EGUs — i.e., those not fueled by petcoke.

Utility Study, EPA-HQ-OAR-2009-0234-3052 at 3-16 (J.A. __). The lack of a "clear exclusion" for petcoke units is irrelevant; EPA must make an affirmative finding that it is "appropriate and necessary" to regulate petcoke-fired EGUs. Having failed to previously make that finding, EPA could not "confirm" it in 2011.

Second, EPA gives no explanation for ignoring 32 of 47 datasets when setting petcoke PM standards nearly 300% lower than proposed. A conclusory assertion that its choice was "reasonable" does not satisfy the APA's requirement for reasoned decisionmaking. This argument was timely raised when it became apparent that the final rule ignored most of the record data. *See* Pet. For Recon., EPA-HQ-OAR-2009-0234-20173 (J.A. ___); *see also Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1055 (D.C. Cir. 2001) (no waiver where ground for objection arose after public comment period and petitioner sought reconsideration).

Third, EPA gave no notice of its eventual input-based standard. The proposal repeatedly stated that EPA favored "output-based (gross basis) standards" because they "encourage . . . efficiency" and provide regulated entities "an additional compliance option." 76 Fed. Reg. at 25,063 (J.A. ___). A single cryptic statement buried in a table at the end of a 172-page NPRM, *id.* at 25,128 (J.A. __) ("Total particulate matter (PM) . . . 0.20 lb/MMBtu or 2.0 lb/MWh."), does not provide notice that EPA might adopt a fundamentally different approach.

Finally, EPA cannot claim that the public had notice of its proposed subcategory definitions while also acknowledging that the final rule completely

reworked those definitions. Validating such rulemaking as a logical outgrowth would grant agencies carte blanche to restate a rule completely whenever there was ambiguity at proposal and perversely incentivize them to issue ambiguous NPRMs.

IV. EPA HAD DATA ON THE NUMBER OF "LONC."

EPA erroneously contends that no record information exists from which to conclude that the LONC subcategory was comprised of fewer than 30 units. EPA Br. at 87. There is a finite number of existing liquid oil-fired ("LO") units. When EPA decided in the final MATS to split its proposed LO subcategory into three (liquid oil-fired, continental ("LOC"); LONC; and LULO), it knew that the LULO subcategory contained 228 units (77 Fed. Reg. at 9,401 (J.A. __)) and that the LULO subcategory would be populated with units that otherwise would be in either the new LOC or LONC subcategories. Thus, EPA could easily assess whether the new LOC and LONC subcategories contained fewer than 30 units. This was important because the LONC subcategory was perilously close (31 units) to the critical §112(d)(3) 30-unit threshold. By not making this analysis, EPA set MACT without considering relevant data and thus acted arbitrarily and capriciously. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must examine relevant data and make rational connection between the facts found and the choice made).

V. EPA IGNORED PUBLIC POWER'S CONCERN THAT MATS COMPLIANCE CONFLICTS WITH STATE LAW OBLIGATIONS.

EPA argues it responded reasonably to public power comments regarding the impossibility of timely compliance because of conflicting state contract-bidding laws. EPA Br. at 99. EPA summarily dismissed the comments, however, EPA-HQ-OAR-2009-0234-20126, Vol. 2 at 342-43 (J.A. ___), without addressing (1) state contract-bidding obligations binding on publicly-owned EGUs or (2) alternative federally-enforceable compliance options. "EPA must have considered relevant data and articulated a rational connection between the facts found and the choices made." *See* EPA Br. at 17 (*citing Motor Vehicle Mfrs.*, 463 U.S. 29 (1983)). EPA's failure to address conflicting state obligations raised "with reasonable specificity during the period for public comment" requires remand of this portion of MATS. CAA §307(d)(2).

VI. EPA ERRONEOUSLY DENIED PUBLIC POWER ENTITIES' EXTENSION REQUESTS.

EPA was asked to grant public power entities, under CAA §112(i)(3)(B), a blanket one-year extension beyond the three-year compliance period. *See generally* Industry-Specific Br. at 17-18. EPA does not challenge public power's need for more time, but claims it "provided the maximum permissible compliance period – 3 years." EPA Br. at 101; *see id.* at n.49 (disclaiming reliance on *NRDC v. EPA*, 489 F.3d 1364, 1373-74 (D.C. Cir. 2007) to "bar[] the blanket extension," but only to show "the Act limits the baseline compliance period to three years"). But both claims rest on CAA §112(i)(3)(A), and thus beg the question of whether §112(i)(3)(B) allows for a longer

compliance period through a blanket exemption.

EPA asserts no showing was made that a blanket "extension is necessary for *every* publicly-owned EGU." EPA Br. at 102 (emphasis in original). As support, EPA points to 69 utilities (only some of which are municipally-owned) "currently complying." *Id.* at 103. But there are approximately 2,000 public power entities, any number of which are unable to comply because of state laws and other issues. With such an overwhelming potential need in the face of these obligations, declining to issue a blanket extension in favor of case-by-case determinations was unreasonable.[2]

CONCLUSION

The Court should remand MATS as applied to unconventional EGUs

[2] EPA argues its industry-wide waiver under CAA §112(f)(4) is not controlling because the statutory regimes differ. EPA Br. at 102 n.51. Regardless, §112(f)(4) refers to a singular "source," just as §112(i)(3)(B) does. This did not stop an industry-wide waiver there, and should have been followed here. Industry-Specific Br. 18.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Supplemental Reply Brief for Industry Petitioner-Specific Issues contains 2,000 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the 2,000 word limit set by the Court.

Dated: March 25, 2013

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CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of March 2013, a copy of the Supplemental Reply Brief for Industry Petitioner-Specific Issues was served electronically through the Court's CM/ECF system on all ECF-registered counsel. I further certify that a copy has been served by first-class US mail on the following:

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