

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 11-1125; 11-1140; 11-1144; 11-1154; 11-1155; 11-1161; 11-1171; 11-1180;
13-1111; 13-1113; 13-1114; 13-1116; 13-1118; 13-1119; 13-1121; 13-1123;
13-1124; 13-1127 (and consolidated cases under No. 11-1125)

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

AMERICAN FOREST AND PAPER ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondent.

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

BRIEF OF INDUSTRY INTERVENOR-RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule (hereinafter “Circuit Rule”) 27(a)(4) and Circuit Rule 28(a)(1), Industry Intervenor-Respondents (“Industry Interveners”) hereby certify as follows:

I. PARTIES AND AMICI

Petitioners: Petitioners are listed in the Brief for Industry Petitioners.

Respondents: Respondents are listed in the Brief for Industry Petitioners.

Interveners: Industry Interveners for Respondents are: American Forest & Paper Association; National Association of Manufacturers; American Wood Council; Chamber of Commerce of the United States of America; American Chemistry Council; Coalition for Responsible Waste Incineration; Cement Kiln Recycling Coalition; Portland Cement Association; Council of Industrial Boiler Owners; Eastman Chemical Company; American Petroleum Institute; Alaska Oil and Gas Association; Alaska Miners Association; ConocoPhillips Alaska, Inc.; Waste Management, Inc. and WM Organic Growth, Inc.; and Wheelabrator Technologies Inc. and Wheelabrator Ridge Energy, Inc.

II. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Industry Petitioners.

III. RELATED CASES

References to the related cases appear in the Brief for Industry Petitioners.

CORPORATE DISCLOSURE STATEMENTS

Industry Intervenor-Respondents submit the following statements pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1:

Alaska Oil and Gas Association (“AOGA”) is a “trade association” as defined by Circuit Rule 26.1. AOGA’s members include oil and gas companies that own and operate small remote incinerators subject to the challenged emission standards. AOGA has no parent corporation and no stock.

Alaska Miners Association (“AMA”) is a “trade association” as defined by Circuit Rule 26.1. AMA’s members include mining companies that own and operate small remote incinerators subject to the challenged emission standards. AMA has no parent corporation and no stock.

American Chemistry Council (“ACC”) is a not-for-profit trade association that participates on its members’ behalf in administrative proceedings and in litigation arising from those proceedings. ACC represents the leading companies engaged in the business of chemistry. ACC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in ACC.

American Forest & Paper Association (“AF&PA”) serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA

member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - Better Practices, Better Planet 2020.

The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures approximately \$210 billion in products annually, and employs nearly 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states. No parent corporation or publicly held company has a 10% or greater ownership interest in AF&PA.

American Petroleum Institute (“API”) is a national trade association representing all aspects of America's oil and natural gas industry. API has over 600 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of industry. API has no parent company, and no publicly held company has a 10% or greater ownership interest in API.

American Wood Council (“AWC”) is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs over

one-third of a million men and women in well-paying jobs. AWC’s engineers, technologists, scientists, and building code experts develop state-of-the-art engineering data, technology, and standards on structural wood products for use by design professionals, building officials, and wood products manufacturers to assure the safe and efficient design and use of wood structural components. AWC also provides technical, legal, and economic information on wood design, green building, and manufacturing environmental regulations advocating for balanced government policies that sustain the wood products industry.

Cement Kiln Recycling Coalition (“CKRC”) is a non-profit “trade association” within the meaning of Circuit Rule 26.1(b). It has no parent corporation, and no publicly held company owns a 10% or greater interest in CKRC.

The Chamber of Commerce of the United States of America (“U.S. Chamber”) is a non-profit corporation organized and existing under the laws of the District of Columbia. U.S. Chamber is not a publicly held corporation and no corporation or other publicly held entity holds more than 10% of its stock. U.S. Chamber is the world’s largest business federation. U.S. Chamber represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry, from every region of the country. An important function of U.S.

Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. Many of U.S. Chamber's members are subject to the regulations at issue in this matter.

Corn Refiners Association (“CRA”) is a non-profit, national trade association headquartered in the District of Columbia. CRA has no parent corporation. CRA serves as the voice of the U.S. corn wet millers industry in the public policy arena. CRA is comprised of 6 member companies with 23 plants located throughout the United States.

Coalition for Responsible Waste Incineration (“CRWI”) is a non-profit trade association as described in Circuit Rule 26.1(b) that provides information about, and conducts advocacy regarding, the use of high-temperature combustion, which is used at facilities owned or operated by CRWI members. Some of CRWI's members are regulated by the rule at issue in this proceeding. No publicly held corporation owns 10% or more of CRWI and CRWI does not have a parent corporation.

ConocoPhillips Alaska, Inc. (“CPAI”) is a wholly owned subsidiary of ConocoPhillips Company, which is a wholly owned subsidiary of ConocoPhillips, which is a publicly traded corporation. Pursuant to Circuit Rule 26.1, CPAI hereby states that ConocoPhillips has no parent corporation and no publicly held corporation owns 10% or more of its stock. CPAI further states that it is an oil and

gas company that operates four small remote incinerators subject to the challenged emission standards.

Council of Industrial Boiler Owners (“CIBO”) is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations. CIBO has not issued shares to the public and has no parent company.

Eastman Chemical Company (“Eastman”) is a publicly traded company (symbol EMN), incorporated in the state of Delaware, with headquarters in Kingsport, Tennessee. Eastman has no parent corporation and, based upon current ownership filings with the Securities and Exchange Commission, no publicly held company has a 10% or greater ownership interest in Eastman.

National Association of Manufacturers (“NAM”) is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM’s mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory

environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM has no parent company, and no publicly held company has a 10% or greater ownership interest in the NAM.

National Oilseed Processors Association (“NOPA”) is a non-profit, national trade association headquartered in the District of Columbia. NOPA has no parent corporation and no publicly held company has a 10% or greater ownership interest in NOPA. NOPA represents 13 companies engaged in the production of food, feed, and renewable fuels from oilseeds, including soybeans. NOPA's member companies process more than 1.6 billion bushels of oilseeds annually at 63 plants located in 19 states throughout the country, including 57 plants that process soybeans.

Portland Cement Association (“PCA”) is a non-profit “trade association” within the meaning of Circuit Rule 26.1(b). It has no parent corporation, and no publicly held company owns a 10% or greater interest in PCA.

Waste Management, Inc. is a publicly-traded holding company; it does not have any parent company and all operations are conducted by its subsidiaries. No publicly-held company has a 10% or greater ownership interest in Waste Management, Inc. **WM Organic Growth, Inc.** is a wholly-owned subsidiary of

Waste Management Holdings, Inc. Waste Management Holdings, Inc. is a wholly-owned subsidiary of Petitioner Waste Management, Inc. Waste Management is the largest provider of comprehensive waste and environmental services in North America, as well as North America’s largest municipal waste recycler and a leader in waste-based energy technologies. Headquartered in Houston, Texas, the company serves over 20 million customers with environmentally sound management of solid wastes and transformation of wastes into usable resources.

Wheelabrator Technologies Inc. is indirectly wholly-owned by Granite Holdings, Inc. Granite Holdings, Inc. is owned by five affiliated private equity investment funds, each of which is directly or indirectly wholly-owned by Energy Capital Partners GP III, LP (“ECP GP III”) and various passive limited partner investors. ECP GP III is directly owned by Energy Capital Partners III, LLC (“ECP III”) and various passive limited partner investors. No publicly-held company has a 10% or greater ownership interest in ECP III. **Wheelabrator Ridge Energy Inc.** is owned 100% by Wheelabrator Falls Inc., which is owned 100% by Wheelabrator Environmental Systems Inc. Wheelabrator Environmental Systems Inc. is owned 100% by Wheelabrator Technologies Inc.

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GLOSSARY OF TERMS

CAA	Clean Air Act
CISWI	Commercial and Industrial Solid Waste Incineration
EPA	Environmental Protection Agency
MACT	Maximum Achievable Control Technology
UL	Upper Limit
UPL	Upper Prediction Limit

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the briefs and addenda of the Industry Petitioners,¹ Environmental Petitioners², and Respondent U.S. Environmental Protection Agency (“EPA” or “the Agency”).

STATEMENT OF ISSUES

1. Whether EPA’s decision to defer establishing Clean Air Act (“CAA”) section 129, 42 U.S.C. § 7429 (2012), standards for burn-off ovens and certain other units because it lacked sufficient data was a reasonable exercise of its authority?
2. Whether EPA’s use of the statistical techniques—Upper Limit (“UL”) and Upper Prediction Limit (“UPL”)—to calculate emission standards is consistent with CAA section 129 or is arbitrary or capricious?

¹ American Forest & Paper Association; National Association of Manufacturers; American Wood Council; Chamber of Commerce of the United States of America; American Chemistry Council; Coalition for Responsible Waste Incineration; Cement Kiln Recycling Coalition; Portland Cement Association; Council of Industrial Boiler Owners; Eastman Chemical Company; American Petroleum Institute; Alaska Oil and Gas Association; Alaska Miners Association; ConocoPhillips Alaska, Inc.; Wheelabrator Technologies Inc. and Wheelabrator Ridge Energy, Inc.; and Energy Recovery Council.

² Louisiana Environmental Action Network; Sierra Club; Clean Air Council; Desert Citizens Against Pollution; Montanans Against Toxic Burning; Huron Environmental Activist League; Downwinders at Risk; Partnership for Policy Integrity; and Environmental Integrity Project.

3. Whether EPA's decision to adopt a thirty-day averaging period for demonstrating compliance for units using continuous monitoring systems was lawful?
4. Whether EPA's determination that beyond-the-floor standards are not achievable for Commercial and Industrial Solid Waste Incineration units is arbitrary or capricious?

STATEMENT OF THE CASE

EPA promulgated the rule titled "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units," 76 Fed. Reg. 15,704 (Mar. 21, 2011) ("2011 Rule") (JA __), as amended upon reconsideration at 78 Fed. Reg. 9112 (Feb. 7, 2013) ("2013 Rule") (JA __). Together these rules constitute the Commercial and Industrial Solid Waste Incineration ("CISWI") Rule (or "CISWI Rule") promulgated at 40 C.F.R. Part 60, Subparts CCCC and DDDD. The factual background of the CISWI Rule is well developed in the Initial Brief of Industry Petitioners ("Industry Petitioners' Brief").

SUMMARY OF ARGUMENT

Industry Intervenors endorse EPA's responses to Environmental Petitioners' arguments and provide the following additional support for EPA's positions.

Burn-off Ovens. EPA reasonably deferred its final determination on regulation of burn-off ovens, cyclonic burn barrels, foundry sand reclamation units, soil treatment units, and space heaters. Upon consideration of comments and data in the record, EPA determined that it lacked sufficient information to classify these units as subject to CISWI requirements, or to develop emission standards. Under these circumstances, EPA is entitled to significant deference and its decision should be upheld.

Upper Prediction Limit. As detailed in the “Remand Memorandum” EPA filed with the Court in the instant case,³ the UPL methodology used by EPA in the CISWI rulemaking is the same methodology that was at issue in the litigation over the sewage sludge incinerator standards. *Nat’l Ass’n of Clean Water Agencies v. EPA*, 734 F.3d 1115 (D.C. Cir. 2013) (“NACWA”). Remand Memorandum at 2 (JA__). In *NACWA*, this Court remanded application of the UPL methodology to EPA. The Court did so in a very prescribed way, however, asking EPA to provide further explanation of certain distinct aspects of the applied methodology.

EPA has addressed all of the questions related to the UPL methodology that were raised first by Environmental Petitioners in *NACWA* and again in this

³ Memorandum from Stephen D. Page, Dir., EPA Office of Air Quality Planning and Standards to Docket ID No. EPA-HQ-OAR-2003-0119, “EPA’s Response to Remand of the Record for Commercial and Industrial Solid Waste Incineration Units” (July 14, 2014), EPA-HQ-OAR-2003-0119-2707 (hereinafter “Remand Memorandum”) (JA__).

litigation. As a result, the UPL and UL methodologies should be upheld here as a reasonable and justified approach to account for variability not reflected in short-term stack testing data alone. Application of these methodologies to short-term stack testing data allows EPA to reasonably estimate the “average emissions limitation achieved over time by the best performing source or sources,” Remand Memorandum at 1 (JA__), consistent with the Agency’s obligations under CAA section 129(a)(2). 42 U.S.C. § 7429(a)(2).

Thirty-Day Averaging. EPA reasonably established a thirty-day averaging period when using continuous monitoring systems in order to demonstrate compliance with the emission standards. The thirty-day averaging period appropriately takes into account the operation of a CISWI unit under variable conditions, and it does not decrease the stringency of the standard. EPA’s reasoned judgment should be upheld.

Beyond the Floor Standards. EPA establishes emissions standards under CAA section 129 that must reflect the maximum degree of reductions in emissions of the listed air pollutants that is achievable for new and existing units, taking into account the cost of achieving such emission reductions and any non-air quality health and environmental impacts and energy requirements. 42 U.S.C. § 7429(a)(2). EPA first determines the maximum achievable control technology (“MACT”) floor based on the performance of the best-performing sources and then

determines whether a “beyond-the-floor” standard is achievable. For each category and pollutant, EPA thoroughly considered whether a beyond-the-floor level of control was achievable and reasonably concluded that it was not. Environmental Petitioners claim that EPA unlawfully and arbitrarily determined that beyond-the-floor standards were not achievable for various categories for certain pollutants but fail to support their claims with any evidence. Instead, among other things, they mischaracterize EPA statements and baldly assert that EPA could have required more stringent standards. This Court should grant EPA appropriate deference on these and other technical determinations, including standard-setting and its decision that beyond-the-floor standards were not achievable considering the relevant statutory factors.

ARGUMENT

I. EPA'S DECISION TO DEFER THE INCLUSION OF CERTAIN UNITS IN THE RULE AT THIS TIME WAS REASONABLE

Based on its consideration of the comments and data received, EPA properly deferred its decision whether to regulate burn-off ovens, cyclonic burn barrels, foundry sand reclamation units, soil treatment units, and space heaters (collectively, the “deferred units”) under the CISWI Rule. EPA appropriately based its decision on the administrative record, especially comments that were submitted by owners and operators of these units. EPA Br. 68-70. These commenters identified significant concerns with EPA’s initial proposal to establish emission standards for the deferred units, including the threshold question of whether the units are “solid waste incineration units,” and therefore whether they can be subject to regulation under CAA section 129.⁴ *Id.*

Environmental Petitioners claim, without citing a single piece of evidence, that the deferred units “undisputedly are CISWI.” Env. Br. 28. There is, however, ample support in the record for the jurisdictional concerns raised by industry. For example, the American Chemistry Council explained in its comments that the purpose of burn-off ovens is to clean parts for reuse, not to *incinerate* solid waste. *See* EPA-HQ-OAR-2003-0119-2092 at 32-33 (JA___). The American Chemistry

⁴ EPA states in its brief that it has not determined that all of the deferred units “are solid waste incineration units for which standards are required” under CAA section 129. EPA Br. 66. Industry Intervenors support EPA in this position.

Council further noted that burn-off ovens typically utilize processes such as pyrolysis or melting at much lower temperatures than incinerators. *Id.* at 33. And these ovens are designed to prevent combustion of the residual material so that the reusable metal part being cleaned will not be damaged. *Id.* Thus, the record provides evidence that burn-off ovens do not meet the statutory definition of a CISWI unit. *See* CAA §129(g)(1) (defining “solid waste incineration unit” as one that combusts solid waste material).

Other comments in the record demonstrate why regulation of the deferred units could not be justified at this time. The Coalition for Responsible Waste Incineration noted that EPA’s 2008 Information Collection Request did not adequately explain the scope of EPA’s desired information, and therefore EPA would not have received complete and accurate data on these deferred units. *See* EPA-HQ-OAR-2003-0119-2041 at 43 (JA___). The Coalition for Responsible Waste Incineration also identified difficulties with EPA’s emissions testing methods that would impair the development of enforceable emission standards for the burn-off ovens. *Id.* at 48-49 (JA___). As EPA itself acknowledged, it severely underestimated the number of burn-off ovens and consequently lacks data upon which it could base a regulatory decision for the deferred units. EPA Br. 68-70.

Accordingly, EPA’s prudent decision to forego immediate regulation of the deferred units should be upheld by this Court. Environmental Petitioners’

characterization of EPA’s action as deferral of a non-discretionary duty, Env. Br. 30, would be true only if the deferred units are properly subject to regulation under CISWI. That determination can only be made through further data gathering and analysis by EPA, and EPA is entitled to significant deference in deciding how to use its limited resources. *See EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004) (“priority-setting in the use of agency resources . . . is least subject to second-guessing by courts”). Based on the record before it, EPA acted reasonably in deferring its decision whether to regulate these units under the CISWI Rule.

II. EPA IS WELL WITHIN ITS LEGAL AUTHORITY TO USE THE UPL AND UL METHODOLOGIES AND HAS PROVIDED AMPLE JUSTIFICATION FOR USING THEM IN THIS RULEMAKING

This Court has numerous times recognized in evaluating EPA’s floor-setting under CAA sections 112(d)(3) and 129(a)(2) that the relevant standard for review is whether EPA’s analysis generates a “reasonable[] estimate [of] the performance of the . . . best-performing plants.” *Mossville Env’tl. Action Now v. EPA*, 370 F.3d 1232, 1241 (D.C. Cir. 2004) (hereinafter “*Mossville*”) (quoting *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 862 (D.C. Cir. 2001) (per curiam)). In developing a reasonable estimate, which all parties agree must be supported by “substantial evidence,” *NACWA*, 734 F.3d at 1131 (internal quotation marks omitted), EPA is not required to rely only on “actual data, but [may] lawfully rely on estimates drawn from the regulatory data as to what the best performing 12

percent [are] achieving” and must simply provide ““evidence supporting the reasonableness of the approximation.”” *Mossville*, 370 F.3d at 1241 (citing and quoting *Sierra Club v. EPA*, 167 F.3d 658, 663 (D.C. Cir. 1999)).

As EPA explains, when it set the floors in the CISWI rulemaking, it had stack testing data that provided only limited duration “snapshots” of the emissions level achieved by the better performing sources. EPA Br. 17. It would not be lawful or reasonable to deem those limited measurements representative of *actual* performance over a more extended period of time during which CISWI unit operations can vary according to process conditions and other relevant factors.⁵ Instead, this Court has made clear that MACT floors should be set at a level that is “achievable ‘under [the] most adverse circumstances which can reasonably be expected to recur’” with regard to the performance of the average of the best performing sources. *Sierra Club*, 167 F.3d at 665 (quoting *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 431 n.46 (D.C. Cir. 1980)); *see also* EPA Br. 82-83.

To meet its statutory obligation to develop floors that represent the average performance of the best-performing sources *over time*, EPA applied the UL or UPL methodology to the data at hand to develop a “reasonable estimate,” as this Court’s case law requires.

⁵ *Cf. NACWA*, 734 F.3d at 1133 (“Recognizing that variability in the performance of sources can make identifying the best-performing sources based on short-term emissions data a nearly impossible task....”).

Environmental Petitioners do not dispute that EPA may account for emissions variability in setting MACT floors, as that is firmly established D.C. Circuit law. Instead, they attempt to attack specific aspects of EPA's chosen methodology of accounting for variability and do so in the same manner in which they did in *NACWA*.⁶ These challenges are unconvincing and without merit.

This Court has already conducted an in-depth assessment of the UPL methodology and Environmental Petitioners' claims with respect to the UPL methodology in *NACWA*. Based on that assessment, the Court required EPA to evaluate a few very specific potential issues with the methodology on remand. As explained further below, EPA has specifically addressed the *NACWA* Court's order to further explain its response to the Environmental Petitioners' claims through the Remand Memorandum that was provided to this Court in July 2014.⁷ Thus, EPA's

⁶ *NACWA*, 734 F.3d at 1130 (“Sierra Club ... challenges EPA’s use of the upper prediction limit, arguing that EPA does not demonstrate that the upper prediction limit presented the ‘average emissions limitation achieved’ and was therefore unlawful and arbitrary.”); *id.* at 1140-41 (describing Sierra Club’s arguments in further detail).

⁷ Industry petitioners in *NACWA* also challenged aspects of the UPL methodology and its application to sewage sludge incinerators. The Court agreed with two points made by *NACWA* (the industry petitioners). One issue concerned whether the UPL methodology could be used only in evaluating intra-unit variability, or something more. *NACWA*, 734 F.3d at 1145-46. This issue was not raised by environmental petitioners in *NACWA* or Environmental Petitioners in this case. The second issue was specific to the data set at issue in *NACWA*, and likewise is not relevant here. *Id.* at 1146 (discussing industry petitioners’ concern that time of year when stack testing was conducted was not representative of emissions over time).

use of the UL and UPL methodologies in the CISWI rulemaking is without question appropriate and justified.

A. The UL and UPL Methodologies Produce an Estimate of the Average Emissions Limitation Achieved by the Best Performing CISWI Units

Environmental Petitioners commit a substantial portion of their argument to the proposition that the UL and UPL methodologies do not derive an estimate of the average emissions limitation achieved by the best performing CISWI units.⁸ In response to the same arguments, the *NACWA* Court disagreed, noting that it “seemed plausible” that EPA’s use of the UPL could represent the “average emissions limitation achieved.” *NACWA*, 734 F.3d at 1143. Thus, the Court has already examined the primary argument presented by Environmental Petitioners here and found it unpersuasive.

However, because EPA’s explanation was only “one sentence” in the Federal Register, the *NACWA* Court remanded (rather than vacating) EPA’s standard for further elaboration on “how the upper prediction limit represents the

⁸ Environmental Petitioners challenge EPA’s use of both the UPL and UL as not reflecting an “average,” or “central tendency.” Env. Br. 32-35. While the UL and UPL “are similar,” *see* Remand Memorandum at 10, and represent “upper-limit” approaches, the UL is different than the UPL in other aspects that Environmental Petitioners do not address. Industry Intervenors, therefore, also limit their response to the Environmental Petitioners’ challenge that neither method represents an “average.”

‘average emissions limitation achieved by the best performing 12 percent.’” *Id.*

EPA has now provided that explanation in the instant case:

EPA interprets the average to mean the average emissions over time, based on both the calculated average of all emissions test data from the best performing source or sources and the available information regarding the variability of emissions. The UPL, which EPA uses to account for variability among the best performing sources, reflects an upper limit for the emissions of those sources at times other than when the emissions tests occurred. This not only is a prediction of the emissions performance of those sources in tests conducted in the future, but is also an indication of the range of current average emissions performance of those units.

Remand Memorandum at 3 (JA __). This is a reasonable interpretation of the statute and a complete response to the concerns raised by the *NACWA* Court. The UPL and UL methodologies should be upheld.

B. The Environmental Petitioners’ Illustrations of Variability Demonstrate that EPA’s Standards are Reasonable

Environmental Petitioners provide graphs for three standards to illustrate their concerns about the use of an upper-bound variability method. *See* Env. Br. 10-14. As EPA correctly points out, the graphs merely illustrate the “substantial variability” that is reasonably expected to occur using standard statistical techniques based on snapshot stack tests. EPA Br. 82. The Court has already seen examples of this substantial variability. In *Mossville*, for example, the Court noted that the source with the “lowest overall long term average” showed significant

variability and its highest recorded daily average emissions “just satisfied” the upper bound standard. *Id.* at 1242.

Moreover, Environmental Petitioners’ efforts to cherry-pick the record and provide examples that (they think) look good on a graph fall apart when you look at the actual numbers underlying those graphs. For example, EPA’s selected data set for cadmium consists of 12 tests from sources employing the same control technology, whose results range from 0.003 parts per million (“ppm”) to 0.213 ppm. EPA-HQ-2003-0119-2662, appendix C (JA__). The variation in those few snapshots is nearly *two orders of magnitude* (71 times). Given the massive variation observed in this limited data set, it is beyond dispute that the actual performance of those units on a regular basis will yield results that are significantly higher than those encountered during testing. Consequently, EPA’s decision to set the floor at the levels indicated by standard statistical methods is entirely justified given the limited data available and the massive variation evident in that data.

C. EPA’s Use of an “Upper-Bound” Estimate Was Lawful

Finally, Industry Intervenors note that, in contrast to the Environmental Petitioners’ incorrect contention, this Court has already upheld the use of an upper-bound approach to represent the “average” emission achieved.

In *Mossville*, the Court considered whether EPA could use a previously promulgated regulatory limit as the existing source standard. The Court upheld

EPA's use of this upper-bound limit as being a valid estimate of what the best-performing sources achieved, stating: "because even the best performing sources occasionally have spikes, and under the standard, each facility must meet the 400 ppm standard every day and under all operating conditions[,] [t]he EPA has met its burden of establishing that its standards reasonably estimate the performance of the best five performing sources." *Id.* at 1242. Thus, the Court has already upheld EPA's setting of an existing source standard at the upper limit of what it considered to be the average emissions limitation achieved in practice by the best performing sources. EPA's use of the UL and UPL methodologies in the CISWI Rule provides the same type of upper-bound estimate when EPA only has "snapshot" data.

III. EPA APPROPRIATELY ESTABLISHED THIRTY-DAY AVERAGING PERIODS FOR UNITS THAT CONTINUOUSLY MONITOR EMISSIONS

Under the CISWI Rule, sources may demonstrate compliance either through periodic stack tests or through continuous monitoring. When sources use continuous monitoring, compliance with an emissions standard is demonstrated on the basis of a thirty-day rolling average. Environmental Petitioners argue that a compliance standard based on a thirty-day rolling average weakens the stringency of the standard, which was calculated based on three-hour stack tests. Env. Br. 46-49. EPA provided a reasonable justification for its selection of a thirty-day rolling

average as a means to show compliance with the standard, and Environmental Petitioners have failed to demonstrate any reason why this Court should not defer to the Agency's reasoned decision-making. EPA Br. 87-91; 76 Fed. Reg. 80,465 (Dec. 23, 2011) (JA __).

Environmental Petitioners argue that allowing emissions averaging over thirty days results in “standards that are ‘less stringent’ than the emission limitation actually achieved by the best performing sources,” and therefore fails *Chevron* step one. Env. Br. 47. However, as EPA reasonably explained, the “total emissions for a unit complying with a rolling average must still be below the total emissions from a unit emitting continuously at the level of the standard.” EPA Br. 90. Thus, there is no difference in stringency among EPA's compliance alternatives, and Environmental Petitioners have failed to show that EPA's approach is unlawful under *Chevron* step one.

Similarly, in presenting their *Chevron* step two argument, the Environmental Petitioners disregard EPA's reasonable justification for allowing a thirty-day averaging period. Env. Br. 47-48. Unlike periodic stack tests, which provide a brief snapshot of performance under “controlled conditions,” continuous monitoring systems provide significantly more data to assess long-term performance of the unit on an uninterrupted basis. EPA Br. 89-90. For example, the American Chemistry Council commented that there “are factors beyond the

operator's control that can cause emissions to vary over a period of days, not just hours." EPA-HQ-OAR-2003-0119-2092 at 42 (JA__). These factors include weather and fuel characteristics, such as moisture content and pollutant content. *Id.* EPA reasonably considered these and other important factors, such as fuel variability and load cycling, when establishing a thirty-day averaging period. *See* EPA Br. 89-90.

Finally, Environmental Petitioners assert that EPA's adoption of a thirty-day averaging period is arbitrary because EPA purportedly deviated from its prior practice. Env. Br. 48-49. Environmental Petitioners cite to four previous rulemakings where EPA has commented on the relationship between emission standards and averaging. *Id.* None of the cited rulemakings has any bearing on this case. First, none of the referenced actions by EPA involved setting MACT standards for hazardous air pollutants under CAA sections 129 or 112.

Second, the citations do not support Environmental Petitioners' assertion that EPA has required a lower numeric level to compensate for a longer averaging period. In its approval of the Illinois regional haze plan, EPA actually concluded that an annual averaging period, rather than a thirty-day period, was appropriate for visibility improvement. 77 Fed. Reg. 39,943, 39,947 (July 6, 2012) (JA __). In providing guidelines to states when developing reasonably available control technology standards, EPA indicated that states "may" consider pairing long-term

averaging with more stringent limits. 73 Fed. Reg. 40,230, 40,233 (July 14, 2008) (JA __) and 73 Fed. Reg. 58,481, 58,484 (Oct. 7, 2008) (JA __). And in developing averaging provisions for internal combustion engines, EPA evaluated emissions averaging across multiple engines, but not different averaging periods for a single engine. 66 Fed. Reg. 51,098, 51,124 (Oct. 5, 2001) (JA __).

In summary, Environmental Petitioners have failed to present any reason why the Court should not defer to EPA's reasoned judgment and technical expertise in setting thirty-day averaging periods for continuously monitored parameters.

IV. EPA PROPERLY DETERMINED THAT BEYOND-THE-FLOOR STANDARDS ARE NOT ACHIEVABLE

Environmental Petitioners summarily assert that EPA unlawfully and arbitrarily determined that "beyond-the-floor" standards were not justified for various categories for certain pollutants. Env. Br. 50-52. In doing so, Environmental Petitioners ignore the fact that EPA carefully considered for each category and pollutant whether a beyond-the-floor level of control was achievable considering the relevant statutory factors and reasonably concluded that it was not. As EPA correctly points out, Environmental Petitioners' claims are without merit, unsupported by any evidence, and "based largely on misstatements about what EPA actually said and did." EPA Br. 92.

For example, in looking at waste-burning kilns, Environmental Petitioners mischaracterize EPA's statements relating to emissions reductions that may be achieved through the use of fabric filters. Environmental Petitioners claim that EPA "admits" that, through the installation of fabric filters to reduce emission levels of metals, "this technology *will* achieve particulate matter emission levels *dramatically lower* than the floor...." Env. Br. 50 (emphasis added). What EPA actually suggested in the *proposed* rule, however, was that "fabric filters that [EPA] believe[s] will be necessary to control the metals will *likely* achieve a level of performance that is better than the MACT floor limit for [particulate matter]." 75 Fed. Reg. 31,938, 31,958 (June 4, 2010) (JA __) (emphasis added).

As EPA points out, Environmental Petitioners fundamentally confuse the distinction between *proposed* particulate matter limits for *new* kilns and energy recovery units and *final* particulate matter limits for *existing* kilns and energy recovery units. Env. Br. 21; EPA Br. 92. This makes a big difference. The proposed standard for new kilns, for example, was 1.8 milligrams per dry standard cubic meter. 75 Fed. Reg. 31,938, 31,945 (Table 2) (June 4, 2010) (JA __). EPA set the final standard for existing kilns at 4.6 milligrams per dry standard cubic meter. 78 Fed. Reg. 9112, 9118 (Table 2) (Feb. 7, 2013) (JA __). Environmental Petitioners' attempt to compare the proposed standards for new units (1.8 milligrams per dry standard cubic meter) to the final standards for existing units

(4.6 milligrams per dry standard cubic meter) to argue that EPA should have set a beyond-the-floor limit is simply disingenuous. In any event, EPA set the final standards after receiving data indicating that it needed to revise its proposed standards. This Court should afford EPA a great deal of deference with respect to these technical determinations. *NACWA*, 734 F.3d at 1155 (“we owe significant deference to EPA in areas of its technical expertise”).

Moreover, the record does not support Environmental Petitioners’ position that the installation of fabric filters will achieve particulate matter limits “dramatically lower than the floor.” Env. Br. 50. In fact, the record shows just the opposite. EPA’s database for setting the existing waste-burning kiln floor contains particulate matter stack test data for eight waste-burning kilns with fabric filters, which are also known as “baghouses.” These data show that six of the eight kilns had stack test results *exceeding* the final particulate matter limit of 4.6 milligrams per dry standard cubic meter. EPA-HQ-OAR-2003-0119-2662, App. B-1 (JA __); EPA-HQ-OAR-2003-0119-0070, Attach. 5 (JA__).

Environmental Petitioners also complain that EPA identified low-cost “linkageless boiler management systems” to reduce carbon monoxide from coal energy recovery units but then did not require the application of that technology due to uncertain emission reductions. Env. Br. 23 and 51. As noted in EPA’s brief, the Agency found that it did not have data to show what, if any, actual

reductions in emissions would result from linkageless burner management systems and therefore did not have a basis to use this technology for a beyond-the-floor standard. EPA Br. 94; *see also* Reconsideration Beyond-the-Floor Memo at 5 (JA__).

In addition, the best performing unit in the coal energy recovery subcategory for carbon monoxide (Eastman Boiler 18) is a stoker boiler. *See* EPA-HQ-OAR-2003-0119-2691 (Data_Unit Design_Operation) (JA __). Yet, comments from the State of California indicated that no existing stoker boilers have been retrofitted with the linkageless burner management systems. EPA-HQ-OAR-2003-0119-2108 at 2 (JA __). Therefore, there is no information in the record to show that further reductions from these units would be achievable.

On the basis of this administrative record, EPA reasonably concluded that there was no basis to establish a beyond-the-floor standard involving linkageless burner management systems. EPA's decision should be upheld.

CONCLUSION

For the reasons explained here, as well as those provided in EPA's Response Brief, EPA acted reasonably in: determining that it lacked sufficient data at this time to determine if certain units, such as, for example, burn-off ovens, constitute CISWI units in the first place, and, if so, to promulgate standards for these units; using the Upper Limit and Upper Prediction Limit methodologies to calculate

emission standards; using a thirty-day rolling average to determine compliance for units that continuously monitor emissions; and determining that beyond-the-floor standards are not achievable for CISWI units.

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Respectfully submitted,

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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 Brief of Industry Intervenor-Respondents contains 5197 words as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the 7,000 word limit set by the Court.

Dated: February 9, 2015

/s/ David Friedland

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CERTIFICATE OF SERVICE

I certify that the foregoing Brief of Industry Intervenor-Respondents was electronically filed with the Clerk of the Court on February 9, 2015 using the CM/ECF system and thereby served upon all ECF-registered counsel.

/s/ David Friedland

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