

ORAL ARGUMENT NOT YET SCHEDULED

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

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STATE OF MISSISSIPPI, <u>et al.</u> ,	)	
	)	
	)	
Petitioners,	)	
	)	No. 08-1200 and consolidated cases
v.	)	(Ozone NAAQS Litigation)
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

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**EPA’s Revised Motion to Govern Further Proceedings**

Respondent United States Environmental Protection Agency (“EPA”) files this Revised Motion to Govern Further Proceedings, which supersedes EPA’s Motion to Govern previously filed on August 12, 2011. As EPA explained in its recent Notice filed on September 2, 2011, the Agency no longer expects that it will complete in the near future its rulemaking reconsidering the “National Ambient Air Quality Standards for Ozone,” 73 Fed. Reg. 16,436 (March 27, 2008) (hereinafter “Ozone NAAQS Rule”). EPA, therefore, does not oppose the request in the previously filed motions to govern by the two sets of Industry Petitioners and by the State Petitioners that the Court reinstate the briefing schedule previously entered in this case.

The grounds for this Motion are more fully set forth below:

1) In these consolidated petitions for review, various industry, environmental and State petitioners challenge a regulation promulgated by EPA under the Clean Air Act, entitled the “National Ambient Air Quality Standards for Ozone,” 73 Fed. Reg. 16,436 (March 27, 2008).<sup>1/</sup> Based on EPA’s prior motions and the orders of the Court, these petitions have been held in abeyance while EPA undertakes a rulemaking to reconsider this Ozone NAAQS Rule.

2) Most recently, in the Court’s Order of April 4, 2011, the Court denied a motion by Environmental Petitioners seeking to compel EPA to take final action on the reconsideration rulemaking by July 29, 2011, denied a motion by Industry Petitioners to set a briefing schedule for their challenges to the underlying Ozone NAAQS Rule, ordered that these cases continue to be held in abeyance pending further order of the Court, and directed the parties to file motions to govern further proceedings within fourteen days after EPA signs the final action for its rulemaking on reconsideration, or by August 12, 2011, whichever occurs first. In a Memorandum filed by EPA prior to that Order, EPA represented to the Court that, if it had not taken final action on its rulemaking reconsidering the Ozone NAAQS Rule by July 29, 2011, EPA would not oppose a motion seeking to

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<sup>1/</sup> In this 2008 final rule EPA established primary and secondary standards for ozone, which standards are currently in effect.

establish an appropriate briefing schedule for the pending challenges to the 2008 Ozone NAAQS Rule.<sup>27</sup> The Court specifically noted this representation in the text of its April 4, 2011 Order.

3) In its Motion to Govern filed on August 12, 2011, the Agency explained that on July 11, 2011, it submitted a draft final rule on reconsideration for inter-agency review pursuant to Executive Order 12,866, and requested that the Court direct EPA to notify the Court and the parties within one day after it took any final action, with the expectation that the Agency would shortly issue a final rule reconsidering the Ozone NAAQS Rule. However, as set forth in the Agency's Notice of September 2, 2011, the inter-agency review of EPA's draft rule to revise the Ozone NAAQS Rule was completed on that date and the Agency's draft rule was returned to EPA for further consideration. EPA thus explained that it no longer intends to take final action completing its rulemaking in the near future. See EPA's Notice of Conclusion of Inter-Agency Review and of EPA's Intention to File a Revised Motion to Govern Further Proceedings. Accordingly, EPA's prior Motion to Govern has been effectively superseded, as the premise of that Motion no longer holds.

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<sup>27</sup> See EPA's Combined Reply in Support of its Revised Motion Requesting a Continued Abeyance and Opposition to Industry Petitioners' Cross-motion for a Briefing Schedule at 5 (dated February 7, 2011).

4) In view of these new circumstances, and consistent with the Agency's prior representation regarding the resumption of briefing, EPA believes that it would be appropriate for the Court to issue an order setting a schedule for briefing of the challenges to the 2008 Ozone NAAQS Rule.

5) In EPA's August 24, 2011, response to the motions by the two sets of Industry Petitioners and the State Petitioners that the Court reinstate the previously-issued briefing schedule, EPA stated that it would not oppose such a briefing schedule, with the addition of two modifications that might allow the schedule to be mooted if EPA took final action on reconsideration in the near future.<sup>37</sup> However, in view of the new circumstances described above and in EPA's notice of September 2, 2011, EPA no longer believes these two modifications are necessary. Accordingly, EPA does not oppose the reinstatement of the briefing schedule previously entered by the Court, see Order (dated Dec, 23, 2008), with the adoption of the Industry Petitioners' proposal that opening briefs

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<sup>37</sup> See EPA's Consolidated Response to the Motions to Govern filed by the Environmental Petitioners, State Petitioners, and Two Sets of Industry Petitioners at 10-12 (dated August 25, 2011).

be due 60 days of the order establishing that schedule.<sup>4/</sup> That schedule is as follows:

Brief of State of Mississippi and Supporting Intervenor MDNR (not to exceed 9,000 words)	Due 60 days from date of Court's order to resume briefing
Joint Brief of Industry Petitioners and Supporting Intervenor (not to exceed 9,000 words)	Due 60 days from date of Court's order to resume briefing
Joint Brief for New York State Petitioners and Supporting Intervenor (not to exceed 9,000 words)	Due 60 days from date of Court's order to resume briefing
Joint Brief for Environmental Petitioners (not to exceed 9,000 words)	Due 60 days from date of Court's order to resume briefing
Brief for Amicus Curiae Province of Ontario (not to exceed 3,600 words)	Due 14 days after Petitioners' briefs filed
Brief for Respondent (not to exceed 36,000 words)	Due 100 days after Petitioners' briefs filed

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<sup>4/</sup> See Opposition of the Ozone NAAQS Litigation Group and The Utility Air Regulatory Group to American Lung Association et al.'s Motion for an Order Directing EPA To Complete Reconsideration Action Forthwith and Cross-motion to Govern Further Proceedings at 8-9 (dated August 10, 2011). In this motion the Industry Petitioners purport to apply the format and schedule previously adopted by the Court. However, in their proposal Industry Petitioners set Respondent EPA's brief to be filed 90 days after Petitioners' brief, whereas the Court's prior schedule provided EPA's brief to be filed on a date that is 100 days after Petitioners' briefs. In the schedule above, we have corrected this error, and minor errors in Industry Petitioners' description of the briefs.

Brief for Industry Intervenors Supporting Respondent (not to exceed 5,625 words)	Due 25 days after Respondent's brief filed
Brief for Environmental Intervenors Supporting Respondent (not to exceed 5,625 words)	Due 25 days after Respondent's brief filed
Reply Briefs (not to exceed 4,500 words each)	Due 27 days after Environmental Intervenors' brief filed
Deferred Appendix	Due 18 days after reply briefs filed
Final Briefs	Due 10 days after deferred appendix filed

WHEREFORE, EPA requests that the Court issue an order establishing a schedule for briefing the challenges to the Ozone NAAQS Rule. EPA does not oppose reinstatement of the schedule previously established by the Court, as proposed by the Industry Petitioners and State Petitioners, set forth in paragraph 5 above.

Respectfully submitted,

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Dated: September 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that the foregoing filing was electronically filed with the Clerk of the Court on September 12, 2011, using the CM/ECF system, which will send notification of said filing to the attorneys of record that have, as required, registered with the Court's CM/ECF system.

/S/ David Kaplan\_\_\_\_\_