ORAL ARGUMENT NOT YET SCHEDULED

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

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

EPA's Consolidated Response to the Motions to Govern filed by the Environmental Petitioners, State Petitioners, and Two Sets of Industry Petitioners

Respondent United States Environmental Protection Agency ("EPA") files this consolidated response to the motions and cross-motions to govern filed by the Environmental Petitioners,[1/] the State Petitioners,[2/] and the two sets of Industry Petitioners.[3/] The procedural history of this case is set out in greater detail in EPA's

[1/] Motion by American Lung Association et al. for Order Directing EPA to Complete Reconsideration Action Forthwith (dated Aug. 8, 2011) (hereinafter "Environmental Petitioners Motion to Govern").

[2/] State Petitioners' Motion to Govern Further Proceedings (dated Aug 11, 2011).

[3/] 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

prior pleadings.[4/]

As explained further below, EPA is conducting a rulemaking to reconsider the "National Ambient Air Quality Standards for Ozone" (hereinafter "Ozone NAAQS Rule"), 73 Fed. Reg. 16,436 (March 27, 2008), which rule is challenged in these consolidated cases. EPA's draft final rule on reconsideration is currently undergoing inter-agency review pursuant to Executive Order 12,866, and EPA expects that review will conclude shortly, after which EPA intends expeditiously to sign the final action that will complete its rulemaking on reconsideration. At that time, the subject of any challenge in this Court would be EPA's new rule, rather than the Ozone NAAQS Rule, and EPA will notify the Court as soon as it takes final action on its rulemaking on reconsideration.

Because this rulemaking has taken longer than expected, the Environmental Petitioners in their motion request that the Court order EPA to take final action

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Cross-Motion to Govern Further Proceedings (dated Aug. 10, 2011) (hereinafter "Ozone NAAQS Litigation Group Cross-Motion to Govern"); Opposition of National Association of Home Builders 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 (dated Aug. 10, 2011) (hereinafter "Home Builders Cross-Motion to Govern"). EPA refers to the two sets of petitioners that filed these cross-motions as the "Industry Petitioners."

[4/] See EPA's Revised Motion Requesting a Continued Abeyance and Response to the State Petitioners' Cross-motion (dated Dec. 8, 2010) (Doc. No. 1281979); EPA's Opposition to the Motion to Govern Further Proceedings of Mississippi and the Industry Petitioners (dated Nov. 10, 2009) (Doc. No. 1215292).

immediately to complete its rulemaking reconsidering the Ozone NAAQS Rule. They point out that establishing a merits briefing schedule at this time for the challenges to the underlying Ozone NAAQS Rule makes little sense since EPA's final action once taken will render such a schedule moot. See Environmental Petitioners Motion to Govern at 6. They thus conclude that the Court should order the Agency to complete its rulemaking immediately. As explained further below, such an order compelling EPA action is neither authorized nor warranted in this case, especially since EPA expects to take final action shortly.

The Industry Petitioners in each of their cross-motions to govern take the opposite view of the Environmental Petitioners. They disagree generally with EPA's efforts to establish more protective standards through its rulemaking reconsidering the Ozone NAAQS Rule, and disagree specifically with the level at which the standards should be set and the process for doing so. Built upon these disagreements they argue that the Court should not order EPA to complete that reconsideration. Instead, they request that the Court establish a briefing schedule at this time for their challenges to the underlying Ozone NAAQS Rule. Apparently recognizing that EPA's issuance of a final action on reconsideration would nullify that schedule, they recommend that, if EPA concludes its reconsideration rulemaking relatively quickly, the parties could then file additional motions regarding the briefing schedule they now request the Court to establish. See Ozone

NAAQS Litigation Group Cross-Motion to Govern at 9-10; Home Builders Cross-Motion to Govern at 8 n.3.

As EPA explained in its own Motion to Govern, EPA ordinarily would recommend in these circumstances that the Court continue to hold these cases in abeyance pending the completion of the Agency's reconsideration rulemaking. EPA, however, recognizes that it previously represented to the Court and the parties that if EPA 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 establish an *appropriate* briefing schedule. Consistent with that representation, EPA does not oppose entry of an appropriate briefing schedule, but does oppose the schedule proposed by the Industry Petitioners and State Petitioners. For the reasons explained further below, if the Court elects to issue a briefing schedule rather than await the conclusion of EPA's rulemaking, EPA requests that the Court set the date for opening briefs to be 90 days after entry of the scheduling order, rather than in the 60 days proposed by the Industry Petitioners. Further, EPA requests that any briefing schedule now issued provide that, once EPA notifies the Court that it has signed a final action on its reconsideration rulemaking, any such briefing schedule be automatically suspended, and that the parties be directed to file further motions to govern within 14 days of that action. With the addition of these two modifications to the schedule proposed by Industry Petitioners, and consistent with

EPA's prior representation, EPA would not otherwise oppose their request.

I. AN ORDER COMPELLING EPA TO TAKE FINAL ACTION IS NOT APPROPRIATE

This Court has previously considered and rejected the prior motions by the Environmental Petitioners and the State Petitioners requesting that the Court issue an order compelling EPA to complete its ongoing rulemaking. Though the Court did not identify the basis for its decision, see Order (dated April 4, 2011), the same concerns previously briefed by EPA in the context of those motions counsel against the Court issuing such an order at this time.[5/] First, as set out more fully in EPA's responses to the prior motions, Congress in the 1990 Clean Air Act Amendments effectively overruled, for purposes of the Clean Air Act, this Court's prior jurisprudence in Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984), and similar cases authorizing courts of appeals to compel agency action, by placing unreasonable delay claims exclusively in the appropriate district court under the Clean Air Act citizen suit provision. 42 U.S.C. § 7604(a)

[5/] See, e.g., EPA's Revised Motion Requesting a Continued Abeyance and Response to the State Petitioners' Cross-Motion at 13-20 (dated Dec. 8, 2010) (Doc. No. 1281979); EPA's Response in Opposition to State and Environmental Petitioners' Revised Cross-motion and Reply in Further Support of EPA's Revised Motion at 2-6 (dated Feb. 22, 2011) (Doc. No. 1294386).

(text after (a)(3)).[6/] Moreover, the specific Clean Air Act provisions governing judicial review of NAAQS, 42 U.S.C. § 7607(d)(1)(A) & (9), do not include authority to compel agency action unreasonably delayed. For these, and the other reasons set forth in EPA's prior memoranda on this issue, see supra n.5, EPA does not believe that the CAA authorizes the Court to issue such an order compelling EPA action in these consolidated cases.

Second, even if this Court had authority to order EPA to complete its ongoing rulemaking, such extraordinary relief is not justified. As previously explained, EPA has been working diligently on its reconsideration rulemaking, and the time and

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[6/] Specifically, the 1990 Amendments added in pertinent part the following to Clean Air Act citizen suit provision:

> The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

See 42 U.S.C. § 7604(a) (text after (a)(3)). In adding this language, Congress in the legislative history specifically noted that the "availability of judicial review of a failure to act has been unclear" and that the amendment "will clarify that such review is available and will assign [that review] to the Federal district courts, in keeping with the principle that those courts are better suited to address claims of inaction than are the courts of appeals." S. Rep. No. 101-228, at 314 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3757.

steps EPA has taken to complete that rulemaking are reasonable.[7] Though EPA did not, as previously expected, complete that rulemaking by July 29, 2011, EPA expects to take final action shortly. As EPA previously explained, the Agency's draft final rule is currently undergoing inter-agency review pursuant to Executive Order 12,866 (issued September 30, 1993), which applies to all significant regulatory actions. EPA expects that inter-agency review will conclude shortly, after which EPA intends expeditiously to sign the final action that will complete its rulemaking on reconsideration. Notably, the Environmental Petitioners identify such inter-agency review as a particular reason why an order compelling action is appropriate, arguing that the Clean Air Act vests only EPA with the authority to set new and revised NAAQS. Environmental Petitioners' Motion to Govern at 8. Such arguments, however, are off point, and provide no basis for the Court to issue an order to circumvent the inter-agency review process applicable before EPA issues its final rule.

II. EPA OPPOSES THE BRIEFING SCHEDULE REQUESTED BY THE INDUSTRY AND STATE PETITIONERS

The two sets of Industry Petitioners in their respective motions request that this Court establish at this time a briefing order for review of the Ozone NAAQS

[7] See EPA's Revised Motion Requesting a Continued Abeyance and Response to the State Petitioners' Cross-motion at 7-12 & 15-18 (dated Dec. 8, 2010) (Doc. No. 1281979).

Rule under reconsideration using the format and schedule established in the Court's Order of December 23, 2008, with the respective filing dates therein to commence 60 days from the date of the order directing such briefing.[8/] As an initial matter, while EPA would not oppose a request to establish an appropriate briefing schedule, EPA does not agree with the underlying bases that these petitioners offer for their request. This Court has previously considered and rejected the two sets of Industry Petitioners' prior requests to resume briefing of the underlying Ozone NAAQS Rule, see Orders (dated Jan. 21, 2010 and April 4, 2011), and the concerns EPA raised in its prior pleadings with these petitioners' underlying arguments remain valid today. As EPA then explained, the two sets of Industry Petitioners seek to circumvent EPA's ongoing rulemaking on reconsideration to establish a more protective standard, notwithstanding the sound scientific and important public health bases for EPA's rulemaking on reconsideration. Such an effort is inappropriate.[9/]

[8/] The State Petitioners also request the Court to enter a briefing schedule, but only if the Court declines to enter an order compelling EPA to take final action. See State Petitioners' Motion to Govern Further Proceedings.

[9/] 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 6-13 (dated February 7, 2011) (Doc. No. 1292145); EPA's Opposition to the Motion to Govern Further Proceedings of Mississippi and the Industry Petitioners (dated Nov. 10, 2009) (Doc. No. 1215292).

Moreover, contrary to their claims, EPA's reconsideration of the 2008 Ozone NAAQS Rule is reasonable and in the public interest. In its reconsideration rulemaking EPA seeks to ensure that the public health and welfare is properly protected, especially given that EPA in the prior Administration rejected the expert advice of the independent Clear Air Scientific Advisory Committee ("CASAC"), 42 U.S.C. § 7409(d)(2)(A), charged to give EPA advice on setting and revising NAAQS, id. § 7409(d)(2)(B), and in light of the subsequent decision by this Court in American Farm Bureau Federation v. EPA, 559 F.3d 512 (D.C. Cir. 2009).[10/] In that case, the Court rejected EPA's 2006 decision not to promulgate a more stringent primary NAAQS for fine particulate matter ("PM"), concluding that EPA inadequately explained its departure from CASAC's recommendation that EPA set a lower standard. Id. at 528-29. On the secondary standard, the Court concluded that "EPA's decision to set secondary fine PM NAAQS identical to the primary NAAQS was unreasonable and contrary to the requirements" of the Act, id. at 531, and criticized EPA's failure to justify its departure from CASAC's recommendation for a more protective secondary standard that is different from the primary standard.

[10/] EPA's reasons for reconsidering the Ozone NAAQS Rule and CASAC's advice are explained in more detail in EPA's prior pleadings. See EPA's Revised Motion Requesting a Continued Abeyance and Response to the State Petitioners' Cross-motion at 5-8 (dated Dec. 8, 2010) (Doc. No. 1281979); EPA's Opposition to the Motion to Govern Further Proceedings of Mississippi and the Industry Petitioners at 3-7 and 9-12 (dated Nov. 10, 2009) (Doc. No. 1215292).

Id. at 530.

Moreover, and contrary to their generalized, non-specific claims, the two sets of Industry Petitioners have not been prejudiced by the Ozone NAAQS Rule, abeyance of litigation, or EPA's reconsideration rulemaking. Indeed, Industry Petitioners make no effort even to argue that they are subject to any undue prejudice from the Ozone NAAQS Rule during EPA's reconsideration, and this Court previously rejected their requests to resume briefing or to stay that rule. Orders (dated Jan. 21, 2010 and April 4, 2011).[11/]

Notwithstanding EPA's disagreement with the bases for the Industry Petitioners' request to resume briefing, and consistent with EPA's prior representations, EPA would not oppose the relief these parties request, provided that the schedule and format proposed by Industry Petitioners include two modifications. First, the proposed schedule should be modified by requiring the filing of opening briefs within 90 days, rather than the 60 days proposed by the Industry Petitioners, of the date of any order the Court may issue that establishes a briefing schedule. EPA makes this request because it expects to complete its ongoing rulemaking shortly, and once it issues a new rule on reconsideration, any

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[11/] See EPA's Opposition to Industry Motion to Govern at 13-16 & 18-19 (dated Nov. 10, 2009) (Doc. No. 1215292); 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 14-15 (dated February 7, 2011) (Doc. No. 1292145).

schedule for any challenges to the Ozone NAAQS Rule will be superseded. Providing this additional 30 days before filing opening briefs further reduces the chance that the parties will unnecessarily expend resources on briefing challenges to the underlying Ozone NAAQS Rule. Moreover, establishing a schedule with a 90-day period before the filing of opening briefs is fully consistent with the Court's prior briefing order, which provided 99 days from that order before the filing of opening briefs. See Order (dated Dec. 23, 2008).

Second, EPA would not oppose the proffered briefing schedule provided that it includes a provision establishing that the schedule is automatically vacated, and that the parties be directed to file additional motions to govern within 14 days, once EPA notifies the Court that it has signed the final action on its rulemaking reconsidering the Ozone NAAQS Rule. This is appropriate given that EPA's final action will supersede the Ozone NAAQS Rule and any briefing challenging it. Industry Petitioners' proposal, that this concern instead be addressed only through a new round of motions to be filed in the midst of an ongoing briefing schedule would be unworkable and inefficient. EPA's proposed modification is also appropriate given that any final rule EPA issues on reconsideration would involve the filing of new petitions for review and different considerations that may warrant a different briefing schedule and format.

Absent these two modifications, EPA opposes the Industry Petitioners' and State Petitioners' proposed briefing order as not appropriate, for the reasons set forth above and in EPA's responses to the prior motions to resume briefing cited above.

CONCLUSION

The motions to govern filed by the Environmental Petitioners and the State Petitioners requesting that the Court order EPA to complete its ongoing rulemaking should be denied. Further, the Court should deny the cross-motions to govern filed by the two sets of Industry Petitioners and the motion to govern filed by the State Petitioners requesting that the Court set a briefing schedule. Rather, if the Court elects to issue a briefing schedule at this time, EPA would not oppose the issuance of the schedule proposed by these parties, provided that schedule is modified as follows: (1) the schedule sets the date for filing opening briefs in 90 days, rather than in the 60 days proposed by the Industry Petitioners, of any Court order setting a briefing schedule and format; and (2) the schedule provides that once EPA notifies the Court that it has signed a final action on its rulemaking reconsidering the Ozone NAAQS Rule, the schedule be automatically suspended and that the parties be directed to file motions to govern within 14 days of that notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing filing was electronically filed with the Clerk of the Court on August 25, 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