

**ORAL ARGUMENT NOT YET SCHEDULED**

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

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

**OPPOSITION OF THE NATIONAL ASSOCIATION OF HOME  
BUILDERS, THE OZONE NAAQS LITIGATION GROUP, AND THE  
UTILITY AIR REGULATORY GROUP TO EPA’S REVISED MOTION  
REQUESTING A CONTINUED ABEYANCE AND  
CROSS-MOTION SEEKING RESUMPTION OF BRIEFING ON  
ISSUES NOT SUBJECT TO RECONSIDERATION**

Petitioners and Intervenor-Respondents the National Association of Home Builders, the Ozone NAAQS Litigation Group, and the Utility Air Regulatory Group (collectively, “Industry Petitioners”), jointly submit this opposition to the U.S. Environmental Protection Agency’s (“EPA” or “Agency”) Revised Motion Requesting a Continued Abeyance (“Revised Motion”). Industry Petitioners also respectfully cross-move for an Order by the Court to allow Industry Petitioners and Petitioner the State of Mississippi (“Mississippi”) to brief their issues because

those issues are not under reconsideration by EPA, and there is no reason to continue to postpone briefing on those issues. Mississippi has not yet been able to formulate a formal opinion on this opposition and cross-motion.

### **BACKGROUND**

1. EPA revised the national ambient air quality standards (“NAAQS”) for ozone in March 2008, and those standards became effective on May 27, 2008. *See* 73 Fed. Reg. 16436 (Mar. 27, 2008) (“2008 Ozone Rule” or “Rule”). The 2008 Ozone Rule revised the primary and secondary ozone NAAQS from a level of 0.08 parts per million (“ppm”) to a more stringent level of 0.075 ppm. Mississippi and Industry Petitioners filed timely petitions for review of the Rule with this Court, challenging the 2008 Ozone Rule on the grounds that the Rule violated the Clean Air Act by setting standards that are more stringent than is requisite to protect public health and welfare (the criterion for regulation established by the Clean Air Act). Parties other than Mississippi and Industry Petitioners (collectively “Environmental and State Petitioners”) also filed petitions for review of the 2008 Ozone Rule challenging the Rule on the grounds that it was not stringent enough. Under the Court’s December 23, 2008 briefing order, petitioners were to file briefs by April 1, 2009.

2. On March 10, 2009, less than one month before petitioners’ briefs were due, EPA filed a motion asking the Court to vacate the briefing schedule and

to hold these cases in abeyance while EPA decided whether to reconsider the 2008 Ozone Rule. *See* Unopposed Motion To Vacate the Briefing Schedule and Hold These Consolidated Cases in Abeyance (Mar. 10, 2009). To give the new Administration time to evaluate this litigation and as a courtesy to EPA, Mississippi and Industry Petitioners agreed not to oppose that EPA motion. *See id.* at 2, 4.

3. Granting EPA's motion in part, the Court suspended the briefing schedule. *See* Order of March 19, 2009. In addition, the Court ordered EPA to notify the Court and the parties by September 16, 2009, of the "action it has [taken] or will be taking with respect to the Ozone NAAQS Rule and its schedule for undertaking any such action." *Id.* The Court also instructed all parties to file motions to govern further proceedings "including any proposals regarding the briefing format and schedule" within 30 days of EPA's September 16, 2009 notice. *Id.*

4. On September 16, 2009, EPA notified this Court and the parties that it had decided to reconsider the Rule. *See* Reconsideration Notice (Sept. 16, 2009). EPA further stated its intent to sign a proposed rule by December 21, 2009, and to issue a final rule by August 31, 2010. *See id.*

5. On October 16, 2009, the deadline set by the Court in its Order of March 19, 2009, EPA filed a joint motion with the Environmental and State

Petitioners requesting that the Court hold these cases in abeyance pending completion of its rulemaking to reconsider the 2008 Ozone Rule. On that same day, Mississippi and Industry Petitioners filed a joint Motion to Govern Further Proceedings that asked the Court to resume briefing or, in the alternative, to stay the 2008 Ozone Rule (“Mississippi, *et al.* Motion to Govern”). EPA and Environmental and State Petitioners opposed the Mississippi, *et al.* Motion to Govern. EPA’s Opposition to the Motion to Govern Further Proceedings of Mississippi and the Industry Petitioners (Nov. 10, 2009) (“EPA Opposition to Motion to Govern”); Environmental and State Petitioners’ Joint Opposition to Motion to Govern (Nov. 10, 2009). Mississippi and Industry Petitioners opposed the joint motion of EPA and Environmental and State Petitioners to hold the cases in abeyance. Opposition of the State of Mississippi, the National Association of Home Builders, the Ozone NAAQS Litigation Group, and the Utility Air Regulatory Group to the Motion of EPA, *et al.* to Continue to Hold These Consolidated Cases in Abeyance (Nov. 10, 2009).

6. On January 21, 2010, the Court granted the motion to continue holding the cases in abeyance of EPA and Environmental and State Petitioners and denied the Mississippi, *et al.* Motion to Govern. Order of January 21, 2010. The Court ordered EPA to file status reports on March 1, 2010, and on September 1, 2010. *Id.* The Court also ordered the parties to file motions to govern further

proceedings within 60 days of EPA's final action on reconsideration or by November 1, 2010, whichever occurred first.

7. The EPA Administrator signed the proposed reconsideration rule on January 6, 2010, and it was published in the Federal Register on January 19, 2010. 75 Fed. Reg. 2938 (Jan. 19, 2010). EPA proposed to revise the ozone NAAQS to make them even more stringent – proposing a primary NAAQS within the range of 0.060 ppm to 0.070 ppm and proposing a new cumulative, seasonal secondary standard. *Id.* at 2938. EPA made clear in the proposed rule that it was reconsidering only parts of the 2008 Ozone Rule and was not reconsidering its decision in “the 2008 final rule conclud[ing] that the 1997 primary and secondary [ozone] standards were not adequate to protect public health and public welfare, and that revisions were necessary to provide increased protection.” *Id.* at 2943.

8. On August 20, 2010, EPA filed a status report with the Court stating that it would be unable to issue the final rule on reconsideration by August 31, 2010, as it had originally planned. EPA stated that it intended to issue the final reconsideration rule by the end of October 2010.

9. On November 1, 2010, EPA filed a Partially Unopposed Motion to Govern that requested that the Court continue to hold the cases in abeyance pending completion of the reconsideration rulemaking, which EPA in its motion estimated would take until December 31, 2010. Mississippi and Industry

Petitioners did not oppose this motion but made clear that their non-opposition was “an accommodation to the federal government,” and Mississippi and Industry Petitioners reiterated that “they stand by the positions taken in their October 16, 2009 motion to govern proceedings and in their November 10, 2009 opposition to EPA’s motion to govern proceedings.” EPA’s Partially Unopposed Motion to Govern Requesting that These Cases Continue to Be Held in Abeyance at 4 (representing position of Mississippi and Industry Petitioners) (Nov. 1, 2010).

10. State petitioners other than Mississippi (“New York, *et al.*”) filed a response to EPA’s motion requesting the Court (1) to order the Agency to finalize the reconsideration of the 2008 Ozone Rule by December 31, 2010, or (2) to “provide for an automatic lifting of the abeyance if EPA fails to complete reconsideration by December 31 unless EPA submits evidence in advance of such deadline clearly demonstrating the need for additional time.” State Petitioners’ Response to EPA’s Partially Unopposed Motion to Govern and Cross-Motion for Affirmative Relief at 2 (Nov. 15, 2010). Mississippi and Industry Petitioners took no position on New York, *et al.*’s cross-motion.

11. On December 8, 2010, EPA filed its Revised Motion. In the Revised Motion, EPA states that it now expects that it will not complete its reconsideration of the 2008 Ozone Rule until July 29, 2011, and that EPA “requests that the Court continue to hold these cases in abeyance, with the parties to file motions to govern

further proceedings 14 days after EPA signs the final action completing its ongoing rulemaking reconsidering the Ozone NAAQS Rule, or by August 12, 2011, whichever is sooner.” Revised Motion at 2-3. EPA acknowledged “that its new schedule for completing its ongoing rulemaking is longer than it previously reported to the parties and the Court – in total, eleven months longer than EPA’s initial anticipated schedule. . . .” *Id.* at 4. In its Revised Motion, EPA also opposed New York, *et al.*’s cross-motion. *Id.* at 3, 13-20. EPA did not contact counsel for Industry Petitioners to ask for those parties’ position on the Revised Motion.

## **ARGUMENT**

### **I. The Court Should Order Briefing to Resume on Those Issues Not Being Reconsidered by EPA.**

When Mississippi and Industry Petitioners filed their motion in October 2009 seeking to brief this case or, in the alternative, to stay the 2008 Ozone Rule, it was not clear what the scope of EPA’s reconsideration of the 2008 Ozone Rule would be. This is no longer the case. When EPA published its proposed rule on reconsideration on January 19, 2010, it made clear that it was reconsidering only “parts of the 2008 final rule.” 75 Fed. Reg. at 2943. Indeed, EPA proposes only to make the 2008 Ozone Rule *more stringent*; it is, therefore, not reconsidering the decision made by the EPA Administrator in 2008 that the ozone NAAQS needed to be revised to be more stringent. Mississippi and Industry Petitioners challenge the

2008 Ozone Rule on the grounds that the Administrator's decision that the existing ozone NAAQS was no longer "requisite" and needed to be revised to be made more stringent was unlawful and violated the Clean Air Act. *See* Petitioner State of Mississippi's Non-Binding Statement of Issues to Be Raised (June 25, 2008); National Association of Home Builders Non-Binding Statement of Issues Presented for Review (June 26, 2008); Nonbinding Statement of Issues of the Ozone NAAQS Litigation Group and the Utility Air Regulatory Group (June 26, 2008). Because EPA is not reconsidering its 2008 decision that the ozone NAAQS is no longer "requisite" and must be revised, but is only reconsidering the level at which the revised NAAQS were set -- and *how much more stringent* to make those NAAQS -- there is no reason Mississippi and Industry Petitioners should not be permitted to proceed with briefing their issues.

In support of the Revised Motion, EPA states that continuing to hold these cases in abeyance "will preserve judicial economy as well as the resources of the parties" and that "recourse to active briefing on the Ozone NAAQS Rule now would be needless and impractical, especially since any rulemaking decision to revise the standards will supersede the 2008 standards of the Ozone NAAQS Rule." Revised Motion at 12. Although the reconsideration proceeding might resolve the claims of the Environmental and State Petitioners, which argue that the 2008 Ozone Rule was not stringent enough, that proceeding cannot resolve the



claims of Mississippi and Industry Petitioners, whose argument -- that the 2008 Ozone Rule is unlawfully stringent -- has already been rejected by EPA and bears no chance of being accepted in the reconsideration process as EPA has chosen to structure it. This is because EPA is explicit in its proposed rule on reconsideration that it is not reconsidering the decision to revise the ozone NAAQS to make them more stringent, 75 Fed. Reg. at 2938, 2943-44, and thus judicial economy would not be served by continuing to hold in abeyance the petitions for review of Mississippi and Industry Petitioners.

## **II. Due Process Supports Allowing Briefing to Resume on Those Issues Not Being Reconsidered by EPA.**

The 2008 Ozone Rule has been in effect since May 27, 2008, 73 Fed. Reg. at 16436, and Mississippi and Industry Petitioners have now for almost three years had to take actions to comply with a rule that they believe to be impermissibly stringent and otherwise unlawful. Under EPA's proposed schedule for reconsideration set forth in the Revised Motion, Mississippi and Industry Petitioners will continue to be denied their right to have the 2008 Ozone Rule reviewed by this Court. 42 U.S.C. § 7607(b); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) (depriving holders of an unadjudicated "chose in action" (a form of property) violates due process). When Mississippi and Industry Petitioners asked the Court in October 2009 not to hold these cases in abeyance, they noted that EPA's schedule for reconsideration of the 2008 Ozone Rule was

“extremely aggressive” and was “inconsistent with the time the Agency has required to reconsider other, similar rules.” *Mississippi et al.* Motion to Govern at 6. Indeed, this prediction was prescient; far from meeting that schedule, EPA now states that it cannot complete the reconsideration rulemaking until 11 months after its original, August 31, 2010 deadline. In opposing *Mississippi et al.*’s Motion to Govern, EPA stated that “this litigation would be effectively moot before briefing could be completed” because of the reconsideration rulemaking. EPA Opposition to Motion to Govern at 12. Although that might have been true had EPA completed its reconsideration rulemaking by August 31, 2010, as it had originally stated it would, briefing as proposed by Mississippi and Industry Petitioners in their Motion to Govern would have been completed in August 2010 (as calculated from the date of the Court’s orders on the motions to govern) -- well before the July 29, 2011 deadline that EPA is now hoping to meet.

In requesting that this case continue to be held in abeyance, EPA has the burden of demonstrating that the balance of the competing interests of the parties weighs in favor of holding a case in abeyance. *Dellinger v. Mitchell*, 442 F.2d 782, 786 (D.C. Cir. 1971) (“[T]he suppliant for a stay [of litigation] must make out a clear case of hardship or inequity in being required to go forward, *if there is even a fair possibility* that the stay for which he prays will work damage to some one else.”) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)) (emphasis

added). As detailed by Mississippi and Industry Petitioners in their October 2009 Motion to Govern, Mississippi and Industry Petitioners are suffering adverse impacts as a result of the 2008 Ozone Rule. *Mississippi et al.* Motion to Govern at 10-16. Although the Court may have determined that these impacts did not rise to a level necessary to justify a stay of the 2008 Ozone Rule, these impacts are enough to demonstrate that “a fair possibility” exists that Mississippi and Industry Petitioners are being damaged while these cases continue to be held in abeyance. Given that EPA’s proposed reconsideration rule makes it clear that the Agency is not reconsidering those issues that Mississippi and Industry Petitioners have raised in their challenges to the 2008 Ozone Rule, there is no reason briefing should not resume on those issues immediately. Furthermore, EPA’s stated reason for continuing to hold the case in abeyance – judicial economy and preservation of resources – does not apply to those issues not being reconsidered.

**III. The Court Should Order Briefing of Those Issues Not Being Reconsidered by EPA to Resume Using the Format and Schedule Established by the Court in Its Order of December 23, 2008.**

Industry Petitioners respectfully request that this Court order briefing to resume on those issues not subject to EPA’s reconsideration of the 2008 Ozone Rule (namely, the issues raised by Mississippi and Industry Petitioners regarding whether EPA’s 2008 decision to make the ozone NAAQS more stringent *at all* violated the Clean Air Act and was otherwise unlawful). Industry Petitioners

respectfully request that this Court resume briefing on these issues,<sup>1</sup> 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 resumption in briefing. Thus, the schedule and format for briefing these select issues would be as follows:<sup>2</sup>

Brief of State of Mississippi (not to exceed 9,000 words)	Due 60 days from date of Court's order to resume briefing
Joint Brief of Industry Petitioners (not to exceed 9,000 words)	Due 60 days from date of Court's order to resume briefing
Brief for Respondent (not to exceed 18,000 words)	Due 90 days after Petitioners' briefs 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

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<sup>1</sup> Industry Petitioners take no position on the cross-motion of New York, *et al.* asking the Court to order EPA to meet its self-imposed deadline or, alternatively, to lift the abeyance. If the Court decides to lift the abeyance and allow briefing to proceed on all issues and not just those that are not being reconsidered by EPA, the briefing schedule would be identical to the Court's Order of December 23, 2008, with new dates set as appropriate.

<sup>2</sup> Industry Petitioners note that this particular briefing format is based on the Court's existing order in this case and should not be construed as setting a precedent in any other cases to which Industry Petitioners are parties.

Final Briefs

Due 10 days after deferred appendix  
Filed

**CONCLUSION**

For the reasons cited herein, Industry Petitioners respectfully request that the Court (1) deny EPA's motion to continue to hold these consolidated cases in abeyance and (2) allow briefing to resume on those issues that are not subject to EPA's reconsideration of the 2008 Ozone Rule, using the briefing format and schedule set forth in its December 23, 2008 Order, adjusting the filing dates as shown herein so that the first briefs are due 60 days after the date of the Court's order in response to this motion.

Counsel for the National Association of Home Builders has consented to the filing of this motion.

Dated: January 10, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 10<sup>th</sup> day of January, 2011, a copy of the foregoing Opposition of the National Association of Home Builders, the Ozone NAAQS Litigation Group, and the Utility Air Regulatory Group to EPA's Revised Motion Requesting a Continued Abeyance and Cross-Motion Seeking Resumption of Briefing on Issues Not Subject to Reconsideration was served electronically through the court's CM/ECF system on all registered counsel and that a copy was served by first class mail, postage prepaid, on the following unregistered counsel:

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