

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 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**

Petitioners and Intervenor-Respondents Ozone NAAQS Litigation Group and Utility Air Regulatory Group (collectively “Industry Petitioners”) submit this opposition to the Motion by American Lung Association et al. to Complete Reconsideration Action Forthwith, Doc. No. 1322986 (Aug. 8, 2011) (“ALA Motion”). Industry Petitioners also respectfully cross-move for an Order by the Court to establish a briefing schedule in these consolidated cases.

BACKGROUND

1. This case involves challenges to the U.S. Environmental Protection Agency's ("EPA" or "Agency") revision of the national ambient air quality standards ("NAAQS") for ozone in March 2008. *See* 73 Fed. Reg. 16436 (Mar. 27, 2008) ("2008 Ozone Rule" or "Rule").

2. In March 2009, 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, Doc. No. 1169527 (Mar. 10, 2009). No party had filed a petition for reconsideration with the Agency asking it to reconsider the 2008 Ozone Rule; EPA decided to examine this issue *sua sponte*. To give the new Administration time to evaluate this litigation and as a courtesy to EPA, Industry Petitioners agreed not to oppose that EPA motion. *See id.* at 2, 4.

3. On September 16, 2009, EPA notified this Court and the parties that it had decided to reconsider the 2008 Ozone Rule. *See* Reconsideration Notice, Doc. No. 1206476 (Sept. 16, 2009).

4. In October 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 reconsideration rulemaking. Joint Motion To Continue To Hold

These Consolidated Cases in Abeyance, Doc. No. 1211554 (Oct. 16, 2009).

Petitioner the State of Mississippi, Petitioner and Intervenor-Respondent National Association of Home Builders (“NAHB”), 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. Motion To Govern Further Proceedings of the State of Mississippi, the National Association of Home Builders, the Ozone NAAQS Litigation Group, and the Utility Air Regulatory Group, Doc. No. 1211561 (Oct. 16, 2009).

5. On January 21, 2010, the Court ordered the cases held in abeyance and denied the motion of Mississippi, NAHB, and Industry Petitioners to resume briefing. Order, Doc. No. 1226738 (Jan. 21, 2010). The Court 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. *Id.*

6. 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 at that time EPA estimated would take until December 31, 2010. EPA’s Partially Unopposed Motion to Govern Requesting that These Cases Continue to Be Held in Abeyance, Doc. No. 1274843 (Nov. 1, 2010). Mississippi, NAHB, and Industry Petitioners

did not oppose this motion but made clear that their non-opposition was “an accommodation to the federal government.” *Id.* at 4.

7. On December 8, 2010, EPA filed a Revised Motion with the Court stating that it now expected that it would not complete its reconsideration of the 2008 Ozone Rule until July 29, 2011, and requesting “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.” EPA’s Revised Motion Requesting a Continued Abeyance and Response to the State Petitioners’ Cross-Motion at 2-3, Doc. No. 1281979 (Dec. 8, 2010) (“Revised Motion”).

8. Industry Petitioners and NAHB opposed EPA’s request to continue to hold the case in abeyance and filed a cross-motion seeking resumption of briefing. 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, Doc. No. 1287186 (Jan. 10, 2011). EPA opposed the cross-motion to resume briefing but noted in its opposition that it “realizes that it would not be appropriate to defer judicial review indefinitely pending EPA’s reconsideration. Accordingly, if by July 29, 2011,

EPA does not sign a final action completing its ongoing rulemaking reconsidering the Ozone NAAQS Rule, EPA would not oppose a request at that time to establish an appropriate briefing schedule.” 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, Doc. No. 1292145 (Feb. 7, 2011).

9. On April 4, 2011, the Court ordered that the case continue to be held in abeyance and denied Industry Petitioners’ cross-motion to resume briefing. Order, Doc. No. 1301540 (Apr. 4, 2011). The Court directed the parties to file motions to govern further proceedings within 14 days of EPA signing a final action on reconsideration or by August 12, 2011, whichever occurs first. *Id.* at 2. The Court also noted that “EPA represents that if by July 29, 2011, it does not sign a final action, it would not oppose a request at that time to establish an appropriate briefing schedule.” *Id.*

10. As of the date of the filing of this opposition and cross-motion, EPA has not yet completed its reconsideration rulemaking.

11. On August 8, 2011, Petitioners American Lung Association, et al. (“Environmental Petitioners”) filed the ALA Motion requesting that this Court order EPA to complete its reconsideration of the 2008 Ozone Rule “immediately.” ALA Motion at 1, 13.

ARGUMENT

I. The Court Should Not Direct EPA To Complete Its Reconsideration Rulemaking.

For the following reasons, the Court should deny the ALA Motion. *First*, the deadline by which EPA must review the 2008 Ozone NAAQS Rule has not yet passed. The Clean Air Act (“CAA”) requires that EPA review NAAQS at least every five years. CAA § 109(d)(1). The 2008 Ozone NAAQS Rule was published in the Federal Register on March 27, 2008. 73 Fed. Reg. 16436. Thus, EPA is not under any obligation to review or revise the NAAQS for ozone until March 27, 2013.

Second, unlike the five-year statutory deadline for reviewing a NAAQS, nothing in the CAA compels EPA to act on reconsideration of a NAAQS by any specific date. As EPA has noted, “[n]o statute . . . establishes a schedule for EPA’s [reconsideration] rulemaking.”¹ Revised Motion at 15; *see also* <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=2060-AP98> (Office of Management and Budget website showing EPA’s reconsideration rulemaking and noting that there is no legal deadline for the rule).

¹ In comments submitted to EPA as part of the reconsideration rulemaking, Industry Petitioners have questioned the legality of EPA’s reconsideration rulemaking process, and this opposition and cross-motion should not be construed as a waiver of any arguments made in those comments.

In support of their motion, Environmental Petitioners note their contention that the 2008 Ozone NAAQS fail to adequately protect public health and welfare. ALA Motion at 2. Environmental Petitioners claim that “[a]n order requiring EPA to complete its reconsideration rulemaking immediately is warranted in light of the substantial health risks faced by . . . the public from ozone pollution levels allowed by the current ozone standards. . . .” *Id.* at 11-12. Industry Petitioners respectfully submit that any concerns that Environmental Petitioners have with whether the level of the 2008 Ozone Rule is adequately protective will be resolved by resuming briefing in this case and getting to the merits. Given Environmental Petitioners’ concerns about health and welfare, Environmental Petitioners could have supported Industry Petitioners’ two motions seeking to resume briefing in this case or filed such motions themselves. Instead, Environmental Petitioners chose to support EPA’s requests to continue to hold these cases in abeyance and opposed Industry Petitioners’ motions. *See* State Petitioners’ and Environmental Petitioners’ Response to EPA’s Revised Motion to Govern, Reply in Support of Cross-Motion for Affirmative Relief, and Response to Industry Petitioners’ Cross-Motion at 2, 11-14, Doc. No. 1992133 (Feb. 7, 2011); Joint Opposition to Motion to Govern, Doc. No. 1215281 (Nov. 10, 2009).

Because nothing in the CAA compels EPA to act on its reconsideration rulemaking by a date certain and because the five-year statutory deadline for

reviewing a NAAQS has not yet passed, this Court should deny Environmental Petitioners' Motion.

II. The Court Should Order Briefing To Resume Using the Format and Schedule Established by the Court in Its Order of December 23, 2008.

For the reasons discussed in their two previous motions to resume briefing (Doc. Nos. 1211561 and 1287186) and the replies to those motions (Doc. Nos. 1217269 and 1293866), Industry Petitioners respectfully request that this Court order briefing to resume in this case using the format and schedule established in the Court's Order of December 23, 2008 (Doc. No. 1155614), with the respective filing dates therein to commence 60 days from the date of the order directing resumption of briefing. Thus, the schedule and format for briefing would be as follows:

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
Joint Brief for New York State Petitioners and Supporting Intervenors (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 90 days after Petitioners' briefs filed
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

As the Court noted in its April 4, 2011 Order, EPA has represented that it would not oppose a request to resume briefing if it failed to sign a final action on its reconsideration rulemaking by July 29, 2011. Order at 2, Doc. No. 1301540 (Apr. 4, 2011). Given the health and welfare concerns expressed in its recent motion, Environmental Petitioners should also want to resume briefing to enable them to get their argument that the 2008 Ozone Rule is not adequately protective before the Court. More than three years have passed since EPA issued the 2008 Ozone Rule, and it is past time for Petitioners to be able to have the Court review that rule as the CAA expressly allows. CAA § 307(b)(1).

If EPA completes its reconsideration rulemaking relatively quickly, the parties can evaluate at that time whether and to what extent EPA's action may

affect briefing in this case and make any motions that the parties deem appropriate at that time. The 2008 Ozone Rule has been in effect since May 27, 2008. 73 Fed. Reg. at 16436. Industry Petitioners have had to take actions for over three years to comply with a rule that they believe to be impermissibly stringent and otherwise unlawful. Delaying briefing any further is unwarranted and denies Petitioners their right to have the Rule reviewed by this Court. CAA § 307(b)(1); *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).

For these reasons, Industry Petitioners request that this Court order briefing to resume in this case, 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.

CONCLUSION

For the reasons cited herein, Industry Petitioners respectfully request that the Court deny the Environmental Petitioners’ motion for an order directing EPA to complete reconsideration action forthwith and grant Industry Petitioners’ cross-motion to govern further proceedings and order briefing to resume in these cases.

Dated: August 10, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of August, 2011, a copy of the foregoing 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 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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