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6 American Lung Association,  
Environmental Defense Fund,  
7 and Natural Resources Defense Council

8  
9 UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 OAKLAND DIVISION  
11

12 SIERRA CLUB, AMERICAN LUNG )  
ASSOCIATION, ENVIROMENTAL DEFENSE )  
13 FUND, and NATURAL RESOURCES DEFENSE )  
COUNCIL )  
14  
15 Plaintiffs, )  
v. )  
16 UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY; GINA McCARTHY, in )  
17 her official capacity as Administrator of the United )  
States Environmental Protection Agency, )  
18  
19 Defendants. )

Case No: 4:13-cv-02809-YGR

**PLAINTIFFS' REPLY TO DEFENDANTS'  
OPPOSITION TO MOTION FOR  
SUMMARY JUDGMENT AND  
OPPOSITION TO DEFENDANTS'  
CROSS-MOTION FOR SUMMARY  
JUDGMENT**

Date: April 8, 2014  
Time: 2:00 p.m.  
Place: Courtroom 5, 2<sup>nd</sup> Fl.  
Judge: Hon. Yvonne Gonzalez Rogers

1 **I. INTRODUCTION**

2 Defendants Environmental Protection Agency, *et al.* (“EPA”) have acknowledged their  
3 failure to comply with EPA’s mandatory, nondiscretionary duty to review the national ambient air  
4 quality standards (“NAAQS”) for ozone by March 12, 2013, and further acknowledge that a Court-  
5 ordered rulemaking schedule governing that overdue review is appropriate. *See* EPA’s Opp’n to  
6 Pls.’ Mot. for Summ. J. (“Opposition”) at 10 [Dkt. No. 44]; *see also* Declaration of Janet McCabe in  
7 Support of Defendant’s Opposition (“McCabe Decl.”) ¶¶ 30-37 [Dkt. No. 44-1]; EPA’s [Proposed]  
8 Order on Remedy at 1 [Dkt. No. 44-3]. EPA also agrees with Plaintiffs that an order requiring EPA  
9 to sign a final rulemaking no later than 10 months after signing the proposed rulemaking is  
10 appropriate. *Id.* The only dispute in this matter is over the date of issuance of the proposed  
11 rulemaking. Because EPA has not met its heavy burden to justify its requests for further delaying  
12 issuance of that proposed rulemaking, the Court should grant summary judgment in favor of  
13 Plaintiffs, and order EPA to sign a Proposed Rule by December 1, 2014, and a Final Rule by  
14 October 1, 2015.

15 **II. ARGUMENT**

16 **A. EPA Bears a Heavy Burden to Demonstrate that More Expeditious Compliance**  
17 **Is Impossible.**

18 Plaintiffs’ Motion for Summary Judgment outlined the steps necessary to prepare a proposed  
19 rulemaking related to the review of the national ozone standards. *See* Pls.’ Mot. for Summ. J.  
20 (“MSJ”) at 14-19. Plaintiffs referenced EPA’s own estimates for the timing of this ozone NAAQS  
21 rulemaking, and argued for a court-ordered schedule that would be consistent with those dates. *Id.* at  
22 17. Plaintiffs also referenced the time EPA has taken in past NAAQS rulemakings, which are  
23 likewise consistent with Plaintiffs’ requested schedule. *Id.* at 18-19.

24 EPA now abandons those previously announced timeframes without ever explaining why its  
25 own previous timetables were wrong or why more expeditious compliance would be impossible.  
26 Instead, EPA asks the Court to defer to the Agency’s conclusory claims regarding “the time needed  
27 by the agency to make a well-reasoned, scientifically supportable, and defensible decision.” *See*

1 Opposition at 12. This is not the relevant standard for determining the appropriate remedy in this  
2 matter.

3 The Agency here has defied the will of Congress. The Agency is not free to rewrite  
4 mandatory duties imposed by statute based on the Agency's assessment of what seems reasonable.  
5 "[W]hen Congress has explicitly set an absolute deadline, congressional intent is clear...The EPA  
6 cannot extract leeway from a statute that Congress explicitly intended to be strict." *American Lung*  
7 *Ass'n v. Browner*, 884 F. Supp. 345, 347 (D. Ariz. 1994) (quoting *Delaney v. EPA*, 898 F.2d 687,  
8 691 (9th Cir. 1990)); *see also Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 53 (D.D.C. 2006) (noting  
9 that when Congress sets forth a clear deadline for issuance of regulations, courts "must not order a  
10 remedy that would...completely neutralize the mandatory nature of the statutory directive"). Unlike  
11 other challenges to EPA decision-making, where "the Court defers to agency expertise about  
12 appropriate rulemaking procedures, such deference is inappropriate where Congress has  
13 unambiguously expressed its intent that these regulations be promulgated by a date certain and the  
14 agency manifestly has failed to fulfill this statutory obligation." *Sierra Club*, 444 F. Supp. 2d at 56.  
15 As the D.C. Circuit has warned:

16 An equity court can never exclude claims of inability to render absolute performance,  
17 but it must scrutinize such claims carefully since officials may seize on a remedy  
made available for extreme illness and promote it into the daily bread of convenience.

18 *Natural Res. Def. Council v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974). In such cases, the "agency  
19 carries a heavy burden to show that compliance with statutory mandated deadlines is impossible or  
20 infeasible." *American Lung Ass'n*, 884 F. Supp. at 347; *see also Sierra Club v. Ruckelshaus*, 602 F.  
21 Supp. 892, 899 (N.D. Cal. 1984) (refuting EPA's argument that plaintiff must demonstrate the  
22 agency's ability to comply with a deadline, and holding that the agency bears a heavy burden to  
23 demonstrate impossibility of compliance); *Sierra Club*, 444 F. Supp. at 53 (holding that it is not  
24 sufficient for an agency to show it has proceeded in "good faith" to meet the statutory deadline, and  
25 that it must show that "it has exercised 'utmost diligence' in its efforts to comply with the statute").

26 As outlined below, EPA has failed to carry its burden, and has not shown that meeting the  
27 schedule proposed by Plaintiffs would be impossible.

1           **B.       It is Possible for EPA to Sign a Proposed Rule by December 1, 2014.**

2           EPA contends that the earliest date it could issue a Proposed Rule would be January 15,  
3 2015. Opposition at 12. EPA offers a list of excuses for not wanting to issue the Proposed Rule  
4 before this date – the complexity of the scientific evidence that must be considered, the time needed  
5 for briefing decision-makers, uncertainties in communications with CASAC, and the need to  
6 dedicate time to other rulemakings involving air quality. Opposition at 12-14; McCabe Decl. ¶¶ 23-  
7 29, 31.

8           None of these excuses is sufficient to meet EPA’s burden of showing that compliance with  
9 the schedule proposed by Plaintiffs would be impossible. EPA simply has not shown that it cannot  
10 shave six weeks off of its desired schedule for signing the proposed rulemaking. EPA’s excuses are  
11 generic statements that are not unique to this rulemaking, and that have been dismissed repeatedly by  
12 other courts in similar deadline cases. EPA can point to no concrete barriers that preclude shifting  
13 resources, scheduling briefings, and setting deadlines to enable signature of the proposed rule by  
14 December 1, 2014. Indeed, EPA’s schedule includes time for interagency review, which is not  
15 required by law and has expressly been identified by courts in this Circuit as “padding” that must be  
16 cut when statutory deadlines have been violated. Thus, even if the Court were to defer to EPA’s  
17 general assertions about the complexity of the rulemaking, it should still reject EPA’s schedule that  
18 includes this inappropriate delay for interagency review.

19                   **1.       EPA’s General Assertions About the Complexity of the Rulemaking**  
20                   **Process Do Not Justify a Delayed Schedule.**

21           EPA claims generally that making the decision on proposed new ozone standards will be a  
22 “consuming and complex undertaking.” Opposition at 13. It cites the fact that there is “extensive  
23 new scientific evidence and other information” to consider, that it is considering reforming the  
24 secondary standard to differ from the primary standard, and that its staff will need to go through  
25 extensive preparations and briefings to issue the proposed rule. Opposition at 12-13; McCabe Decl.  
26 ¶¶ 26-29. It also complains that there is uncertainty surrounding the review by CASAC and that it  
27 will need time to consider public comments and incorporate CASAC’s comments into the proposed  
28 rule. *Id.*

1 It is important to note that none of the particular steps identified by EPA is new or unique to  
2 this rulemaking. The consideration of public and CASAC comments, internal briefing of key  
3 officials, and preparation of the proposed rulemaking packet are part of every NAAQS rulemaking  
4 process. *See* Environmental Protection Agency, Review of the Ozone NAAQS: Schedule and  
5 Process, Clean Air Scientific Advisory Committee Meeting, CASAC Ozone Panel (Sept. 11-13,  
6 2012) (“Ozone NAAQS Schedule 2012”) at 3, attached as Exhibit 8 to Plaintiffs’ Request for  
7 Judicial Notice; MSJ at 16-17.

8 EPA’s only claim here is that *this time*, the issues will be *really* complicated. However, EPA  
9 offers no actual evidence substantiating this claim – it does not, and cannot, claim that the analysis  
10 required is more complex than past rulemakings, or that the comments will be more sophisticated  
11 than past rulemakings. In opposing the motion for summary judgment, EPA conveniently ignores  
12 the fact that it signed a proposed ozone NAAQS rulemaking in January 2010 – after determining that  
13 the 2008 ozone NAAQS were not sufficiently protective of public health and welfare – that included  
14 much of the scientific analysis and groundwork that EPA is relying upon for the present rulemaking.  
15 *See* 75 Fed. Reg. 2938 (Jan. 19, 2010). In the 2010 proposal, EPA proposed lowering the primary  
16 standard to a range of 0.060 to 0.070 ppm. *Id.* EPA’s draft Policy Assessment now recommends the  
17 same range for the current ozone rulemaking proposal. United States Environmental Protection  
18 Agency, EPA-452/P-14-002, Policy Assessment for the Review of the Ozone National Ambient Air  
19 Quality Standards, Second External Review Draft (Jan. 2014) (“Draft Policy Assessment”) at ES-1  
20 and 1-17 (noting EPA’s analysis is built on the approach used in the 2008 review and 2010  
21 reconsideration proposal); *available at*  
22 [http://www.epa.gov/ttn/naaqs/standards/ozone/s\\_o3\\_2008\\_pa.html](http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_2008_pa.html).

23 Similarly, EPA’s argument that it needs time to develop a different “secondary standard”  
24 based on a “cumulative, seasonal exposure index” fails to acknowledge that the 2010 proposal  
25 already included a distinct secondary standard, which would have required the same “cumulative,  
26 seasonal standard.” *See* Opposition at 13; *see also* 75 Fed. Reg. at 2938. Again, EPA’s Draft Policy  
27 Assessment states that the current round of analysis for the secondary standard will give “great  
28 weight” to the scientific evidence used to analyze the secondary standard in the 2008 rulemaking and  
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1 2010 reconsideration, utilize the same index to express ozone exposure, and will consider the same  
2 important policy questions regarding an “appropriate exposure index for vegetation.” Draft Policy  
3 Assessment at 1-38.

4 EPA would have the Court believe that this rulemaking will be unlike any before, but EPA  
5 simply is not breaking new ground with this rulemaking. It has already proposed standards similar  
6 to those that it is now considering, and has taken similar actions for other pollutants such as  
7 particulate matter. *See, e.g.*, 77 Fed. Reg. 38890 (Jun. 29, 2012) (proposing distinct primary and  
8 secondary standards for control of fine particulate matter). The rulemaking here is not so  
9 complicated or unique that there is reason to believe the schedule of past rulemakings cannot be  
10 followed here.

11 Rulemakings for national ambient air quality standards have always involved consideration  
12 of novel and complex scientific information, and courts have recognized that incorporating this type  
13 of evidence into a rulemaking does not justify extensive delay. In *American Lung Ass’n*, EPA  
14 contended that it needed additional time beyond the schedule proposed by plaintiffs, in order to  
15 ensure that the national ambient air quality standards for particulate matter “accurately reflect the  
16 latest scientific knowledge.” 884 F. Supp. at 348. In rejecting adoption of the lengthy schedule  
17 proposed by EPA, the court noted, “[e]xcuses for delay must go beyond the general proposition that  
18 further study and analysis of materials will make final agency action better, because further study  
19 will always make everything better, and it is always easier to do something with more rather than  
20 less time.” *Id.* at 347; *see also Sierra Club*, 602 F. Supp. at 898-99 (holding that despite the fact that  
21 “further study always makes everything better,” courts must “separate justifications grounded in the  
22 purposes of the Act from footdragging efforts of a delinquent agency”).

23 EPA’s arguments also imply that EPA has no control over matters such as how quickly it  
24 responds to comments, schedules briefings of senior management, or prepares rulemaking  
25 documents. These matters are not structural barriers that are beyond the control of the Agency.  
26 Although EPA notes that CASAC is not bound by statutory deadlines, EPA may call public meetings  
27 of CASAC and set CASAC deadlines. *See, e.g.*, 79 Fed. Reg. 4693 (Jan. 29, 2014) (EPA calling  
28 public meeting of CASAC to review draft risk assessments and policy assessment). While CASAC

1 may not have a statutory deadline for its activities, EPA does, and EPA cannot rely on the statutory  
2 directive to consult with CASAC to excuse it from complying with its duty to review the ozone  
3 standards by the statutory deadline. *See Sierra Club*, 602 F. Supp. at 898 (holding that while the  
4 Clean Air Act required EPA to consult with the advisory committee, consultation could not delay  
5 rulemaking, and rulemaking “must be carried out within the statutory deadlines for issuing the  
6 regulations”). Thus, EPA can inform CASAC when recommendations need to be received and can  
7 cut off debate as necessary to comply with the law. The EPA has itself acknowledged the need to  
8 constrain CASAC review in order to meet statutory deadlines in prior reviews of the ozone NAAQS:  
9 “[A]t some point the process of incorporating new studies must end so decisions can be made.” 58  
10 Fed. Reg. 13008, 13014 (Mar. 9, 1993) (finding that new studies cited by CASAC should not be  
11 considered, since such consideration would delay the statutorily-mandated review).

12 EPA’s justifications for delaying issuance of the proposed rulemaking boil down to nothing  
13 more than general concerns about the complexity of the rulemaking process and the burden of  
14 briefing agency officials and preparing the rulemaking package. None of this provides justification  
15 for delaying an already overdue review process. An agency’s “apprehension” that it will not be able  
16 to complete the various steps required in a rulemaking does not constitute a sufficient justification to  
17 delay a rulemaking schedule. *Train*, 510 F.2d at 712 (noting “[a]lthough these steps may be  
18 cumbersome, even awesome, they may well be within the agency’s grasp[, and]... [t]he court’s  
19 injunction should serve like adrenalin, to heighten the response and to stimulate the fullest use of  
20 resources”).

21 The schedule proposed by Plaintiffs allows time for EPA to complete all of the steps EPA  
22 has identified and those required by statute. The timeframes recommended by Plaintiffs are based  
23 on a (generous) application of empirical data concerning the time EPA has taken to complete these  
24 steps in prior NAAQS rulemakings, as well as EPA’s own past statements regarding the time that  
25 would be required for this rulemaking. EPA agrees with the use of these timeframes to estimate the  
26 time needed between proposed and final rulemaking, but then claims that these timeframes will not  
27 work for the proposed rulemaking without offering any meaningful justification. EPA’s vague  
28 claims do not provide sufficient reason to further delay the issuance of the Proposed Rule.

1                   **2. EPA’s Unsupported Claim Regarding “Other” Rulemaking Obligations**  
2                   **Also Does Not Justify a Delayed Schedule.**

3                   EPA also claims that its proposed schedule “takes into account that during the same time  
4 period for this rulemaking, EPA’s Office of Air and Radiation will be working on many other major  
5 rulemakings involving air pollution requirements for a wide variety of stationary and mobile sources,  
6 many with court-ordered or settlement agreement deadlines.” McCabe Decl. ¶ 31. This statement is  
7 a “throw away” claim with no support or explanation. It offers no explanation of whether the  
8 relevant “time period” covers the next 9 to 10 months that are relevant to the deadline for the  
9 proposed rulemaking. It does not identify any particular rulemakings, settlement agreements, or  
10 dates that would allow the Court to conclude that these “other” rulemakings will involve the same  
11 EPA staff or resources that will be assigned to the ozone rulemaking. Like general claims of  
12 complexity, generic claims of other competing agency responsibilities have also been rejected  
13 repeatedly by the courts. *See Sierra Club*, 444 F. Supp. 2d at 54 and 57 (holding that competing  
14 nondiscretionary duties did not excuse EPA delay); *see also Natural Res. Def. Council v. EPA*, 797  
15 F. Supp. 194, 197 (E.D.N.Y. 1992) (noting that “shifting resources in response to statutory  
16 requirements and court orders is commonplace for EPA”).

17                   **3. EPA’s Schedule Includes Time for Interagency Review, Which Can and**  
18                   **Should Be Cut to Allow for Expedient Compliance.**

19                   Even if the Court were to defer to EPA’s claims regarding the complexity of the new ozone  
20 rulemaking and the other competing demands on EPA’s time, the Court should still reject EPA’s  
21 schedule because it inappropriately includes time for discretionary interagency review. EPA states  
22 that it intends to conduct interagency review pursuant to Executive Orders 12,866, 58 Fed. Reg.  
23 51735 (Sept. 30, 1993) and 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011). Opposition at 13.

24                   As noted in Plaintiffs’ Motion for Summary Judgment, EPA cannot rely on review by other  
25 agencies in order to extend an already delayed rulemaking schedule. Multiple courts have held that  
26 time set aside for “interagency review” is not a valid grounds for adding further delays to the  
27 rulemaking process. “Review by the Office of Budget Management [sic] (OMB) serves no  
28 congressional purpose and is wholly discretionary. Therefore, it is not required, and the schedule  
shall exclude such review.” *American Lung Ass’n*, 884 F. Supp. at 349; *see also Env’tl Def. Fund v.*



1 *Thomas*, 627 F. Supp. 566, 571 (D.D.C. 1986) (OMB review cannot delay promulgation of  
2 regulations “beyond the date of a statutory deadline”); Exec. Order No. 12,866 § 6(a)(3)(D), 58 Fed.  
3 Reg. at 51741 (interagency review can be shortened or waived “for regulatory actions that are  
4 governed by a statutory or court-imposed deadline”).

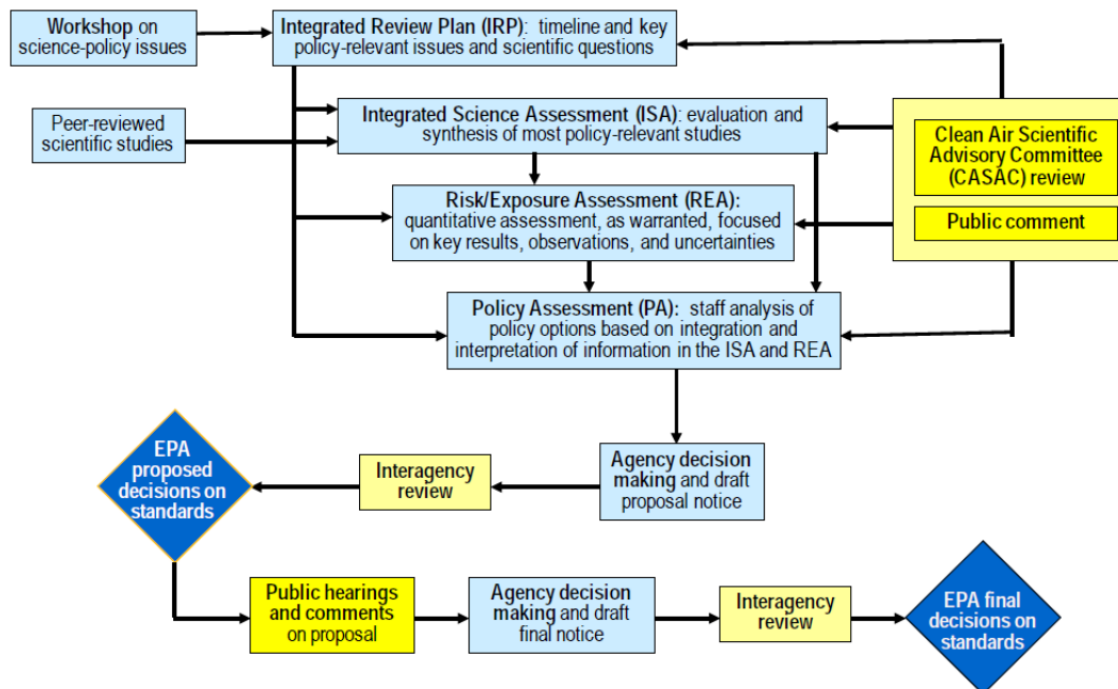
5 EPA does not state how much time it plans to allow for this interagency review, but it says  
6 that it plans to allow for such review “pursuant” to the cited Executive Orders. Opposition at 13.  
7 Executive Order 12,866 allows for ninety days of review at the Office of Management and Budget.  
8 *See* Exec. Order 12,866 § 6(b)(2)(B). Ninety days is double the six week spread that is the  
9 difference between Plaintiffs’ proposal deadline and EPA’s. Thus, even if this interagency review  
10 time were only cut in half, EPA’s schedule would be the same as Plaintiffs’ schedule.

11 EPA’s Opposition argues that the Court need not address the interagency review issue  
12 because the deadline Plaintiffs’ request “fails to adequately account for even the time that is  
13 reasonably necessary to complete the other tasks EPA must accomplish before taking final action.”  
14 Opposition at 17 (citing McCabe Decl ¶ 29, noting that EPA continues to work on rulemakings  
15 during interagency review, for example, drafting responses to public comments).

16 This declaration fails to support EPA’s position that additional time is needed to issue the  
17 proposed rule. Since the only dispute is over when EPA can propose the overdue ozone rule, this  
18 court’s inquiry must focus on whether EPA’s delay is justified by steps that must be completed  
19 before the proposed rule is issued. As set forth in Plaintiffs’ moving papers, the NAAQS review  
20 process proceeds through the following stages:



## NAAQS Review Process



Before the proposed rule is issued, EPA will develop assessment documents that inform the scientific basis and policy options for the Proposed Rule. CASAC will provide comment on these assessments, which EPA will incorporate into the final versions. Based on these final assessments, EPA will make its decisions on the Proposed Rule and prepare a rulemaking packet. The only remaining step prior to signature is discretionary OMB review. All of the significant steps that EPA has identified as necessary to prepare a proposed rulemaking will be completed prior to submitting the rulemaking packet to OMB for review. *See* Ozone NAAQS Schedule 2012 at 3; Opposition at 6-10. For a proposed rule, there are no responses to public comments or other steps that must be completed. EPA has not identified, nor could it, any other substantial pre-proposal activities that will need to be completed in parallel with OMB review. Thus, cutting the time claimed by EPA for OMB review directly shortens the time needed to sign a proposed rulemaking and more than accounts for the difference between Plaintiffs' December 1, 2014 deadline and EPA's January 15, 2015 deadline for issuance of the Proposed Rule.

1 **III. CONCLUSION**

2 For the reasons enumerated above, it is possible for EPA to issue the Proposed Rule by  
3 December 1, 2014 and the Final Rule by October 1, 2015. EPA has not met its heavy burden of  
4 showing it is impossible to comply with this timeline, and summary judgment must therefore be  
5 granted in Plaintiffs' favor.

6  
7 DATED: March 11, 2014

Respectfully submitted,

8  
9 /s/  
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