

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)

UNITED STATE ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**MOTION BY AMERICAN LUNG ASSOCIATION ET AL. FOR
ORDER DIRECTING EPA TO COMPLETE RECONSIDERATION
ACTION FORTHWITH**

Petitioners American Lung Association, et al.¹ (collectively, “American Lung Association”) respectfully ask the Court to order the respondent Environmental Protection Agency (EPA) to complete its reconsideration of the 2008 ozone standards immediately, and to direct that motions to govern further proceedings be due ten days after such final EPA action. The agency’s excessive and inexcusable delay in reconsidering the standard threatens the health and welfare of millions of Americans,

¹ American Lung Association, Environmental Defense Fund, Natural Resources Defense Council, National Parks Conservation Association, and Appalachian Mountain Club.

including American Lung Association members, frustrates the Court's prior orders, and unreasonably interferes with prompt resolution of this case.

Background

This litigation concerns challenges to a 2008 Rule issued by EPA under the Clean Air Act ("CAA" or "the Act"), wherein EPA set national ambient air quality standards (NAAQS) for ozone, the main component of urban smog. American Lung Association contends that these standards fail to comply with the Clean Air Act's mandate that NAAQS be strong enough to protect public health with an adequate margin of safety and to protect against any adverse affects on public welfare. 42 U.S.C. 7408. Mississippi and several industry petitioners contend that the 2008 Rule is too stringent.

The Clean Air Scientific Advisory Committee (CASAC) – the expert body charged by the Act with advising EPA in setting the NAAQS – has unanimously and repeatedly recommended that EPA adopt a health standard more protective than the agency adopted in the 2008 Rule. Likewise, the nation's leading medical organizations – including the American Medical Association, American Heart Association, American Academy of Pediatrics, American Public Health Association, American Thoracic Society, American College of Chest Physicians, American College of Preventive Medicine, and

many others – called for a much stronger health standard than the one EPA adopted. EPA-HQ-OAR-2005-0172-1219.1[1], -4218.1[1], -4305.1.

After initial filings were completed, the Court set a briefing schedule under which opening briefs would be filed by April 2009. In March 2009, EPA moved the Court, upon the consent of all parties, to vacate the briefing schedule and have the case held in abeyance while it re-evaluated whether the 2008 Rule met the CAA's requirements. The Court granted EPA's motion and ordered EPA to notify the Court and the parties by September 16, 2009 of "what action it has taken or will be taking with respect to the Ozone NAAQS Rule and its schedule for undertaking such action." EPA notified the Court and the parties on September 16, 2009 that it had "concerns regarding whether the revisions to the primary and secondary NAAQS adopted in the [2008] Ozone NAAQS Rule satisfy the requirements of the Clean Air Act, and thus EPA will reconsider the Ozone NAAQS Rule through notice and comment rulemaking." The agency further stated that "EPA's schedule for this rulemaking is to sign the Notice of Proposed Rulemaking by December 21, 2009, and to sign the Final Action by August 31, 2010."

On January 21, 2010, the Court ordered that the case be held in abeyance and directed the parties to file motions to govern further

proceedings within 60 days after EPA published its final action on reconsideration, or by November 1, 2010, whichever came first. Thereafter EPA filed no notice indicating any delay in its reconsideration action until eleven days before its scheduled August 31, 2010 completion date, when EPA for the first time notified the Court it expected the rulemaking to take approximately two months longer than originally estimated, and that “EPA’s current schedule is to sign a final rule on the reconsideration of the 2008 Ozone standard on or about the end of October 2010.” Thus began a series of EPA delays that have now spanned almost a full year past the date the agency originally said it would complete reconsideration.

On November 1, 2010, EPA notified the Court that it needed until December 31, 2010 to finish its reconsideration, but expressly stated that the agency was “committed” to completing its action by that date. Just over a month later, however, EPA told the Court that it now needed seven additional months, until July 29, 2011, to finish the job. The stated reason was a desire to seek further advice from CASAC. In response, American Lung Association and numerous States asked the Court to make the July 29 2011 date a binding, court-ordered deadline, but the Court denied that request without comment and directed that the case be continued in abeyance, with motions to govern further proceedings due by the earlier of

August 12, 2011 or fourteen days after EPA's signature of final action on reconsideration. Order of April 4, 2011.

EPA did not complete its reconsideration by July 29, 2011, and now says only that it "look[s] forward" to taking final action "shortly," without indicating whether that means days, weeks or months.

<http://www.epa.gov/glo/actions.html>. This fourth delay of EPA's reconsideration decision is utterly inexcusable. The agency received the additional advice it sought from CASAC on March 30, 2011 when the science advisers unanimously reaffirmed their prior recommendation that the ozone standards needed to be stronger (and expressing concern that EPA's request for additional advice was "redundant with our past reviews.").

[http://yosemite.epa.gov/sab/sabproduct.nsf/RSSRecentHappeningsCASAC/F08BEB48C1139E2A8525785E006909AC/\\$File/EPA-CASAC-11-004-unsigned+.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/RSSRecentHappeningsCASAC/F08BEB48C1139E2A8525785E006909AC/$File/EPA-CASAC-11-004-unsigned+.pdf) ("CASAC 2011 Letter"). The rulemaking package is now complete and has been sitting at the Office of Management and Budget (OMB) since July 11. <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp>. As further detailed below, given the critical importance of this rule to the health and lives of millions of Americans, the history of EPA delay, and the interference of that delay with meaningful resolution of the instant

litigation, American Lung Association respectfully requests that the Court order EPA to finish its reconsideration action forthwith.

1. A Court-Ordered Deadline for Completion of EPA's Reconsideration Action is Fully Warranted to Effectuate the Clean Air Act and Avoid Wasteful Litigation

EPA's foot-dragging has created an untenable situation in this case. On the one hand, it makes little sense to proceed immediately with litigation over the 2008 standards if EPA is going to revise those standards in the near future. 75 Fed. Reg. 2938 (Jan. 19, 2010). The EPA Administrator herself has stated that reconsideration is warranted based on concerns that the 2008 standards are "not legally defensible given the scientific evidence." http://www.eenews.net/assets/2011/07/14/document_gw_03.pdf at 2. On the other hand, EPA's repeated failure to complete its reconsideration within the timeframes promised prevents resolution of American Lung Association's substantial and legitimate health concerns. EPA itself estimates that stronger standards proposed in its reconsideration proposal could prevent as many as 12,000 premature deaths, avoid tens of thousands of hospital and emergency room visits, and prevent hundreds of thousands of lost work and school days each year. EPA-HQ-OAR-2007-0225-0402[1] at 11.

CASAC has stated unequivocally and repeatedly that to protect public health, the ozone primary (health) standard must be stronger than the .075 parts per million (ppm) level adopted in 2008. In 2006, the science advisers concluded that “[t]he primary 8-hr NAAQS needs to be substantially reduced to protect human health, particularly in sensitive subpopulations. Therefore, *the CASAC unanimously recommends a range of 0.060 to 0.070 ppm for the primary ozone NAAQS.*” (emphasis in original). After EPA rejected this advice in 2008, CASAC took the extraordinary step of writing a strong letter of disapproval to the Administrator, stating:

[T]he members of the CASAC Ozone Review Panel do not endorse the new primary ozone standard as being sufficiently protective of public health. The CASAC — as the Agency’s statutorily-established science advisory committee for advising you on the national ambient air quality standards — unanimously recommended decreasing the primary standard to within the range of 0.060–0.070 ppm. It is the Committee’s consensus scientific opinion that your decision to set the primary ozone standard above this range fails to satisfy the explicit stipulations of the Clean Air Act that you ensure an adequate margin of safety for all individuals, including sensitive populations.

[http://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/\\$File/EPA-CASAC-08-009-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/$File/EPA-CASAC-08-009-unsigned.pdf) (emphasis in the original).

In response to EPA’s most recent request for advice, CASAC on March 30, 2011 expressly “reaffirm[ed]” the above recommendation, stating that “[c]hildren and adults with asthma are at increased risk of acute exacerbations” from ozone levels below the 2008 standard, and that “the

evidence is sufficiently certain to be confident of public health benefits and additional protection for susceptible groups” by strengthening the standard to between .060 and .070 ppm. CASAC 2011 Letter at iii-iv.

EPA does not need any more time to complete its reconsideration. The agency’s sole stated grounds for delaying action until July 29, 2011 was to seek advice from its science advisers. That advice was provided in timely, final, and unequivocal terms on March 30, 2011, reaffirming repeated prior recommendations from CASAC. *Id.* In its February 7, 2011 filing with this Court, EPA said it was “confident that it will complete its rulemaking reconsidering the Ozone NAAQS Rule by July 29, 2011.” The agency has run out of excuses for any more stalling on this decision.

Moreover, the reality is that EPA has finished its reconsideration rule package. That package has been sitting at OMB since July 11. Further delay of the rule at OMB is neither warranted nor consistent with the Act, which grants exclusive authority to the EPA Administrator to set clean air standards, and provides no authority to OMB whatsoever to delay or interfere with the Administrator’s action thereon. CAA §109, 42 U.S.C. §7409. Moreover, the Administrator’s decision in setting the primary standard must be based exclusively on protection of public health. The statute does not allow consideration of other factors such as economic

impacts or budgetary concerns. Whitman v. American Trucking Assn's, 531 U.S. 457, 471 (holding that the Clean Air Act “unambiguously bars cost considerations from the NAAQS-setting process”).

An order setting a deadline for EPA action is warranted because the agency simply cannot otherwise be relied upon to take timely final action. EPA has shown as much by its repeated failures to adhere to its own stated timetables for finishing the reconsideration at issue here. Those timetables were stated in unambiguous terms,² and indeed, as noted above, EPA at one point even assured the Court that it was “committed” to completion reconsideration by the December 31, 2010 date. Yet EPA obviously did not view itself to be bound by any of these representations. At this point, only an order from the Court will assure timely and final agency action.

2. The Court has the authority to order EPA to complete the reconsideration process immediately.

This Court has authority to set a deadline for EPA to complete administrative proceedings under its equitable power to ensure effective

² In its September 16, 2009 filing, EPA stated that its “schedule is” to complete reconsideration by August 2010 (emphasis added). In its Federal Register notice proposing reconsideration of the 2008 standard, EPA characterized this commitment in unequivocal terms, stating: “In its notice to the Court, EPA stated that this notice of proposed rulemaking would be signed by December 21, 2009, and that the final rule will be signed by August 31, 2010.” 75 Fed. Reg. 2938, 2944 (Jan. 19, 2010)(emphasis added).

exercise of its jurisdiction. Pursuant to CAA sections 307(b)(1) & (d)(1)(A), this Court has jurisdiction to review EPA action in promulgating or revising any NAAQS. 42 U.S.C. § 7607(b)(1), (d)(1)(A). That jurisdiction in turn confers on the Court equitable power to issue appropriate orders concerning the conduct of pending agency proceedings that relate directly to matters properly before the Court. *See* Virginia Petroleum Jobbers Assn v. Federal Power Comm'n, 259 F.2d 921, 924-25 (D.C. Cir. 1958)(rejecting “artificial restrictions of the court’s power to grant equitable relief” in furtherance of the public interest, and holding that D.C. Circuit has power to stay agency proceedings on the basis of its jurisdiction to consider petition for review on related matter). *See also* Potomac Electric Power Co. v. Interstate Commerce Comm'n, 702 F.2d 1026, 1032 (D.C. Cir. 1983)(Court of Appeals has power to issue orders to agency “to effectuate or prevent the frustration of orders previously issued.”).

Here, the Court has repeatedly held this case in abeyance based on EPA’s multiple representations (and a commitment) that the agency would complete its reconsideration by dates certain. In light of EPA’s failure to fulfill these prior representations, it is well within the Court’s authority to now require EPA to complete the reconsideration forthwith as part of the Court’s equitable power to manage its docket and to remedy the delay

occasioned by EPA's actions. See In re Core Communications, Inc., 531 F.3d 849, 856 (D.C. Cir. 2008) (court has authority to issue mandamus "to prevent the frustration of orders previously issued") (citation and internal quotations omitted). After four EPA failures to honor its representations to this Court, a remedial order directing the agency to do what it promised is fully justified.

Contrary to prior EPA claims, Petitioners are not somehow required to first seek relief from the District Court in a situation such as this. Although the 1990 Clean Air Act amendments to CAA § 304, 42 U.S.C. §7604, allowed the filing in district court of suits to compel certain EPA actions unreasonably delayed, the amendments did not divest this Court of its authority in pending cases to manage its docket and grant equitable relief to effectively exercise its jurisdiction. This Court has already properly exercised jurisdiction here, and there is no authority for the notion that the agency's delay somehow ousts the Court's jurisdiction to manage the proceedings and instead transfers that decision to the district court.

3. An Order Requiring Immediate EPA Action is Justified

An order requiring EPA to complete its reconsideration rulemaking immediately is warranted in light of the substantial health risks faced by American Lung Association members and the public from ozone pollution

levels allowed by the current ozone standards that EPA itself now acknowledges to be unsafe. See 75 Fed. Reg. at 2,996 (the Administrator “concludes that important and significant risks to public health are likely to occur at a standard level of 0.075 ppm”, the ozone level allowed by the 2008 standards that EPA is reconsidering) (emphasis added). As noted above, those risks include thousands of premature deaths, tens of thousands of hospital and emergency room visits, and hundreds of thousands of lost work and school days each year. EPA-HQ-OAR-2007-0225-0402[1] at 11. Indeed, as recently as May 2011, the director of EPA’s clean air program stated that “[t]he Administrator believes it is both appropriate and beneficial to issue final revised standards for the reconsideration in July 2011 given the importance of the ozone NAAQS in protecting public health and welfare and her serious concern regarding whether the 2008 standards are requisite to protect public health and welfare with an adequate margin of safety, as required by the Clean Air Act.” <http://www.usclimatenetwork.org/resource-database/epa-letter-to-inhofe-responding-to-letter-on-ozone/> at 2.

An order requiring immediate EPA action is also justified to avoid further waste of the Court’s and the parties’ resources from the protraction of this case due to needless EPA delays. There is no basis for allowing EPA yet more time to act, given that the agency’s previously stated reason for

further delay (the need to consult the science advisers) no longer exists, and the rulemaking package is in fact complete.

Accordingly, American Lung Association respectfully requests that the Court order EPA to sign final action on its reconsideration of the 2008 ozone standards immediately, and also order that motions to govern further proceedings be due ten days after such final EPA action.

DATED: August 8, 2011.

/s/ David S. Baron

David S. Baron

Earthjustice

1625 Massachusetts Ave., N.W. # 702

Washington, D.C. 20036-2212

(202) 667-4500 ext. 203

dbaron@earthjustice.org

*Counsel for American Lung
Association, Environmental Defense
Fund, Natural Resources Defense
Council, National Parks Conservation
Association, and Appalachian
Mountain Club*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion by American Lung Association et al. for Order Directing EPA to Complete Reconsideration Action Forthwith was filed on August 8, 2011 using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system at the e-mail addresses noted below and further that a courtesy copy of the said Motion was sent to counsel at the e-mail addresses noted below:

For Petitioners State of New York et al:

Michael J. Meyers
Michael.Meyers@oag.state.ny.us

For Petitioner State of Mississippi:

Harold E. Pizzetta, III
e-mail: hpizz@ago.state.ms.us

For Petitioners Ozone NAAQS Litigation Group and Utility Air Regulatory Group:

F. William Brownell
Allison D. Wood
Lucinda Minton Langworthy
e-mail: bbrownell@hunton.com, awood@hunton.com,
clangworthy@hunton.com

For Petitioner National Association of Home Builders:

Robert R. Gasaway
Jeffrey Bossert Clark
e-mail: rgasaway@kirkland.com, jclark@kirkland.com

For Respondent Environmental Protection Agency:

David J. Kaplan
e-mail: david.kaplan@usdoj.gov

For Amicus Province of Ontario:

Richard A. Wegman
Garvey Schubert Barer
e-mail: DWegman@gsblaw.com