

ORAL ARGUMENT NOT YET SCHEDULED

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

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

**AMERICAN LUNG ASSOCIATION’S CROSS MOTION AND
RESPONSE TO EPA’S REVISED MOTION TO GOVERN**

EPA’s revised motion to govern further proceedings (filed 9/12/11) proposes that the Court restart briefing of this case using the same briefing schedule set by the Court more than 2½ years ago. Although petitioners American Lung Association, et al. (collectively, “American Lung Association”)¹ strongly advocate moving forward with briefing of this case, they urge adoption of a more expedited briefing schedule than proposed by EPA or Industry. A faster briefing schedule is warranted to address the

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

severe health risks at stake and to at least partially remedy the delays caused by the government's dilatory conduct in this case.

Background

The relevant background of this case is set forth in American Lung Association's motion to govern filed August 8, 2011. In summary, this suit was filed in May 2008 challenging EPA's revision of the national ambient air quality standards (NAAQs) for ozone. American Lung Association contends that these standards violate 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. §7409(b). EPA's own science advisers unanimously and repeatedly recommended stronger health standards than those adopted in 2008, as did the nation's leading medical organizations.

This case was stayed beginning in the Spring of 2009 and continuing until the present, based on repeated representations by EPA to the Court that the agency was reconsidering the 2008 standard because of the agency's concerns that it was not adequate to comply with the Clean Air Act ("the Act"). In January 2010, EPA published a formal proposal to strengthen the ozone NAAQS. Its schedule, filed with Court, provided for final action on that rule by August 2010. But thereafter EPA said it was delaying final

action to October 2010, then told the Court it was “committed” to finishing by December 2010, and then stalled again saying it needed until July 29, 2011 to complete the rule. Even after missing the July 29 date, EPA stated that it expected to complete the reconsideration rule soon. As late as August 25, 2011, EPA told the Court that it expected to sign a notice of final rulemaking “shortly.” On September 2, 2011, however, only eight days later, EPA drastically reversed course, telling the Court that it was not going to promulgate a reconsidered standard.

Misled by EPA’s repeated assurances that it would take final action on its proposal to strengthen the ozone standards, American Lung Association previously supported the stay of briefing in this case. There was little point to litigating challenges to a standard that was about to be changed. After EPA’s repeated delays, American Lung Association twice requested a court-ordered deadline for EPA to complete its rulemaking, but EPA responded both times with assurances that it would sign a final rule by a specified date or “shortly.”

Having misled both the Court and the parties into delaying this case for almost 2 ½ years, the government now proposes that briefing resume on the same timetable as originally set in December 2008, as though no delay had occurred in the interim. That position is untenable. American Lung

Association contends that the 2008 ozone standards are unlawfully weak, allowing thousands of premature deaths, thousands of heart attacks, thousands of hospitalizations, and tens of thousand of cases of asthma exacerbation each year due to ozone pollution. Resolution of these serious health concerns has been inexcusably delayed by the government's conduct here. In proposing its reconsideration rulemaking to strengthen the standards, EPA itself expressed "serious cause for concern" over whether the 2008 standards "satisfy the requirements of the CAA," and said that "the importance of the O3 [ozone] NAAQS to public health and welfare weigh heavily in favor of reconsidering parts of the 2008 final rule **as soon as possible.**" 75 Fed. Reg. 2938, 2943 (Jan. 19, 2010)(emphasis added).

Those same considerations support a faster briefing schedule in this case.

Requested Relief

For all the foregoing reasons, American Lung Association cross-moves for a more expedited briefing schedule than proposed by EPA. In particular: i) the time for EPA's brief should be no more than 60 days after filing of the Petitioners' briefs (as opposed to 100 days as proposed by EPA and 90 days proposed by Industry); ii) the time for intervenor briefs should be shortened to 14 days after EPA's brief is filed (as opposed to 25 days in the EPA and Industry schedules); iii) the time for preparation of the deferred

appendix should be shortened to 7 days after reply briefs are filed (as opposed to 18 days); and iv) the time for final briefs should be shortened to 7 days after the deferred appendix is filed (as opposed to 10 days).

These modifications to the schedule will cut more than two months off the briefing schedule without impairing the ability of any party to prepare adequate briefs. EPA in particular cannot seriously complain about a 60-day time frame for preparing its brief, given that this is the same amount of time provided in its schedule for preparation of the petitioners' briefs, and given that it is entirely appropriate for EPA to speed up its briefing to remedy at least a portion of the delay it has caused in this case.²

DATED: September 23, 2011

Respectfully submitted,

/s/David S. Baron

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²American Lung Association reserves the right to file a challenge in this Court to EPA's rejection of its own proposal on reconsideration to strengthen the ozone standards.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2011 I have served the foregoing **American Lung Association's Cross Motion and Response to EPA's Revised Motion to Govern** on all registered counsel through the Court's electronic filing system (ECF).

/s/David S. Baron
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