

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

STATE OF MISSISSIPPI, <u>et al.</u> ,)	
)	
)	
Petitioners,)	
)	No. 08-1200 and consolidated cases
v.)	(Ozone NAAQS Litigation)
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**EPA’S PARTIALLY UNOPPOSED
MOTION TO GOVERN REQUESTING THAT
THESE CASES CONTINUE TO BE HELD IN ABEYANCE**

Respondent United States Environmental Protection Agency ("EPA") requests that the Court continue to hold these cases in abeyance pending completion by EPA of its ongoing rulemaking reconsidering the rule challenged in these cases. As explained below, EPA will require an additional two months, until December 31, 2010, to complete its ongoing rulemaking and sign a final rule reconsidering the rule challenged in these cases. The coordinating counsel for the parties and amicus in these consolidated cases have authorized the counsel below to represent that they do not oppose the relief requested by this motion, as set forth below, with the exception of aligned State Petitioners and Intervenors (New York, et al.) who have not yet formulated their position on this motion.

The grounds for this motion are as follows:

1. Petitioners challenge in these consolidated cases a regulation promulgated by EPA under the Clean Air Act entitled the "National Ambient Air Quality Standards for Ozone" (hereinafter "Ozone NAAQS Rule"), 73 Fed. Reg. 16,436 (March 27, 2008).

2. By order dated March 19, 2009, the Court held these consolidated cases in abeyance as EPA considered whether to reconsider the Ozone NAAQS Rule challenged in these cases. Based upon EPA's subsequent notice that it will reconsider the Rule and conduct a rulemaking on reconsideration, and EPA's request to continue to hold these cases in abeyance pending completion of that rulemaking, the Court ordered on January 21, 2010, that these cases continue to be held in abeyance, directed EPA to file status reports, and directed the parties to file motions to govern further proceedings within sixty days after EPA publishes its final action on reconsideration in the Federal Register, or by November 1, 2010, whichever comes first.

3. In its last status report (dated August 20, 2010), EPA notified the Court that its proposed rule on reconsideration was published in the Federal Register on January 19, 2010 (75 Fed. Reg. 2938), that the comment period on that proposal concluded on March 22, 2010, and that EPA was continuing to review the comments received. At that time, EPA explained that it believed that it would be

able to sign a final rule on the reconsideration of the 2008 Ozone standard on or about the end of October 2010.

4. Completing this rulemaking has taken longer than anticipated. EPA expects that this process will take an additional two months. Thus, EPA is committed to signing a final rule on the reconsideration of the 2008 Ozone standard by December 31, 2010.

5. Accordingly, EPA requests that these cases continue to be held in abeyance. This will reasonably accommodate EPA's interest to reassess the Ozone NAAQS Rule and to promulgate alternative Ozone standards if appropriate. It will also likely preserve the resources of the Parties and the Court, by deferring litigation on the Ozone NAAQS Rule that may prove unnecessary depending upon the outcome of EPA's administrative reconsideration.

6. EPA further requests that the parties be directed to file motions to govern further proceedings by January 10, 2011.

7. This motion is unopposed by the parties in these cases, except for the aligned State Petitioners and Intervenors (New York, et al.) who have not yet formulated their position on this motion. Specifically, the undersigned counsel has been authorized to state by the appropriate coordinating counsel that (a) the Environmental Petitioners and Intervenors do not oppose this motion and reserve all rights reserved in paragraph five of the Joint Motion to Continue to Hold These

Consolidated Cases in Abeyance filed on October 19, 2009; (b) that amicus Province of Ontario does not oppose this motion; (c) that neither Petitioner the State of Mississippi nor Petitioner and Intervenor-Respondents National Association of Homebuilders, Utility Air Regulatory Group and the Ozone NAAQS Litigation Group will oppose this requested extension through calendar year 2010 as an accommodation to the federal government, but 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; and (d) that counsel for the aligned State Petitioners and Intervenor (New York, et al.) have not yet formulated their position on this motion.

Wherefore, EPA requests that these cases continue to be held in abeyance and that the parties be directed to file motions to govern further proceedings by January 10, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing filing was electronically filed with the Clerk of the Court on November 1, 2010, using the CM/ECF system, which will send notification of said filing to the attorneys of record that have, as required, registered with the Court's CM/ECF system.

/S/ David Kaplan