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

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

EPA'S REVISED MOTION REQUESTING A CONTINUED ABEYANCE AND RESPONSE TO THE STATE PETITIONERS' CROSS-MOTION

EPA is working diligently on its ongoing rulemaking reconsidering the rule challenged in these cases (i.e., the "National Ambient Air Quality Standards for Ozone" (hereinafter the "Ozone NAAQS Rule"), 73 Fed. Reg. 16,436 (March 27, 2008)). In its previously-filed motion to govern further proceedings, EPA stated that it required additional time, until December 31, 2010, to complete that rulemaking and sign a final rule, and thus requested that the Court continue to hold these cases in abeyance and direct the parties to file motions to govern further proceedings by January 10, 2011.

Reaching a final decision on the reconsideration of the Ozone NAAQS Rule requires the deliberative evaluation of the extensive body of scientific and technical information in the record and the many comments received on the Agency's January 19, 2010, rulemaking proposal reconsidering the 2008 rule. 75 Fed. Reg. 2938. In the process of evaluating this information and determining how to

exercise her judgment concerning the appropriate revisions to the Ozone NAAQS Rule, the EPA Administrator recently determined that additional advice from the Clean Air Scientific Advisory Committee ("CASAC") may prove useful and important in evaluating the scientific and other information before her. CASAC is the statutorily-mandated "independent scientific review committee," 42 U.S.C. § 7409(d)(2)(A), charged to give EPA advice on setting and revising NAAQS, id. § 7409(d)(2)(B). EPA's proposal to revise the Ozone NAAQS Rule within a particular range took account of the prior CASAC advice EPA received on these matters. 75 Fed. Reg. at 2992-93 & 2996-98. EPA intends to submit questions to the CASAC panel for the Ozone NAAQS Rule requesting additional advice, with the expectation that, for example, CASAC's advice "may aid the Administrator in most appropriately weighing the strengths and weaknesses of the scientific evidence and other information before her, and thus aid her in the exercise of judgment as to the appropriate standard for ozone under CAA section 109(b)." McCarthy Dec. ¶ 9 (attached hereto as Exhibit 1). The CASAC process also includes an opportunity for the public to submit comments to CASAC and EPA. Thereafter, the Administrator will consider CASAC's further advice and any additional public comments, together with the other record information, to reach her final decision. Id. ¶ 10. EPA expects that this process will require just over an additional seven months, until July 29, 2011. Id.

Accordingly, EPA revises the relief requested in its prior motion and requests that the Court continue to hold these consolidated 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. This request supersedes the relief requested by EPA in its partially unopposed motion to govern filed November 1, 2010.

The State Petitioners, in their response to EPA's prior motion to govern, stated that they did not oppose EPA's motion of November 1, 2010. State Petitioners' Response to [EPA's Motion] and Cross-Motion for Affirmative Relief, at 1 (dated Nov. 15, 2010). Those petitioners also included a cross-motion for affirmative relief, in which they requested that the Court order EPA to complete its ongoing rulemaking by the date EPA previously stated it would take final action (i.e, December 31, 2010), or, in the alternative, if EPA requires more time beyond that date to complete its rulemaking, that the abeyance lift after December 31, 2010, unless EPA submits evidence in advance of that date clearly demonstrating the need for additional time. In view of this instant revised motion and schedule, the specific relief requested by State Petitioners in their cross-motion could be considered moot and therefore denied. EPA also recognizes, however, that the State Petitioners may not consider their cross-motion moot, or that they otherwise may renew their request for relief, adapted to reflect EPA's new schedule. Accordingly, we respond to these arguments in State-Petitioners cross-motion.

As explained below, their request for a writ of mandamus, to order EPA to complete its ongoing rulemaking by a date certain, should be denied. EPA has been diligently working to complete its ongoing rulemaking reconsidering the Ozone NAAQS Rule, and the additional time, until July 29, 2011, by which EPA intends

to take final action, hardly warrants issuance of the extraordinary relief of a writ of mandamus. EPA recognizes that its new schedule for completing its ongoing rulemaking is longer than it previously reported to the parties and the Court – in total, eleven months longer than EPA's initial anticipated schedule to undertake its rulemaking reconsidering the Ozone NAAQS Rule, for a combined period less than two years. Although EPA has had to revise the schedules it previously represented to the Court, that cannot supplant the Administrator's current determination that her deliberations would likely benefit from the additional advice described above. Neither the statute nor caselaw would support a writ of mandamus conflicting with the Administrator's charge to consider the relevant information and reach a reasonable decision that is requisite to protect public health and welfare.

Nor should the Court grant Petitioners' alternative request for relief, to decide in advance what judicial standard or measure of evidence EPA must satisfy or provide in any future motion, should the Agency conclude that additional time is necessary to complete its ongoing rulemaking. On this issue, we note that EPA is providing with this filing a declaration by its Assistant Administrator for Air and Radiation explaining the reasons for the additional time EPA needs and the steps EPA intends to take to complete its ongoing rulemaking by July 29, 2011. See McCarthy Dec. As further explained, EPA believes that this warrants a continued abeyance of these cases. State Petitioners' request, however, that the Court enunciate a particular judicial standard that must be satisfied to justify an extension, should be denied.

STATUTORY AND PROCEDURAL BACKGROUND

I. Primary and Secondary Ozone NAAQS

EPA promulgates "primary" and "secondary" NAAQS to protect public health and welfare for certain pervasive pollutants in the ambient atmosphere. 42 U.S.C. § 7409(a)(1), (b)(1)-(2). "Primary" standards are set at levels which, "in the judgment of the Administrator," are "requisite to protect the public health" with "an adequate margin of safety"; "secondary" standards are set to protect public welfare "from any known or anticipated adverse effects," id. § 7409(b)(1)-(2), which include "effects on soils, water, [and] vegetation." Id. § 7602(h). Every five years EPA must review published air quality criteria and promulgate any revised or new standards as may be appropriate. Id. § 7409(d)(1).

When setting a NAAQS, EPA must consider the recommendations of a statutorily-mandated "independent scientific review committee," 42 U.S.C. § 7409(d)(2), commonly referred to as the Clean Air Scientific Advisory Committee ("CASAC"). At five-year intervals, CASAC must provide its "recommend[ations] to [EPA] of any new [NAAQS] and revisions of existing . . . [scientific-based air quality criteria and NAAQS]." Id. § 7409(d)(2)(B). For any significant departure from CASAC's advice, EPA must provide "an explanation of the reasons for such differences." Id. § 7607(d)(3).

II. EPA's Decision to Reconsider the 2008 Ozone NAAQS Rule

Ozone is the principal component of smog and causes numerous adverse health effects, including emergency room visits and hospital admissions for respiratory causes, and possibly cardiovascular-related morbidity and cardiopulmonary mortality. The primary and secondary Ozone NAAQS

promulgated by EPA in 1997 are identical, and are set at a level of 0.08 parts per million ("ppm") using an 8-hour daily averaging time. These 1997 Ozone NAAQS were upheld after extensive litigation. American Trucking Ass'ns v. EPA, 283 F.3d 355 (D.C. Cir. 2002) (omitting history).

As part of its review of the 1997 ozone standard, CASAC found a "'large body of data clearly demonstrates adverse human health effects at the current level'" of the 1997 standard, concluded that the 1997 standard "'needs to be substantially reduced to protect human health, particularly in sensitive subpopulations'," 72 Fed. Reg. 37,818, 37,869 (July 11, 2007) (quoting 2006 CASAC Letter), and advised EPA to adopt a level between 0.060 to 0.070 ppm. Id. at 37,877/3. In the final Ozone NAAQS Rule challenged in these cases, EPA adopted a revised standard of 0.075 ppm, 73 Fed. Reg. at 16,436, and explained that it reached a different judgment than CASAC. Id. at 16,483/1.

On the secondary standard, CASAC recommended that EPA depart from its practice of setting the secondary NAAQS identical to the primary NAAQS, and given the nature of ozone exposures that adversely affect vegetation during maximum growth periods, that EPA "'establish an alternative cumulative secondary standard for [ozone] . . . that is distinctly different in averaging time, form and level from the currently existing or potentially revised 8-hour primary standard.'" 72 Fed. Reg. at 37,899-900 (quoting 2006 CASAC Letter). After internal debate, President Bush "concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard," 73 Fed. Reg. at 16,497/2,

and EPA ultimately concluded that a secondary standard identical to the primary standard would be sufficient. Id. at 16,500. Petitions for review challenging the Ozone NAAQS Rule were filed in 2008 by aligned industry petitioners and the State of Mississippi, alleging that the revised NAAQS are too stringent, and by numerous States (New York, et al.), environmental and public health groups alleging that the primary and secondary revised NAAQS are not sufficiently protective.

On March 10, 2009, EPA requested that the Court hold the cases in abeyance, "to allow time for appropriate EPA officials that are appointed by the new Administration to review the [2008 Ozone NAAQS] Rule to determine whether the standards established in [that] Rule should be maintained, modified or otherwise reconsidered." EPA's motion was unopposed by all the parties in these cases. On March 19, 2009, the Court granted EPA's unopposed motion and directed EPA to notify the Court by September 16, 2009, of the actions it will be taking with respect to the Ozone NAAQS Rule and its schedule for undertaking such actions. In accordance with this Order, EPA notified the parties and Court on September 16, 2009, that EPA had concerns regarding whether the 2008 standards satisfied the requirements of the Act and that it would reconsider those standards through notice-and-comment rulemaking. See EPA's Notice That It Is Reconsidering the Rule Challenged in These Cases. EPA further explained that its schedule was to sign a Notice of Proposed Rulemaking by December 21, 2009, and to sign any Final Action by August 31, 2010. Id. As further required, on October 16, 2009, EPA filed a joint motion with the environmental, public health, and State

petitioners, requesting a continued abeyance of these cases pending completion of EPA's rulemaking to reconsider its 2008 Ozone Rule.

Over the objections of the industry petitioners, the Court granted EPA's joint motion and placed these cases in abeyance. Order (dated Jan. 21, 2010).[1/] In its briefing on that motion, EPA explained that its decision to reconsider the Ozone NAAQS Rule and request to hold these cases in abeyance were appropriate given, among other things, this Court's recent decision in American Farm Bureau Federation v. EPA, 559 F.3d 512 (D.C. Cir. 2009). In that case, the Court rejected EPA's 2006 decision not to promulgate a more stringent primary NAAQS for fine particulate matter ("PM"), concluding that EPA inadequately explained its departure from CASAC's recommendation that EPA set a lower standard. Id. at 528-29. On the secondary standard, the Court concluded that "EPA's decision to set secondary fine PM NAAQS identical to the primary NAAQS was unreasonable and contrary to the requirements" of the Act, id. at 531, and criticized EPA's failure to justify its departure from CASAC's recommendation for a more protective secondary standard that is different from the primary standard. Id. at 530.

[1/] In their motion to govern (dated October 16, 2009), the Industry Petitioners and Mississippi opposed EPA's joint motion to hold these cases in abeyance, because they then preferred to brief their issues challenging the Ozone NAAQS Standard, and in the alternative they requested that the Court stay the Ozone NAAQS Rule pending EPA's reconsideration. EPA and the Environmental and State Petitioners opposed the Industry Petitioners' motion, which the Court denied. Order (dated Jan. 21, 2010); see EPA's Opposition to the Motion to Govern Further Proceedings of Mississippi and the Industry Petitioners (dated Nov. 10, 2009); Environmental and State Petitioners' Joint Opposition to Motion to Govern (dated Nov. 10, 2009). Neither the Industry Petitioners nor the Environmental Petitioners opposed EPA's subsequent November 1, 2010, motion to continue to hold these cases in abeyance as EPA reconsiders the Ozone NAAQS Rule.

ARGUMENT

I. THE COURT SHOULD CONTINUE TO HOLD THESE CASES IN ABEYANCE, PENDING EPA'S COMPLETION OF ITS ONGOING RULEMAKING BY JULY 29, 2011.

The time EPA has taken, and continues to take, to complete its ongoing rulemaking reconsidering the Ozone NAAQS Rule is reasonable and warrants the continued abeyance of these cases. Specifically, in accordance with the Court's abeyance order of March 19, 2009, EPA timely notified the Court on September 16, 2009, of its intention to reconsider the Ozone NAAQS through a notice-and-comment rulemaking, which EPA then expected to complete by August 31, 2010. EPA worked expeditiously, and four months after its notice to the Court, on January 19, 2010, EPA published in the Federal Register its notice of proposed rulemaking reconsidering the Ozone NAAQS. 75 Fed. Reg. 2938; see McCarthy Dec. ¶ 4.[2/]

Thereafter, EPA provided a 62-day public comment period on its proposal, until March 22, 2010, conducted three public hearings in which the Agency heard testimony from approximately 210 interested stakeholders, and has since been reviewing the more than 5,000 unique comments received from citizens, industry groups, public health organizations, States and public interest groups. McCarthy

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[2/] Under the statute, EPA's notice of proposed rulemaking must be accompanied by a detailed statement of its basis and purpose, including the factual data on which the proposal is based and the methodology used in obtaining and analyzing the data. 42 U.S.C. § 7607(d)(3). In the case of a NAAQS rulemaking, the Act further requires that the proposal "set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments" made by the Clean Air Scientific Advisory Council and explain any important departures from that advice. EPA diligently worked to develop its proposal, and as noted EPA published its rulemaking proposal just four months after its decision to reconsider the Ozone NAAQS Rule.

Dec. ¶ 5. These comments touch on all aspects of the primary and secondary ozone NAAQS under reconsideration, and EPA is evaluating the issues raised. Id. Before EPA can take final action, the Administrator must determine whether any revisions are warranted and the Agency must draft the final rulemaking decision and supporting technical documents, and include a detailed statement of basis and purpose, an explanation of the reasons for any major changes from the proposal, and a response to each significant comment submitted in written or oral presentations during the comment period. 42 U.S.C. § 7607(d)(6). Finally, this rulemaking is subject to interagency review under Executive Order No. 12866, during which the Office of Management and Budget coordinates review within the Executive Branch for major regulatory actions such as this rulemaking. See McCarthy Dec. ¶ 10.

The Agency has been diligently proceeding with this work, together with the necessary briefings for the Administrator and others on the complex issues involved and the Agency's internal deliberations over the issues raised. Id. ¶ 6. EPA previously believed that it could complete this rulemaking in the identified time period, and most recently informed this Court that it was committed to issuing a final rule by December 31, 2010. EPA's Partially Unopposed Motion (dated November 1, 2010). However, in the process of considering the information and issues before her and determining how to exercise her judgment concerning the appropriate revisions to the Ozone NAAQS Rule, the Administrator decided that seeking additional advice from CASAC may serve to facilitate her exercise of judgment about the scientific and other information in the administrative record.

McCarthy Dec. ¶¶ 7-9. "[T]he Administrator believes that additional advice from CASAC may be useful, especially in the context of a more specific and focused solicitation of scientific advice. For example, the advice from CASAC may aid the Administrator in most appropriately weighing the strengths and weaknesses of the scientific evidence and other information before her, and thus aid her in the exercise of judgment as to the appropriate standard for ozone under CAA section 109(b). 42 U.S.C. § 7409(b). McCarthy Dec. ¶ 9.

Accordingly, EPA intends to take final action on its ongoing rulemaking reconsidering the Ozone NAAQS Rule by July 29, 2011. During the approximately seven months and three weeks between this filing and that date, EPA intends to take the following steps:

> During December 2010 and January 2011, EPA intends to prepare a set of questions for CASAC and provide them for CASAC's review. The questions are expected to request additional advice focused on the scientific evidence and other information before the Administrator. EPA anticipates that CASAC will hold a public meeting in February 2011 to discuss their response, and anticipates that CASAC will provide its additional advice to the Agency by letter shortly thereafter. The CASAC process includes an opportunity for the public to submit comments to CASAC and EPA.

McCarthy Dec. ¶ 10. Thereafter, EPA would consider CASAC's additional advice as well as any public comments received, prepare a final rule and accompanying rulemaking documents, and conduct the appropriate interagency review under Executive Order No. 12866 before issuing a final decision on its reconsideration rulemaking. Id. EPA believes this schedule will provide the Administrator with the opportunity to obtain the additional advice and comments she seeks as well as to conduct the appropriate deliberations, and for the Agency to complete the remaining

steps necessary to take final action by July 29, 2011.

This is a reasonable schedule for EPA to conduct its rulemaking, in all a total of approximately 22 months from the time EPA determined to reconsider the Ozone NAAQS Rule, and just over 18 months from the time EPA issued is rulemaking proposal on January 19, 2010. As explained above, EPA has been working, and will continue to work, diligently to complete this important rulemaking. In Sierra Club v. Thomas, 828 F.2d 873, 798 (D.C. Cir. 1987), this Court found reasonable a rulemaking schedule in which the Agency had taken just less than 3 years from proposal without final action. In so finding, the Court explained that "[a] simple reading of the Clean Air Act reveals that whether to impose a certain type of regulation often involves complex scientific, technological, and policy questions. EPA must be afforded the amount of time necessary to analyze such questions so that it can reach considered results in a final rulemaking that will not be arbitrary and capricious or an abuse of discretion." Id. at 799.

Likewise, a continued abeyance pending this process will preserve judicial economy as well as the resources of the parties, and will serve the public interest, by ensuring that the primary ozone NAAQS EPA promulgates is "requisite to protect the public health" with "an adequate margin of safety," 42 U.S.C. § 7409(b)(1), and that the secondary NAAQS "is requisite to protect the public welfare." Id. § 7409(b)(2). Moreover, recourse to active briefing on the Ozone NAAQS Rule now would be needless and impractical, especially since any rulemaking decision to revise the standards will supersede the 2008 standards of the Ozone NAAQS Rule. In such circumstances, an abeyance of litigation to

accommodate agency reconsideration is appropriate. See Pennsylvania v. ICC, 590 F.2d 1187, 1194 (D.C. Cir. 1978) ("Administrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts.").

II. STATE PETITIONERS CANNOT MEET THEIR HIGH BURDEN TO JUSTIFY ISSUANCE OF A WRIT OF MANDAMUS, AND ARE IN THE WRONG COURT TO SEEK SUCH RELIEF

The State Petitioners' request for a court order that EPA complete its ongoing rulemaking by the date EPA previously stated that it would complete this process effectively seeks a writ of mandamus. To the extent that the State Petitioners reassert that request given EPA's revised schedule discussed above, it should be denied. Such relief is neither available nor appropriate in this case for several reasons.

As an initial matter, while the Court may have mandamus authority to enforce a prior judgment, State Petitioners here do not seek such relief, but rather seek extraordinary relief relating to an ongoing rulemaking. In 1990 Congress amended the Clean Air Act citizen suit provision, placing a claim for unreasonable delay over ongoing rulemakings exclusively in federal district court within the Circuit in which the final action, once taken, would be reviewed. 42 U.S.C. § 7604(a) (text after (a)(3)). Thus, at a minimum, to obtain the relief State Petitioners here seek, they must comply with the Act's citizen suit requirements and file a

complaint in U.S. District Court for the District of Columbia.[3/] Filing an appropriate complaint in district court not a mere formality, and State Petitioners' failure to do so alone provides a sufficient basis to deny their request.[4/]

Beyond this, mandamus is a "drastic" remedy available only in "extraordinary situations." Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394, 403 (1976); In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). A petitioner seeking mandamus relief has the burden of showing that the respondent owes it a "clear and compelling" duty, Cheney, 406 F.3d at 729; Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), a duty "so plainly prescribed as to be free from doubt and equivalent to a positive command," Consol. Edison Co. of N.Y., Inc. v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002) (quoting

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[3/] The Administrative Procedure Act provides a claim for an order to ''compel agency action unlawfully withheld or unreasonably delayed,'' 5 U.S.C. § 706(1). Prior to Congress' 1990 amendment to the CAA citizen suit provision, jurisdiction for a petition for review asserting such a claim may have existed in the D.C. Circuit. See Sierra Club v. Thomas, 828 F.2d. at 791-92.

[4/] State Petitioners cite two cases and appear to argue (at 8) that they may forego filing a separate petition for mandamus or claim for unreasonable delay. Neither of the cases they cite, however, supports this claim, nor supersedes the exclusive grant of jurisdiction under the CAA citizen suit provision. In Potomac Elec. Power Co. v. Interstate Commerce Comm'n, 702 F.2d 1026 (D.C. Cir. 1983), op. supplemented by 705 F.2d 1343 (D.C. Cir. 1983), the Court in a prior case had issued a merits decision and remanded the challenged rate decision to the Commission. Id. at 1028-29. In the new case, the court issued a writ of mandamus to the Commission because its continuing delay responding to the remand "violates our earlier mandate [remanding the rate decision] or because it jeopardizes our future review." Id. at 1033. In contrast, here the Court has not remanded the Agency's Ozone NAAQS Rule and it continues to have jurisdiction over State Petitioners' pending petition challenging that rule. Similarly, Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958), only involved the Court's authority to issue a stay pending judicial review while it considered whether intervention should have been granted in that same proceeding.

Wilbur v. United States, 281 U.S. 206, 218-19 (1930)).

In Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) ("TRAC"), this Court emphasized that the liability analysis of an unreasonable delay claim focuses on "whether the agency's delay is so egregious as to warrant mandamus." 750 F.2d at 79 (emphasis added). The Court adopted a six-part test for this inquiry as providing "useful" but "hardly ironclad" guidance:

> (1) the time agencies take to make decisions must be governed by a 'rule of reason,' . . .; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason . . .; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake . . .; (4) the court should consider the effect of expediting agency action on agency activities of a higher or competing priority . . .; (5) the court should also take into account the nature and extent of the interests prejudiced by delay . . .; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Id. at 80 (citations and internal quotations omitted). Application of these factors to this case demonstrates that EPA's action on its ongoing rulemaking reconsidering the ozone NAAQS has not been dilatory, let alone unreasonably delayed.

A. EPA Has Neither Missed a Statutory Deadline Nor Unreasonably Delayed Completing Its Rulemaking.

EPA's decision to reconsider the Ozone NAAQS Rule is discretionary; so too is its ongoing rulemaking reconsidering that Rule. No statute requires such reconsideration or establishes a schedule for EPA's rulemaking to do so. In such a situation, "an agency's control over the timetable of a rulemaking proceeding is entitled to considerable deference." Sierra Club v. Thomas, 828 F.2d at 797. Here, as discussed above, EPA has been proceeding reasonably in its ongoing rulemaking

reconsidering the Ozone NAAQS Rule. Further, its schedule to complete its rulemaking by July 29, 2011, accommodates important interests described above to facilitate the Administrator's decision-making. The fact that EPA requires additional time beyond its initial estimates to complete this rulemaking hardly warrants the issuance of a writ of mandamus. This is particularly true given that EPA has not breached any statutory time frame governing its ongoing rulemaking. See Action on Smoking & Health v. Dep't of Labor, 100 F.3d 991, 993-95 (D.C. Cir. 1996) (agency receives considerable deference even where the agency's own initial estimated deadlines have passed; declining to issue a writ of mandamus).

EPA acknowledges that the process to reach a final decision will take longer than initially expected. In its previous notices to the Court, EPA "made its best good faith estimate on how much time would be needed to complete the various steps necessary to reach a conclusion on the reconsideration." McCarthy Dec. ¶ 7. For the reasons stated above, however, more time is needed: specifically, approximately 11 months beyond the little more than seven-month period (until August 31, 2010) that EPA initially believed would be required to take final action after its January 19, 2010, proposal. But this delay hardly provides the factual predicate for the extraordinary relief State Petitioners request.

Given the importance and complexity of the issues, and the necessary steps detailed above, it is not unreasonable for EPA to take more time to reconsider the Ozone NAAQS Rule. By July 29, 2011, EPA will have spent just over 18 months since its January 19, 2010, proposal was published, and during the remaining seven months of this time EPA intends to obtain additional advice from CASAC, a

process which may also result in additional public comment, and take the remaining steps necessary to take final action. This rulemaking pace is clearly reasonable, and does not warrant relief from the Court. See Sierra Club v. Thomas, 828 F.2d at 798 (approximately three years of agency deliberations on a proposed Clean Air Act rule was not unreasonable); see also In re Monroe Commc'ns Corp., 840 F.2d 942, 945-46 (D.C. Cir. 1988) (five-year delay does not warrant mandamus); Oil, Chem. & Atomic Workers Int'l Union v. Zegeer, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (no need for court order when agency intends to take final action in two years). For these reasons, not only would an order that EPA take final action by July 29, 2011 (let alone December 31, 2010), not be justified, such an order risks improperly cutting off necessary time for EPA to complete its deliberations and properly conclude all work necessary to support its final action.

B. A Compelling Deadline is Not Required to Protect Public Health and Welfare.

Petitioners cite only generalized public health concerns caused by ozone pollution and argue that implementation may be delayed. But it is appropriate to allow EPA the time it believes necessary to complete its ongoing rulemaking reconsidering the Ozone NAAQS Rule, as any resulting revision of the NAAQS will be designed to ensure that the public health and welfare are adequately protected. Petitioners' generalized claims of harm provide no basis to curtail the Agency's rulemaking. Furthermore, the Ozone NAAQS Rule remains in effect pending EPA's reconsideration, Order at 2 (dated Jan. 21, 2010), the continued effectiveness of which the State Petitioners strongly supported. Environmental and

State Petitioners' Joint Opposition to Motion to Govern, at 7-15 (dated Nov. 10, 2009). Moreover, State Petitioners' reference to additional needed public health protection based upon a revised standard presupposes the outcome of EPA's ongoing rulemaking.

In any event, EPA is well aware of the public health and welfare issues at stake whenever the Agency revises a NAAQS under the Clean Air Act, as well as the particular risks posed by ozone pollution. EPA must, however, have the time it believes necessary to complete its rulemaking properly, so it can consider the "complex scientific, technological, and policy questions" raised, reach "considered results," and establish a defensible standard that is requisite to protect public health and welfare. Sierra Club v. Thomas, 828 F.2d at 798. As this Court explained in Sierra Club v. Thomas, "by decreasing the risk of later judicial invalidation and remand to the agency, additional time spent reviewing a rulemaking proposal before it is adopted may well ensure earlier, not later, implementation of any eventual regulatory scheme." Id. at 798-99.

C. Judicial Review Will Not Be Frustrated Absent Mandamus.

State Petitioners (at 8) cite two cases, suggesting that the Court should issue an order to prevent the frustration of judicial review or its prior orders. Neither of these cases, however, displaces the heavy burden State Petitioners bear to justify mandamus based upon a claim of unreasonable delay discussed above. See supra at 14-15 & n.4. Significantly, the State Petitioners did not request that the abeyance be lifted on their challenge to the Ozone NAAQS Rule and that active litigation resume, through issuance of a briefing schedule. Indeed, in opposing the Industry

Petitioners' prior efforts to preclude EPA's reconsideration, State Petitioners opposed precisely this course, as did EPA, preferring instead that EPA reconsider the Ozone NAAQS Rule without the burden of a pending briefing schedule. Environmental and State Petitioners' Joint Op. to Motion to Govern, at 4-5 (dated Nov. 11, 2009). Especially given this, State Petitioners should not now be heard to argue that an order is necessary at this juncture to prevent the frustration of judicial review. Accordingly, the Court should deny State Petitioners' request for an order requiring EPA to take final action by December 31, 2010.

III. THE COURT SHOULD DECLINE STATE PETITIONERS' ALTERNATIVE REQUEST

As an alternative, Petitioners request an advisory decision from the Court that sets out, in advance of any future motion EPA may file, a judicial standard and evidentiary threshold for EPA to justify any further time that may prove necessary for EPA to complete its ongoing rulemaking. Such extraordinary relief is not warranted.

As explained above, although EPA has taken longer than it initially expected, it is proceeding diligently to complete its rulemaking, particularly given the magnitude of the task and complexity of the issues. Nothing in the facts here warrants the extraordinary relief State Petitioners request. Moreover, the case relied upon by State Petitioners to justify the relief they seek is wholly inapposite. The text they quote in American Lung Ass'n v. EPA, 134 F.3d 388, 392 (D.C. Cir. 1998), referring to EPA's heavy obligation to explain its reasoning, applies to EPA's final rule establishing a NAAQS "requisite to protect the public health"

under 42 U.S.C. § 7409(b)(1), not a standard under which EPA must justify more time to complete its ongoing rulemaking.

State Petitioners further speculate that time spent by EPA to conduct its rulemaking will cascade into delay implementing any revised ozone NAAQS EPA may issue upon completing its rulemaking. Again, State Petitioners offer only the generalized and theoretical specter of harm. This cannot displace the time necessary for EPA to complete its ongoing rulemaking, especially since any EPA decision to revise the standards in the Ozone NAAQS Rule will be designed to ensure that the public health and welfare are adequately protected; it is appropriate for EPA to take the time necessary to do so properly.

Finally, EPA notes that it has provided a declaration detailing the time necessary and steps the Agency will take to complete its ongoing rulemaking by July 29, 2011. This fact, however, does not warrant the relief State Petitioners request, that the now Court enunciate a judicial standard or measure of evidence that must be satisfied for any future extension.

CONCLUSION

For the reasons set forth above, the Court should continue to hold these consolidated cases in abeyance and direct 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. Further, the Court should deny State Petitioners' cross-motion for additional relief.

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 December 8, 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