

No. 08-16961 B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALABAMA ENVIRONMENTAL COUNCIL, *et al.*,

Petitioners,

v.

LISA JACKSON, in her capacity as Administrator,
United States Environmental Protection Agency, and the
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND

April 9, 2009

JOHN C. CRUDEN
Acting Assistant Attorney General
MARY M. WHITTLE
Trial Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice

ATTORNEYS FOR RESPONDENTS

Respondents Lisa Jackson, in her capacity as Administrator, United States Environmental Protection Agency (“the Administrator”), and the United States Environmental Protection Agency (“EPA”), through undersigned counsel, move this Court for a voluntary remand of the final rule at issue here: “Approval and Promulgation of Implementation Plans: Alabama: Approval of Revisions to the Visible Emissions Rule,” 73 Fed. Reg. 60,957 (Oct. 15, 2008). Counsel for Petitioners Alabama Environmental Council, Sierra Club, Natural Resources Defense Council, and Our Children’s Earth Foundation (“Petitioners”) have indicated that they do not oppose this motion. Counsel for Intervenor Alabama Power Company has indicated that his client opposes this motion. Counsel for Intervenors Tennessee Valley Authority and Alabama Department of Environmental Management (“Intervenors”) were unable to confirm what position their clients will take on the motion.

The remand will allow EPA to conduct further administrative proceedings and provide an opportunity for additional public comment on the final rule. The requested remand will serve the interests of judicial efficiency and economy, without prejudice to Petitioners or Intervenors. As grounds for this motion, EPA represents:

1. On October 15, 2008, EPA published its final rule approving revisions to the Alabama State Implementation Plan (“SIP”) concerning opacity requirements for certain sources (73 Fed. Reg. 60,957) (“Final Rule”).
2. On December 12, 2008, Petitioners filed a petition for review of the Final Rule in this Court.
3. On December 12, 2008, Petitioners also submitted to the EPA Administrator a petition to reconsider the final rule. On January 15, 2009, EPA denied that petition for

reconsideration.

4. On February 25, 2009, Petitioners submitted to the Administrator a second petition for reconsideration. On April 3, 2009, EPA granted the second petition for reconsideration. See Letter from A. Stanley Meiburg, Acting Regional Administrator, Region 4, EPA to George E. Hays, Esq., dated April 3, 2009 (Attached as Exhibit A).

5. Petitioners' second petition for reconsideration raises legal, technical and policy issues that warrant additional review. EPA would like the opportunity to reconsider its interpretation and implementation of the statute.

6. The case law fully supports granting an agency's motion for a voluntary remand where, as here, the agency has determined that its prior action may have been in error or inadequately explained. See, e.g., Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) ("We commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than waste the courts' and parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete."); See also Trujillo v. Gen. Elec. Co., 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."); Citizens Against the Pellissippi Parkway Extension v. Mineta, 375 F.3d 412, 416 (6th Cir. 2004); SKF USA Inc. v. United States, 254 F.3d 1022, 1030 (Fed. Cir. 2001).

7. Remand of this rule will serve the interests of judicial efficiency because the issues that Petitioners have raised in this litigation may become moot or may be significantly narrowed if this motion for remand is granted and EPA reconsiders its

implementation and interpretation of the statute.

8. Federal Defendants request only a remand of EPA's final rule rather than a vacatur of its decision. Remanding without vacatur is appropriate where, as here, the Court does not render a decision on the merits. See Ford Motor Co. v. Nat'l Labor Relations Bd., 305 U.S. 364, 375 (1939) (affirming lower court's decision to grant agency's request for remand, reasoning that, unless precluded by statute, it is entirely consistent with principles of judicial review to "giv[e] an administrative body an opportunity to meet [a challenged party's] objections to its order"); Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1431 (9th Cir. 1991) (granting agency's motion for voluntary remand so that the agency could reconsider the challenged decision).

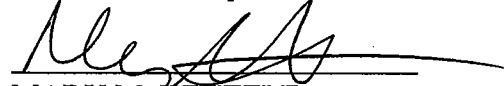
9. A remand of the final action approving the SIP revision will not prejudice Petitioners or Intervenors. All interested parties will have an opportunity to participate in EPA's administrative process that will follow the remand. To the extent that any interested party is not satisfied with EPA's final action following the remand, that party may obtain review of that agency action in this Court in accordance with the relevant statutory provisions governing judicial review.

10. EPA expects to complete the reconsideration process within 12 months from the date this Court grants the motion for remand. While EPA and Petitioners believe that a voluntary remand is appropriate, EPA requests that the Court retain jurisdiction pending reconsideration. Once EPA has completed the formal reconsideration process or after the 12 months have passed, Petitioners may reactivate this litigation or dismiss their Petition, by motion to the Court.

11. EPA is authorized to represent that Petitioners consent to, and do not oppose, this motion.

Dated: April 9, 2009

Respectfully submitted,
JOHN C. CRUDEN
Acting Assistant Attorney General
United States Department of Justice



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EXHIBIT A



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APR - 3 2009

George E. Hays, Esq.
236 West Portal Ave., #110
San Francisco, California 94127

Re: February 25, 2009, Petition for Reconsideration on
Alabama State Implementation Plan Revision

Dear Mr. Hays:

This is in response to the petition for reconsideration dated February 25, 2009, submitted on behalf of the Alabama Environmental Council (AEC) and other parties (Petitioners). Petitioners seek reconsideration of the Environmental Protection Agency's (EPA's) October 15, 2008, final action approving revisions to the Alabama State Implementation Plan (SIP) concerning opacity requirements for certain sources (73 *Fed. Reg.* 60957). Petitioners also challenged EPA's October 15, 2008, final action in the 11th Circuit Court of Appeals, where litigation is pending.

EPA grants the February 25, 2009, petition for reconsideration in order to allow for Agency reconsideration of the October 15, 2008, final action. EPA anticipates initiating a new rulemaking process to provide an additional public comment opportunity on the September 11, 2003, proposed SIP revision (as amended by a revision provided to EPA on August 22, 2008) submitted by the State of Alabama through the Alabama Department of Environmental Management.

If you have any questions regarding EPA's path forward for responding to the petition for reconsideration you may contact David Orlin in the Office of General Counsel at (202) 564-1222.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Stanley Meiburg".

A. Stanley Meiburg
Acting Regional Administrator

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on April 9, 2009, by first-class United States mail to:

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