

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

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

**OPPOSITION OF THE STATE OF MISSISSIPPI, THE NATIONAL
ASSOCIATION OF HOME BUILDERS, THE OZONE NAAQS
LITIGATION GROUP, AND THE UTILITY AIR REGULATORY GROUP
TO THE MOTION OF EPA, ET AL. TO
CONTINUE TO HOLD THESE CONSOLIDATED CASES IN ABEYANCE**

Petitioner the State of Mississippi, together with Petitioners and Intervenor-Respondents the National Association of Home Builders, the Ozone NAAQS Litigation Group, and the Utility Air Regulatory Group (collectively, “Mississippi *et al.*”), jointly submit this response in opposition to the Motion To Continue To Hold These Consolidated Cases in Abeyance, filed by Respondent the U.S. Environmental Protection Agency (“EPA” or “Agency”) on October 16, 2009, along with various environmental petitioners, state petitioners, and intervenors supporting EPA (hereinafter “EPA’s Motion”).

In EPA’s Motion, EPA and its supporting parties seek an order from the

Court to continue to hold these consolidated cases in abeyance while the Agency reconsiders the National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (Mar. 27, 2008) (the “Ozone Rule”). In support of EPA’s Motion, the Agency cites “concerns regarding whether the [Ozone Rule] satisf[ies] the requirements of the Clean Air Act.” EPA’s Motion at 2-3.

For the same reasons given in the Motion To Govern Further Proceedings filed in these consolidated cases by Mississippi *et al.* on October 16, 2009 (“Mississippi Motion”), Mississippi *et al.* oppose EPA’s Motion and instead respectfully request that this Court order briefing to resume in these cases. In the event that the Court should decide to grant EPA’s Motion, however, Mississippi *et al.* respectfully reiterate their request that the Court stay the Ozone Rule in its entirety, pending EPA’s reconsideration of the Ozone Rule. *See* Mississippi Motion at 16-19. The legal basis for the “partial stay” approach that EPA proposes is deeply flawed.

Furthermore, as explained in their Motion To Govern Further Proceedings, Mississippi *et al.* will suffer significant and irreparable harm as a result of both implementation of the Ozone Rule and loss of their rights to due process if the Court continues to hold these cases in abeyance, unless the Court stays the Ozone Rule in its entirety during Agency reconsideration. *See* Mississippi Motion at 10-18. By contrast, EPA has failed to show that the Agency will suffer *any* harm

unless the Court continues to hold the cases in abeyance.

CONCLUSION

The Court should order briefing in this case to be resumed, or in the alternative should enter a stay of the underlying EPA rule in its entirety.

Dated: November 10, 2009

Respectfully submitted,

<p><u>/s/ Harold E. Pizzetta, III</u> Harold E. Pizzetta, III Special Assistant Attorney General Civil Litigation Division P.O. Box 220 Jackson, MS 39205 (601) 359-3680 <i>Counsel for Petitioner State of Mississippi</i></p>	<p><u>/s/ Jeffrey Bossert Clark</u> Robert R. Gasaway Jeffrey Bossert Clark KIRKLAND & ELLIS LLP 655 Fifteenth Street, N.W. Suite 1200 Washington, DC 20005 (202) 879-5175 <i>Counsel for Petitioner National Association of Home Builders</i></p>
<p><u>/s/ Allison D. Wood</u> F. William Brownell Allison D. Wood Lucinda Minton Langworthy HUNTON & WILLIAMS LLP 1900 K Street, N.W. Washington, DC 20006 (202) 955-1500 <i>Counsel for Petitioners Ozone NAAQS Litigation Group and Utility Air Regulatory Group</i></p>	

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and this Court's electronic filing system procedures, I, Jeffrey Bossert Clark, the undersigned, certify under penalty of perjury, that, on November 10, 2009, I caused the attached Opposition to be filed through the Court's electronic filing system, and to be served by U.S. Mail, postage pre-paid, to the following counsel:

Harold E. Pizzetta, III
Office of the Attorney General
Civil Litigation Division
P.O. Box 220
Jackson, MS 39205

David J. Kaplan
United States Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986

Valarie Satterfield Czimadia
Attorney General's Office
State of Delaware
102 West Water Street
Third Floor
Dover, DE 19904-0000

Susan J. Hedman
Gerald T. Karr
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, IL 60601

Bill Brownell
Allison D. Wood
Lucinda Minton Langworthy
Aaron M. Flynn
Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20006

Gerald D. Reid
Attorney General's Office
State of Maine
6 State House Station
Augusta, ME 04333-0006

Roberta R. James
Office of the Attorney General
State of Maryland
Department of Environment
1800 Washington Boulevard
Suite 6048
Baltimore, MD 21230-1719

Nicolas Stern
Attorney General's Office of the
California
P.O. Box 944255
Sacramento, CA 94244-2550

Maureen D. Smith
Attorney General's Office
State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397

Kevin P. Auerbacher
Jung W. Kim
Attorney General's Office
State of New Jersey
Division of Law
25 Market Street
P.O. Box 093, Richard J. Hughes
Justice Complex
Trenton, NJ 08625-0093

Kristen Campfield Furlan
Pennsylvania Department of
Environment Protection
400 Market Street
Rachel Carson State Office
Building, 9th Floor
Harrisburg, PA 17105-8464

William L. Pardee
Attorney General's Office
Commonwealth of Massachusetts
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108-0000

Richard A. Wegman
Garvey Schubert Barer
1000 Potomac Street, NW
Flour Mill Building, 5th Floor
Washington, DC 20007-3501

Stephen R. Farris
Attorney General's Office
State of New Mexico
P.O. Box Drawer 1508
Santa Fe, NM 87504-0000

Paul S. Logan
Philip Schradle
Attorney General's Office
State of Oregon
Office of General Counsel
1162 Court Street, NE
100 Justice Building
Salem, OR 97310-0000

Katherine Kennedy
Michael J. Myers
Attorney General's Office
State of New York
120 Broadway
Department of Law, 26th Floor
New York, NY 10271-0000

Tricia K. Jedele
Attorney General's Office of the State
of Rhode Island
150 South Main Street
Providence, RI 02903-0000

Donna M. Murasky
Office of the Attorney General
District of Columbia
Office of the Solicitor General
441 4th Street, N.W.
Sixth Floor
Washington, DC 20001-2714

Christopher G. King
Corporation Counsel's Office
City of New York
New York City Law Department
6-143
100 Church Street
New York, NY 10007-0000

Jonathan K. Tycko
Tycko & Zavareei LLP
Suite 808
Washington, DC 20036-0000

Lorna B. Goodman
Laura A. Negron
Office of the County Attorney
One West Street
Mineola, NY 11501

Allen Brooks
Attorney General's Office
State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397

Duane J. Desiderio
Thomas J. Ward
Amy C. Chai
National Association of Home
Builders
1201 15th Street, NW
Washington, DC 20005-2800

Kimberly P. Massicotte
Attorney General's Office
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

David S. Baron
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., NW
Suite 702
Washington, DC 20036-2212

/s/ Jeffrey Bossert Clark