

ORAL ARGUMENT NOT YET SCHEDULED

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

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STATE OF MISSISSIPPI, et al.

Petitioners,

v.

Index No. 08-1200
(and consolidated cases)

UNITED STATE ENVIRONMENTAL
PROTECTION AGENCY,

JOINT OPPOSITION
TO MOTION TO
GOVERN

Respondent.

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Petitioners American Lung Association, et al. (“Environmental Petitioners”) and State of New York, et al.¹ (“State Petitioners”) hereby submit this joint opposition to the motion to govern further proceedings filed by several industry groups and Mississippi (collectively, “Industry”) on October 16 in this case concerning the 2008 ozone National Ambient Air Quality Standard rule (“2008 Rule”). Industry’s position that the Court should reinstitute a briefing schedule on a rule that EPA is in the process of reconsidering is unprecedented and untenable. Industry’s argument that briefing should proceed (or alternatively that the Court

¹ New York, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania Department of Environmental Protection, Rhode Island, the District of Columbia, the City of New York, and Nassau County, NY.

should stay the 2008 Rule) because EPA might decide to stay only part of the 2008 Rule during reconsideration makes no sense, and fails in any event because the agency has not yet taken formal action on a stay that would create a record for judicial review. Finally, Industry has failed to demonstrate a likelihood of success, irreparable harm, or a favorable balancing of the equities that would entitle it to a court-ordered stay of the 2008 Rule. Therefore, Industry's motion should be denied in its entirety.

Background

This litigation concerns various challenges to the 2008 Rule, issued by EPA under Section 109 of the Clean Air Act ("CAA"). In the 2008 Rule, EPA established the primary NAAQS at 0.075 parts per million and set the secondary NAAQS at the same level. Environmental Petitioners and State Petitioners are challenging the 2008 Rule on the grounds that EPA failed to promulgate primary and secondary standards that satisfy Section 109 of the CAA. In a nutshell, Environmental Petitioners and State Petitioners both take the position that the primary NAAQS is inadequate to protect public health with an adequate margin of safety and that the secondary NAAQS is inadequate to protect public welfare, and that the agency should have followed the advice of its science advisors, the Clean Air Scientific Advisory Committee, to make both standards more protective.

Mississippi and several industry petitioners argue, on the other hand, that the 2008 Rule is too stringent and unsupported by the administrative record.²

After initial filings were completed, a briefing schedule was established, pursuant to which opening briefs would be filed by April 2009. In March 2009, EPA moved the Court, upon the consent of all parties, to vacate the briefing schedule and have the case held in abeyance while it evaluated whether the 2008 Rule met the CAA's requirements. The Court granted EPA's motion on March 19 and ordered EPA to notify the Court and the parties by September 16, 2009 of what action the agency intended to take with respect to the 2008 Rule. EPA notified the Court and the parties on September 16 that it intended to reconsider the 2008 Rule, citing concerns that the standards adopted by EPA in the Rule do not satisfy the CAA. The agency further stated that it intended to sign its reconsideration proposal by December 21, 2009 and issue its final reconsideration decision by August 31, 2009.

On October 16, EPA, Environmental Petitioners, and State Petitioners filed a joint motion to govern future proceedings. The motion seeks to have the case remain in abeyance to allow EPA to complete the reconsideration process, to require EPA to file status reports on March 1, 2010 and September 1, 2010, and to

² The Missouri Department of Natural Resources, with the Court's permission, intervened in the litigation on Mississippi's side. Missouri DNR has since withdrawn from the case.

require the parties to file motions to govern within 60 days of EPA's publication in the Federal Register that it has completed reconsideration of the 2008 Rule. In its motion to govern, Industry has asked the Court to order resumption of merits briefing in the case, or, in the alternative, to stay the 2008 Rule.

Argument

1. Industry's Request that the Parties Brief a Rule that EPA is in the Process of Reconsidering Must Be Rejected.

Industry argues that the Court should order the parties to proceed with merits briefing in the case while EPA is in the process of reconsidering the rule at issue. Such an approach makes no sense and should be rejected. See Ethyl Corp. v. EPA, 989 F.2d 522, 524 (D.C. Cir. 1993) (granting EPA's motion to hold the case in abeyance pending its reconsideration of the rule at issue, reasoning "[w]e commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete"). Not surprisingly, Industry cites no precedent in which the Court has ordered the parties to proceed with merits briefing while the agency was reconsidering the rule at issue. Furthermore, although the result of reconsideration cannot be known ahead of time, Industry seems convinced that EPA will make changes to the 2008 Rule due to concerns that the Rule does not satisfy the CAA's requirements, further undercutting the basis for its suggested approach. See Industry Mot. at 17.

Industry's argument that EPA lacks the authority to reconsider the 2008 Rule because the time for seeking judicial review has expired (Industry Mot. at 8-10) is meritless. As Industry is well aware, it is a common practice for the Court to hold a case in abeyance (without vacating the underlying rule) well past the 60-day period for filing petitions of review if EPA decides that reconsideration is necessary. E.g., Per Curiam Order of December 15, 2008 in American Petroleum Institute v. EPA, No. 08-1277 (D.C. Cir.) (granting motion to hold challenge to EPA rule in abeyance pending EPA reconsideration of the rule); see also Wrather-Alvarez Broadcasting v. FCC, 248 F.2d 646, 648-49 (D.C. Cir. 1957) (where an agency seeks to reconsider decision after appeal of decision is filed in court, the "proper course. . . is not to dismiss the appeal, but rather, upon motion of any party, to hold the appeal in abeyance pending the [agency's] further proceedings").

Contrary to Industry's assertion, the Court's holding in American Methyl Corp. v. EPA, 749 F.2d 826 (D.C. Cir. 1985), did not turn on whether EPA had sought to reconsider the rule in question after the expiration of the 60-day period for judicial review. Instead, the Court held that the agency's use of reconsideration to revoke a waiver granted under the CAA for a fuel additive was improper where another section of the statute provided a procedure for EPA to address an improvidently granted waiver. See id. at 835 ("[W]hen Congress has provided a mechanism capable of rectifying mistaken actions . . . it is not reasonable to infer

authority to reconsider agency action.”); see also New Jersey v. EPA , 517 F.3d 574 (D.C. Cir. 2008) (EPA may not invoke inherent authority to “delist” mercury as a hazardous air pollutant where the statute prescribes a procedure for the agency to follow for delistings). Here, the statute is silent on the procedure the agency must follow if it concludes that it has (or has concerns that it has) promulgated a NAAQS rule that fails to meet the CAA’s requirements.³ Therefore, Industry’s argument must be rejected.

2. Industry’s Argument Regarding EPA’s Plans for a Stay of the 2008 Rule during Reconsideration is Unripe.

Industry attempts to bolster its argument by asserting that because EPA only intends to stay part of the 2008 Rule during reconsideration, and because Industry doubts EPA’s authority to issue a partial stay, it would be unfair to permit the agency to avoid merits briefing while keeping part of the Rule in place. This argument is unripe. EPA has not set forth in any detail what it plans to do with respect to a stay and upon which statutory authority it would rely. Until and unless EPA takes action to stay the 2008 Rule during reconsideration and explains its

³ Industry’s assertion that in reconsidering a NAAQS rule that has been challenged, the statute requires the agency to undertake a new NAAQS review, *i.e.*, a review that encompasses the latest scientific knowledge, Industry Mot. at 6-7, has no basis in the statutory text and therefore should be summarily rejected. EPA’s stated intent is to reconsider whether the 2008 standard was lawfully and rationally adopted in light of the record *already developed* for that standard. EPA is not purporting to undertake a new review of the standard, and does not contend that its reconsideration of the 2008 standard will supplant its duty to complete another full review of the standard by 2013, as required by 42 U.S.C. § 7409(d).

authority for doing so, there will be no agency record for the Court to review in evaluating Industry's argument. Therefore, such an argument is unripe and cannot form a valid basis to oppose holding the case in abeyance pending reconsideration.

3. Industry Has Not Justified Its Alternative Request for a Stay of the 2008 Ozone Standard.

Industry's alternative request that the Court stay the 2008 Rule is without merit. On a motion for stay, "it is the movant's obligation to justify the court's exercise of such an extraordinary remedy." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985). In particular, the movant has the burden of showing that following factors support the granting of a stay: (1) irreparable harm to the movant absent a stay; (2) a "strong showing" that movant is likely to prevail on the merits; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Id. at 974. As further detailed below, Industry has failed to make the required showing here.

a. Industry had failed to show irreparable harm.

A showing of irreparable harm is central to a request for a court-imposed stay of agency action. Wisconsin Gas Co. v. FERC, 758 F.2d 669 (D.C. Cir. 1985) ("The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.") (citation omitted). The harm "must be both certain and great; it must be actual and not theoretical," and it must be imminent - not "something merely feared as liable to occur at some indefinite

time.’” Id. at 674. The movant must further “substantiate the claim that irreparable injury is ‘likely’ to occur. “Bare allegations” will not suffice; rather, the “movant must provide proof.” Id.

Industry has utterly failed to make these required showings here. There is no claim of actual injury from the standards in the 2008 Rule, much less a showing of such injury. Industry notes that Mississippi had to submit a list to EPA of areas violating the standards, and that Delaware “cited” the 2008 standards in a pending petition to EPA seeking pollution reductions from sources in upwind states, but these limited steps have caused injury to no one, and any claim that they might somehow lead to other actions that might injure someone in the future would be pure speculation - hardly proof of the “likely” and “great” injury that this Court requires. Industry also raises generalized concerns about regulatory requirements that would be triggered if and when EPA formally designates “nonattainment areas” for the 2008 standards, but again these impacts are speculative and remote. The Act does not require EPA to make these designations until March 2010, and EPA has represented to the Court that it will undertake a rulemaking to defer that deadline. Moreover, if EPA does complete nonattainment area designations in March 2010, the regulatory consequences that Industry cites (at 11) – state implementation plans to bring these areas into compliance with the standards – would not be due until as late as 2013. 42 U.S.C. § 7502(b). Not only are these

impacts far from “imminent,” but Industry has failed show any specific injury that its members will suffer from either the nonattainment designations or the state implementation plans. Industry notes that the plans must include enforceable emissions limitations and other measures, but offers no showing at all that any of its members are likely to suffer injury therefrom.⁴ Even assuming that Industry has members who would be impacted by such plans, there has been no showing that such impact would be harmful, or that steps required for compliance would be unnecessary to meet other regulatory or business obligations.

Industry further speculates (at 14-15) that if EPA decides to defer nonattainment designations for the standards in the 2008 Rule, it would be “unclear” how a permitting program for new emitting facilities would operate, and there would be a “risk” that permits would be “effectively beyond reach” for certain facilities in areas violating the 2008 standards. This claim is premature at best, as it is premised on EPA’s deferral of nonattainment designations, a deferral that has not yet happened. Moreover, the claim of injury is purely speculative, as Industry again fails to cite a single, concrete example of a member that would be

⁴ Industry (at 12) cites Chlorine Chem. Council v. EPA, 206 F.3d 1286, 1288 (D.C. Cir. 2000), but there the court (as part of its ruling on the merits) denied an EPA request for a voluntary remand that would have left the challenged rule in place indefinitely. Nothing in that case changes the well-settled requirement for a showing of imminent and substantial injury as a precondition for a stay.

harmful in some material way by the alleged lack of clarity in permitting requirements or the alleged risk of difficulty in obtaining a permit.

The Prevention of Significant Deterioration (“PSD”) permitting requirement to which Industry refers applies only to construction of new facilities expected to emit certain pollutants in “major” amounts, and to certain modifications of major facilities expected to result in significant emission increases. 42 U.S.C. §§ 7475(a) & (b), 7479(1); New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005) (discussing test for determining whether a modification triggers PSD permit requirement). Industry has not identified a single member that: a) intends to construct a new or modified major facility in an area violating the standards in the 2008 Rule; b) that is expected to emit sufficient additional amounts of pollutants as to trigger PSD permitting requirements; and c) that is likely to experience difficulty in obtaining a permit due to the existence of the standards in the 2008 Rule. Nor has Industry cited a single concrete instance in which a member has faced or will face significantly increased compliance costs amounting to “great” injury absent a stay of the 2008 Rule. As noted above, this Court’s precedent requires Industry to offer substantiation of injury: Mere assertions or speculation do not suffice.

Industry’s inability to cite specific examples of injury is particularly telling because, under Industry’s theory, such injury should *already* be occurring. Industry claims that if EPA defers designating areas as “nonattainment” for the

standards in the 2008 Rule, there is a risk of a “de facto moratorium” on permitting of new sources in areas violating those standards. But the ozone standards in the 2008 Rule took effect in May 2008 – more than 17 months ago – and during that entire time there have been no nonattainment designations for those standards.⁵ Under Industry’s theory, the “de facto moratorium” should have been in effect all that time as well, but Industry cites no examples of members unable to obtain permits and injured due to existence of the standards in the 2008 Rule. Nor did Industry seek a stay of the Rule when it first took effect in May 2008, something Industry presumably would have done if it truly feared irreparable harm prior to nonattainment designations.

Moreover, Industry fails to cite any legal authority for its claim that a permitting moratorium has been or will be triggered by the absence of nonattainment designations. The claim is based on the alleged inability of proposed new sources to locate in areas already violating the standard (because their emissions would contribute to the violation), but EPA guidance identifies options to allow issuance of permits in such situations. E.g., EPA, New Source Review Workshop Manual (Draft 1990) at C.52-53 (Where proposed new source predicted to cause standards violation outside of designated nonattainment area,

⁵ Industry (at 15) asserts that states and tribes have proposed to add approximately 95 new ozone nonattainment areas as a result of the 2008 Rule, but those proposals have no regulatory consequences, as it is EPA that must ultimately decide which areas to designate as “nonattainment.” 42 U.S.C. § 7407(d)(1)(B).

PSD permit can still issue if “sufficient emissions reductions are obtained to compensate for the adverse ambient impacts caused by the proposed source”), available at: <http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf>

b. Industry has made no showing that it is likely to succeed on the merits.

Industry challenges the 2008 Rule “on grounds that EPA’s revised standards [in the Rule] are more stringent than necessary to protect public health and welfare.” Joint Briefing Proposal of the State of Mississippi, et al, dated Nov. 6, 2008, at 2. Yet Industry has not even tried to show that it is likely to succeed on the merits of this claim. Industry relies entirely on the fact that EPA has expressed concerns about whether the standards in the 2008 Rule satisfy the requirements of the CAA. But EPA’s concerns are that the standard is **too weak**— not that it is overly stringent. EPA, “Fact Sheet - EPA to Reconsider Ozone Pollution Standards,” (Sept. 16, 2009), at 1 (“EPA Administrator Lisa P. Jackson will reconsider the ozone standards to ensure that two of the nation’s most important air quality standards are clearly grounded in science, protect public health with an adequate margin of safety, and are sufficient to protect the environment . . . **The ozone standards set in 2008 were not as protective as recommended by EPA’s panel of science advisors**, the Clean Air Scientific Advisory Committee (CASAC)”) (emphasis added). If anything, then, EPA’s statements substantially undermine, rather than support, the likelihood of Industry success on its claims that

that the standards are overly stringent. See also American Farm Bureau Federation v. EPA, 559 F.3d 512 (D.C. Cir. 2009) (holding that EPA’s adoption of airborne particulate standards that were weaker than recommended by CASAC was arbitrary and capricious).

c. The public interest and the risk of harm to third persons weigh strongly against a stay.

A complete stay of the 2008 Rule would threaten the health of millions of Americans. Although weaker than recommended by CASAC, the 2008 standard (75 parts per billion or “ppb”) still provides greater health protection than the 1997 standard (effectively 84 ppb). A stay would leave in effect only the 1997 standard – a standard that EPA in 2008 found to be too weak to protect public health. 73 Fed. Reg. 16436, 16471-72 (2008). Among other things, EPA found that ozone levels allowed by the 1997 standard were causally related to “a broad array of adverse health effects,” including premature deaths, impairment of breathing, and increased hospital admissions for cardio-pulmonary distress. Id. at 16470-71. Children, older adults, and people with asthma and other lung diseases were all found to be at special risk. Id. at 16471. So strong was the evidence of inadequacy of the 1997 standard, that CASAC unanimously found there was “no scientific justification for retaining” it. Id. at 16472.

The effect of reverting to a standard so profoundly unprotective of health would be to weaken public health protections under the Act. This Court has

refused to block implementation even of rules already judged to be unlawful where the result would be to threaten public health. E.g., North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (refusing to vacate unlawful rule limiting power plant emissions because vacatur “would at least temporarily defeat ... the enhanced protection of the environmental values covered” by the EPA rule at issue).

Industry asserts that there is a public interest in “enforcing due process rights,” Industry Mot. at 19, but even if a constitutional right is at stake here, holding the case in abeyance for nine months hardly constitutes a deprivation of due process, particularly where Industry fails to identify any tangible loss or injury from such a limited delay. Industry itself does not seem to seriously believe it will suffer significant injury from a nine month delay, as its preferred approach provides more time than that for briefing and arguing the case *without* a stay of the standard. The briefing schedule that Industry seeks to reinstate spans nine months plus one week, and Industry asks the Court to restart that schedule within 60 days of the Court’s order on these motions. Under such a schedule, briefing would not be completed until October 2010 at the earliest, and resolution of the case by the Court would take well beyond that. Yet under Industry’s preferred approach, the 2008 Rule would remain in full force and effect for that entire time.

Industry’s argument also ignores the strong public interest in avoiding waste of judicial resources and those of the parties on a case that is likely to become

moot before briefing can be completed. See Commonwealth of 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.”). Such waste is particularly hard to justify given Industry’s complete failure to show concrete injury from continuation of the 2008 Rule or any likelihood of success on its claim that the standards in the Rule are overly stringent.

CONCLUSION

Based on the foregoing reasons, Industry’s motion to govern further proceedings should be denied in its entirety.

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I hereby certify that a copy of the foregoing Joint Opposition to Motion to Govern was filed on November 10, 2009 using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system at the e-mail addresses noted below and further that a courtesy copy of the said Opposition was sent to counsel at the e-mail addresses noted below:

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