

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF WISCONSIN, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, ET AL.,

Respondents.

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) No. 16-1406
) (and consolidated
) cases)
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**STATE INTERVENORS' OPPOSITION TO JOINT MOTION FOR
MODIFICATION OF BRIEFING SCHEDULE**

The undersigned Intervenor-Respondent States (State Intervenor) respectfully submit this opposition to the Joint Motion for Modification of Briefing Schedule to Allow for Agency Consideration of Petitions for Reconsideration of the Agency Rule Under Review, ECF No. 1687655 (the Motion) filed by several petitioners in these consolidated petitions for review of a final rule entitled Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74504 (Oct. 26, 2016) (the Cross-State Update Rule), promulgated by

respondent U.S. Environmental Protection Agency (EPA). The Motion asks for a 120-day delay in the briefing schedule to allow additional time for EPA to decide certain administrative petitions for reconsideration of the Cross-State Update Rule before briefing begins.

State Intervenors oppose the motion for two main reasons. First, there is no demonstrated need for any delay, let alone the requested 120-day delay, as EPA has not requested or otherwise indicated any need for this extension of time to address the administrative petitions. Second, the State Intervenors have a strong, important interest in having the Court determine the legality of the Cross-State Update Rule at the earliest reasonable time. The State Intervenors rely on the pollution reductions that the rule provides to protect the health and welfare of their residents and to move toward or preserve attainment of the Clean Air Act's national ambient air quality standards. Therefore, State Intervenors need to know whether the rule is lawful or not as soon as reasonably possible to determine what next actions might be necessary either to supplement or to replace the rule.

There Is No Need for the Requested 120-Day Delay

After EPA promulgated the Cross-State Update Rule, a number of entities filed administrative petitions for reconsideration of the rule with EPA. As stated in the Motion, EPA has not yet resolved those petitions. Motion at 4-5.

In EPA's response to the Motion, ECF No. 1688478 (EPA Response), the agency correctly notes that these petitions for reconsideration are an administrative matter before the agency and are not before this Court. EPA Response at 5-6. While EPA does not oppose the request for a 120-day delay in this court proceeding, it neither joins the request for the delay nor states any reason why such a delay would be necessary or useful. Since the agency for whose benefit the delay is sought offers no reason for the delay, the Court should not impose the delay.

The State Intervenors Have a Strong, Important Interest in Prompt Resolution of the Petitions for Review Pending Before This Court

The State Intervenors rely on the Cross-State Update Rule for important pollution reductions that reduce illness and environmental harm within their borders. The purpose of the Cross-State Update Rule

is to reduce interstate transport of ozone pollution from fossil fuel-fired power plants in upwind states that significantly contributes to other states' nonattainment or interferes with other states' ability to maintain ozone air quality standards. Nitrogen oxide emissions from power plants react with other chemicals in the atmosphere to form ozone, which moves on the prevailing winds into the State Intervenors and other downwind states. The ozone then aggravates respiratory disease, causing, among other things, premature death and asthma attacks, and also harms vegetation and ecosystems, including commercial crops. 76 Fed. Reg. 48208, 48218 (Aug. 8, 2011). The Cross-State Update Rule reduces the nitrogen oxide emissions from coal-fired power plants in certain upwind states, and as a result reduces the amount of ozone transported across the borders of the State Intervenors and the amount of ozone-caused harm in those states.

The State Intervenors now benefit from these pollutant and harm reductions, but only after years of delay. EPA has a statutory obligation under the good neighbor provision of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I), to fully address the interstate transport of ozone pollution from upwind states that significantly contributes to

nonattainment in, or interferes with maintenance by, any other state with respect to ozone air quality standards. In partial fulfillment of that obligation, in 2011, EPA promulgated the predecessor to the Rule, known as the Cross State Air Pollution Rule, 76 Fed. Reg. 48208 (Aug. 8, 2011) (Cross-State Rule), with pollution reductions to begin in 2012 and further reductions scheduled for 2014. Upon the filing of petitions for review of the Cross-State Rule in this Court, in December 2011 this Court stayed the Cross-State Rule and its pollution reductions. Several years later, in October 2014, after this Court had issued a decision on the merits of the rule and the Supreme Court had reviewed that decision, this Court lifted the stay, with the result that emission reductions originally scheduled for 2012 and 2014 did not occur until 2015 or later.

Even after that delay, the Cross-State Rule only provided a partial remedy for the interstate ozone pollution problem, as EPA has admitted, and EPA promulgated the Cross-State Update Rule in part to rectify those inadequacies with additional ozone reductions. 81 Fed. Reg. at 74504. Although the Cross-State Update Rule also does not fully satisfy EPA's obligation to prohibit emissions that contribute to

State Intervenors' and other downwind states' air quality problems, it is an important building block for upcoming regulatory actions EPA must take to further address such obligation. *See, e.g., Order Re Partial Consent Decree & Summ. J., Sierra Club v. Pruitt*, Case No. 15-cv-4328 (N.D. Cal. May 23, 2017) (ordering EPA to promulgate a good neighbor provision ozone federal implementation plan for Kentucky by June 30, 2018). Moreover, EPA has cited the pollutant reductions from the Cross-State Update Rule as a reason for a proposed denial of a request by the State Intervenors and other states to EPA for further relief for the interstate ozone problem, namely, the addition of more upwind states to a designated Ozone Transport Region that is subject to additional pollution reduction requirements. *See* 82 Fed. Reg. 6509, 6515, 6518-19 (Jan. 19, 2017) (proposed denial of states' request).

Every day that the Cross-State Update Rule remains in place provides reductions in health and environmental problems within the borders of the State Intervenors, but EPA will need to do more. The longer the wait before a ruling by the Court on the Cross State Update Rule, the longer it will take for EPA to take those next steps, either to supplement the rule, if upheld, or to replace the rule or provide

alternative relief, if invalidated. So the State Intervenors seek a ruling from the Court at the earliest reasonable time, and oppose any delay that, like the one proposed in the Motion, serves no purpose.

The Court Should Set a New Briefing Schedule That Adheres as Closely as Possible to the Prior One

The State Intervenors recognize that the Court has suspended the existing briefing schedule, ECF No. 1688178, and that it may now be infeasible to reinstate that schedule. In light of the interests and arguments set out above, the State Intervenors respectfully request that the Court set a new schedule that adheres as closely as possible to the structure of the prior schedule and creates the minimum delay possible.

Conclusion

The Court should deny the Motion and set a new schedule consistent with the prior schedule that minimizes any unnecessary delay.

Dated: August 17, 2017

Respectfully submitted,

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The undersigned attorney, Andrew G. Frank, hereby certifies:

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Dated: August 17, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State Intervenors' Opposition to Joint Motion for Modification of Briefing Schedule was filed on August 17, 2017 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

Dated: August 17, 2017

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