

ORAL ARGUMENT NOT YET SCHEDULED

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

TRUCK TRAILER MANUFACTURERS)
ASSOCIATION, INC., *et al.*,)
))
Petitioners,)
v.)
))
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, *et al.*,)
))
Respondents,)
))
and)
))
CALIFORNIA AIR RESOURCES)
BOARD, *et al.*,)
))
Respondent-Intervenors.)

)

Consolidated Case
Nos. 16-1430, 16-1447

**RESPONDENT-INTERVENOR PUBLIC HEALTH AND
ENVIRONMENTAL ORGANIZATIONS’ OPPOSITION TO
PETITIONER’S PROPOSED BRIEFING SCHEDULE**

ALICE HENDERSON
PETER ZALZAL
VICKIE PATTON
Environmental Defense Fund
2060 Broadway, Ste. 300
Boulder, CO 80302
Tel: (303) 447-7205
ahenderson@edf.org

SUSANNAH L. WEAVER
SEAN H. DONAHUE
Donahue, Goldberg, Weaver &
Littleton
1008 Pennsylvania Ave SE
Washington, DC 20003
Tel: (202) 559-0773
susannah@donahuegoldberg.com

*Counsel for Petitioner Environmental Defense Fund
(Additional counsel for Respondent-Intervenors listed in the signature block)*

Respondent-Intervenor public health and environmental organizations oppose the schedule proposed by Petitioner Truck Trailer Manufacturers Association (“TTMA”) because it does not afford Respondent-Intervenors any opportunity to respond to the federal government’s brief. The Environmental Protection Agency’s (“EPA”) and the National Highway Traffic Safety Administration’s (“NHTSA”) (together, the “Agencies”) past positions and representations before this Court and in administrative documents leave significant uncertainty as to whether they will defend the rule under review. Because of this uncertainty, Respondent-Intervenor public health and environmental organizations request 30 days to file their response brief after the Agencies file their response brief in order to respond both to the Petitioner’s brief and to the Agencies’ brief.

In addition, TTMA does not provide support for what is essentially a request for expedited disposition of an agency review case with numerous parties. Expedited consideration is particularly inappropriate here, where TTMA has been content to allow its lawsuit to sit in abeyance since 2017, only to suddenly request that the parties and the court rush through briefing and oral argument now.

BACKGROUND

On October 25, 2016, EPA and NHTSA finalized greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles. 81 Fed. Reg. 73,478 (Oct. 25, 2016) (“Final Rule”). Because trailers significantly

impact the greenhouse gas emissions and fuel efficiency of tractor-trailers, the Final Rule includes trailer-specific requirements. These trailer requirements are authorized under the Clean Air Act and the Energy Independence and Security Act, and are critically necessary to reduce substantial amounts of dangerous pollution from medium- and heavy-duty vehicles, which are responsible for more than a quarter of all transportation sector greenhouse gas emissions.¹ The EPA requirements were to take effect on January 1, 2018, while the NHTSA requirements are scheduled to go into effect in January 2021, a compliance date set by the 2016 Final Rule that has remained unchanged. 81 Fed. Reg. 73,478, 73,643.

TTMA filed this petition on December 22, 2016. ECF 1652784. Beginning in April 2017, before a briefing schedule had been set, the Agencies sought a series of abeyances pending their review of TTMA's requests for administrative reconsideration. TTMA partially opposed the Agencies' first request for a 90-day abeyance, but supported a 30-day delay. ECF 1672207 at 2. Later, although the Final Rule remained in effect, TTMA did not oppose two subsequent abeyance requests in July and August 2017. ECF 1685013, ECF 1689310. And TTMA did not file a motion to stay the EPA trailer requirements contained in the Final Rule until September 25, 2017, eleven months after the Final Rule was promulgated,

¹ U.S. Energy Info. Admin., *Table: Energy-Related Carbon Dioxide Emissions by End Use*, ANNUAL ENERGY OUTLOOK 2019, <https://www.eia.gov/outlooks/aeo/data/browser/#/?id=22-AEO2019&cases=ref2019&sourcekey=0> (last visited Dec. 13, 2019).

and just over three months before the compliance date for the EPA requirements. ECF 1694522. At that time, TTMA indicated that it “ha[d] no objection” to “*permanent* abeyance” so long as the Court granted TTMA’s stay application. ECF 1693481 at 3 (emphasis added).

This Court granted TTMA’s motion to stay the EPA trailer standards on October 27, 2017, and continued the abeyance of the case, directing the parties to file status reports at 90-day intervals. ECF 1701733. From January 2018 until November 2019, the Agencies submitted status reports to this Court that gave no indication that their deliberations were proceeding in earnest. On August 6, 2018—over a year ago—TTMA noted the “filing of content-less status reports” as having “the potential to prejudice TTMA’s members in connection with the fuel economy portions of the Rule,” set to take effect in January 2021. ECF 1744152 at 5. But after filing a motion to compel a more detailed status report, *id.*, TTMA decided to withdraw that motion before the Court could act on it, ECF 1752285.

Five 90-day status reports and 15 months later, TTMA now seeks to lift the abeyance of the case, pointing the same January 2021 compliance date for the NHTSA trailer requirements, and now arguing that this longstanding deadline necessitates a rushed schedule for briefing, hearing and deciding its challenge. TTMA’s proposed schedule should be rejected.

ARGUMENT

I. Respondent-Intervenors Should Be Granted Time to Respond to the Agencies' Brief.

Respondent-Intervenor public health and environmental organizations respectfully request that 30 days be allotted between the due date for the Agencies' response brief and the due date for Respondent-Intervenors' response briefs.² The Agencies' positions and representations before this Court, and their responses to TTMA's request for reconsideration of the Final Rule's trailer requirements, suggest a significant likelihood that the Agencies will not defend (and may even make arguments adverse to) the trailer requirements in forthcoming briefs. Consequently, Respondent-Intervenors may be the only parties substantively defending the Rule.

Most notably, EPA has already refused to defend the trailer standards on the merits in this litigation, when the agency responded to TTMA's motion for a stay of those requirements. ECF 1698457 at 3 ("EPA takes no position on the merits of Trailer Petitioner's underlying arguments regarding the trailer provisions."). The Agency did not oppose a stay of its own Final Rule, citing "EPA's intent to revisit the Rule's trailer provisions through notice-and-comment rulemaking," and

² The Agencies have proposed a schedule that would grant Respondent-Intervenors only seven days to file their briefs after the Agencies' brief. ECF 1820078 at 5. This would allot an insufficient amount of time for Respondent-Intervenors to review and respond to the Agencies' brief.

“Trailer Petitioner’s allegations of harm from the standards.” *Id.* Respondent-Intervenors alone defended the legality of EPA’s standards in responding to TTMA’s stay motion. ECF 1698824 (public health and environmental organizations’ response); ECF 1698825 (States’ response).

The Agencies’ position in this litigation is consistent with current and historical communications between the Agencies and Petitioners and with the Agencies’ administrative actions. For instance, on August 17, 2017, then-EPA Administrator Scott Pruitt wrote a letter to TTMA President Jeffrey Sims and TTMA’s counsel, Jonathan Martel, stating, “EPA has decided to revisit the Phase 2 trailer provisions in general, and the issue of the EPA’s authority to regulate trailers in particular.” ECF 1694522 at 856. For its part, NHTSA likewise represented that “NHTSA has decided to grant [TTMA’s] petition for rulemaking,”³ treating TTMA’s request for reconsideration as a petition for rulemaking. That process continues now, as TTMA highlights in the instant motion. ECF 1818576 at 5–6.

EPA earlier explained to this Court that while it is conducting a notice-and-comment rulemaking regarding the trailer standards it is “unable to represent its ultimate conclusions on these issues.” ECF 1698457 at 3. In litigation over other

³ Letter from Jack Danielson, Acting Deputy Adm’r, U.S. Dep’t of Transp., to Jeffrey Sims, President, Truck Trailers Mfrs. Ass’n (Aug. 17, 2017) (available at <https://www.edf.org/sites/default/files/content/2017-08-17%20NHTSA%20Letter%20to%20TTMA.pdf>).

EPA rules that are under reconsideration, EPA has explained to this Court that “requiring the United States to prematurely opine on issues under review by the new Administration would prejudice EPA and could raise questions concerning the integrity of administrative proceedings.” Reply ISO EPA’s Mot. to Hold Cases in Abeyance at 5, *North Dakota v. EPA*, No. 15-1381, ECF 1670859 (April 12, 2017). Accordingly, the Agencies are likely not to defend the Final Rule’s trailer requirements (and certainly not to defend them vigorously).

In anticipation of the likelihood that the Agencies decline to defend (and perhaps even attack) the trailer requirements as currently codified, Respondent-Intervenors should be afforded the opportunity to respond to both the Petitioner’s opening brief and the Agencies’ response brief. This Court has in numerous cases granted time between respondents’ and respondent-intervenors’ briefs to account for differences in parties’ positions and to reduce duplication, even in cases where there was not so much evidence that the positions of the respondents and respondent-intervenors were likely to conflict. *See, e.g.*, Order, *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, ECF 1299368 (Mar. 22, 2011) (setting 29 days between respondent’s and respondent-intervenors’ briefs); Order, *Air Alliance Houston v. EPA*, No. 17-1155, ECF 1694791 (Sept. 26, 2017) (setting 14 days between respondents’ and respondent-intervenors’ briefs).

For the same reason, as the likely sole defenders of the rule under review, Respondent-Intervenors should be given more than the standard number of words for an intervenor brief supporting respondent. Respondent-Intervenor public health and environmental organizations request that each of the two sets of respondent-intervenors in this case be allocated at least 9,100 words for their response brief. Respondent-Intervenor public health and environmental organizations intend to assess whether 9,100 words is sufficient after seeing the Agencies' response brief.

II. TTMA Proposes a Truncated Schedule Without Good Reason.

TTMA has proposed a briefing and argument schedule that is more truncated than the typical schedule in agency record review cases with multiple parties and has not offered good reasons for this truncation. TTMA proposes that its opening brief be filed 30 days after an order lifting the abeyance, response briefs be filed 30 days later, and its reply brief be filed 21 days after response briefs, with argument in May 2020. This Court would have to rule immediately—and in the midst of two national holidays—to allow adequate time for TTMA's proposed briefing schedule and for the minimum of 45 days after briefing is completed that this Court typically allots before a case's argument date. *See* D.C. Cir. Handbook of Practice and Internal Procedures ("Handbook"), § X.D at 48. Moreover, the schedule does not give consideration to the inappropriateness of requiring Respondent-

Intervenors to respond on the same day as the Agencies given the likelihood that they will need to respond to both TTMA's and the Agencies' briefs. *See supra* § I.

TTMA's willingness to delay briefing for nearly three years, and filing of the present motion a mere 5 months prior to the date it seeks a hearing on the case, severely undercuts its assertion of prejudice if this Court does not reach a decision before "mid-2020." ECF 1818576 at 2.⁴ During the past 13 months, as TTMA itself concedes, the Agencies' status reports stating that they "continue to assess next steps" have offered no indication that TTMA members should not prepare to comply with NHTSA's trailer requirements in 2021. ECF 1818576 at 5. There is no good reason that TTMA could not have requested to lift the abeyance six months ago or more in order to allow the parties and the Court to brief and decide this case under a negotiated and orderly schedule.⁵

⁴ TTMA would not face prejudice from an orderly briefing schedule. Such a schedule would permit a decision before the January 2021 compliance deadline, which is more than a year away. With respect to the EPA standards (which were to take effect in January 2018), TTMA did not seek any relief from the Agencies until April 2017, *see* ECF 1673036 at 2 & n.1 (EPA filing noting TTMA's slow pace), and did not seek a stay from this Court until less than four months before the compliance deadline (in September 2017 for a January 2018 deadline), undermining its assertion that it requires resolution by "mid-2020."

⁵ To the extent TTMA believes its members require a disposition from this Court sooner than would occur under an orderly schedule, TTMA should consider proposing earlier deadlines for its opening and reply briefs.

CONCLUSION

For the foregoing reasons, Respondent-Intervenors urge this Court to reject TTMA's proposed schedule for briefing and argument. If this Court lifts the abeyance, it should give Respondent-Intervenors 30 days to respond to the Agencies' brief and allocate at least 9,100 words for the brief of each set of Respondent-Intervenors.

DATED: December 13, 2019

Respectfully submitted,

/s/ Benjamin Longstreth

Benjamin Longstreth
Natural Resources Defense Council
1152 15th St. NW, Suite 300
Washington, DC 20005
(202) 289-6868
blongstreth@nrdc.org
*Counsel for Natural Resources
Defense Council*

/s/ Joshua R. Stebbins

Joshua R. Stebbins
Joanne Spalding
Alejandra Núñez
Sierra Club
50 F. St. NW, 8th Floor
Washington, DC 20001
(202) 675-7917
josh.stebbins@sierraclub.org
joanne.spalding@sierraclub.org
alejandra.nunez@sierraclub.org
Counsel for the Sierra Club

/s/ Susannah L. Weaver

Susannah L. Weaver
Sean H. Donahue
Donahue, Goldberg, Weaver &
Littleton
1008 Pennsylvania Ave. SE
Washington, DC 20003
(202) 559-0773
susannah@donahuegoldberg.com
sean@donahuegoldberg.com

/s/ Peter Zalzal

Alice Henderson
Peter Zalzal
Vickie Patton
Environmental Defense Fund
2060 Broadway, Ste. 300
Boulder, CO 80302
(303) 447-7214
pzalzal@edf.org
ahenderson@edf.org
*Counsel for Environmental Defense
Fund*

/s/ Ken Kimmell

Ken Kimmell
President
Union of Concerned Scientists
2 Brattle Square
Cambridge, MA 02138
(617) 547-5552
*Counsel for the Union of
Concerned Scientists*

/s/ Howard Crystal

Howard Crystal
Clare Lakewood
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
hcrystal@biologicaldiversity.org
*Counsel for Center for Biological
Diversity*

CERTIFICATE OF COMPLIANCE

I certify that the foregoing **Public Health and Environmental Organizations' Opposition to Petitioner's Proposed Briefing Schedule** was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 1,906 words.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **Public Health and Environmental Organization Opposition to Petitioner's Proposed Briefing Schedule** on all parties through the Court's electronic case filing (ECF) system.

DATED: Dec. 13, 2019

/s/ Susannah L. Weaver

Susannah L. Weaver