ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

On Petitions for Review of Final Actions
of the United States Environmental Protection Agency

REPLY BRIEF OF STATE PETITIONERS

Petitioners New York, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Rhode Island, the District of Columbia, and the City of New York

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Dated: August 13, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL REGULATIONS

*citations upon which we primarily rely are marked with an asterisk

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

Act	Clean Air Act
Administrator	Administrator of the EPA
CASAC	Clean Air Scientific Advisory Committee
EPA	United States Environmental Protection Agency
EPA Br.	Brief of Respondent EPA
Ind. Int. Br.	Brief of Industry Intervenors in support of EPA
NAAQS	National Ambient Air Quality Standards
O_3	Ground-level ozone
OMB	White House Office of Management and Budget
Op. Br.	Opening brief of State Petitioners
ppm	Parts per million
SIP	State Implementation Plan
W126	An index used to measure harm from exposure to ozone based on a weighted average of cumulative, seasonal ozone concentrations

SUMMARY OF ARGUMENT

Administrator Stephen Johnson's decision in 2008 to set the primary ozone standard at 0.075 ppm is arbitrary, capricious and contrary to law. The standard he chose does not protect at-risk groups against respiratory illnesses, and does not provide for an adequate margin of safety required by the Clean Air Act. Moreover, the Administrator's decision lacks support in the record in light of "overwhelming" evidence cited by the Clean Air Scientific Advisory Committee (CASAC) that a standard of no higher than 0.070 ppm is necessary to protect public health.

At a minimum, the Administrator failed to provide a reasonable explanation for how an ozone standard of 0.075 ppm, just 0.005 ppm below the 0.080 ppm level at which he concluded healthy adults suffer harm, protects at-risk groups with an adequate margin of safety. CASAC and EPA staff determined that one of those groups, asthmatic children, will "likely" suffer adverse effects when exposed to ozone concentrations "well below" 0.080 ppm. The Administrator's conclusory statement that he set the standard "appreciably below" 0.080 ppm does not constitute a reasoned explanation of how the standard protects at-risk groups with an adequate margin of safety.

The Administrator also acted unlawfully, when contrary to the determination by his staff and CASAC that a separate secondary standard is necessary to protect plants and trees from cumulative, seasonal exposure to ozone during the growing

season, he adopted an eight-hour standard. In adopting a standard that will not provide the requisite protection in certain areas of the country, the Administrator failed to protect public welfare against "any . . . anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. § 7409(b)(2). In contending that significant uncertainties in the evidence justified rejecting a cumulative, seasonal standard in favor of an eight-hour standard, the Administrator failed to account for CASAC's and EPA staff's finding that scientific advances have resolved "key uncertainties" since the last ozone standards review. The Administrator's unsupported conclusion that the eight-hour standard will provide the same level of protection as a cumulative, seasonal standard is erroneous for the same reasons this Court cited in *American Farm Bureau v. EPA*, 559 F.3d 512 (D.C. Cir. 2009).

In view of the lengthy delay caused by EPA's abandonment of its voluntary reconsideration of the standards, the Court should order EPA to revisit and revise them on an expedited schedule. Allowing EPA to address remanded issues in its ongoing ozone standards review, with no court-ordered deadline, will frustrate the States' ability to obtain a remedy for EPA's violations of the statute.

ARGUMENT

I. The Administrator Adopted a Primary Standard that Does Not Protect Public Health with An Adequate Margin of Safety.

A. A primary standard of 0.075 ppm does not protect the public health, including at-risk groups.

In its brief, EPA contends that the record supports the Administrator's decision that adverse effects are too uncertain below 0.075 ppm to require a more protective standard. EPA Br. 110-14. That contention is unfounded. As explained in our opening brief, CASAC concluded that "overwhelming scientific evidence" required a standard of "no greater than 0.070 ppm." Op. Br. 19. EPA argues that the Adams chamber studies upon which CASAC relied provide "very limited" support for finding adverse effects below 0.075 ppm, and without further evidence, too much uncertainty exists to set the standard at a lower level.[1] But EPA does not dispute CASAC's conclusion that several epidemiological studies also reported adverse health effects associated with exposure to ozone at "levels well below the current standard." 72 Fed. Reg. at 37,869/1-2. Indeed, in response to Industry Petitioners, EPA cites two multi-city epidemiological studies of asthmatic children exposed to ozone pollution, including at levels below 0.080 ppm, as "provid[ing]

[1] The Administrator's conclusion that the Adams studies provide very limited support that adverse effects occur below 0.075 ppm was erroneous. *See* American Lung Ass'n Op. Br. 17-21.

robust results regarding increased asthma medication use" associated with that exposure. EPA Br. 59 (citing 73 Fed. Reg. at 16,445-46).

EPA further contends that the Administrator properly gave "very little weight" to adverse effects asthmatic children could experience when exposed to ozone concentrations of 0.060 ppm. EPA Br. 104. But EPA staff found that due to the adverse impacts on healthy adults documented in the Adams studies, exposure to ozone at 0.060 ppm is "likely to cause" decreased lung function and other respiratory symptoms in children with asthma. Staff Paper at 6-59 (J.A._____). In light of these findings by EPA staff, the Administrator's failure to protect against the "likely" adverse effects to children with asthma at the 0.060 ppm level was arbitrary. And even if there is "increasing uncertainty of the existence and magnitude of additional public health protection" for standards set below 0.070 ppm, EPA Br. 101 (quoting 73 Fed. Reg. at 16,478/1), that would not support the Administrator's ultimate decision to set the standard higher, at 0.075 ppm. His decision to do so was contrary to the record and violated the requirement that he err on the side of caution by adopting a primary standard under 42 U.S.C. § 7409(b)(1) that addresses identified risks even if they "cannot be quantified or precisely identified as to nature or degree." *Whitman v. American Trucking Ass'ns*, 283 F.3d 355, 369 (D.C. Cir. 2002) ("*ATA III*").

EPA's reliance on *ATA III*, EPA Br. 111-12, is misplaced. In *ATA III*, this Court upheld EPA's decision to establish the primary standard for fine particulate matter above levels correlated with adverse effects in "non-significant study results." 283 F.3d at 372. But here, EPA set the standard above levels where both chamber and epidemiological studies showed statistically significant adverse effects. 73 Fed. Reg. at 16,444/1; *see* Staff Paper App. 3B (J.A.___). And, unlike in *ATA III*, CASAC's determination here that a standard of no higher than 0.070 ppm is necessary to protect public health supplies a "basis for concluding that EPA's decision was unreasonable or unsupported by the record." 283 F.3d at 372.

B. The Administrator failed to provide a reasonable explanation for how a standard set within 0.005 ppm of demonstrated harm to healthy adults protects at-risk groups with an adequate margin of safety.

In setting the primary standard, EPA "has the heaviest of obligations to explain and expose every step of its reasoning." *American Lung Ass'n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998). EPA has not reasonably explained how the 0.075 ppm standard protects at-risk groups as well as healthy individuals with an adequate margin of safety.

The Administrator's explanation -- that a standard of 0.075 ppm provides adequate protection for at-risk groups because it is "appreciably below" 0.080 ppm, the level at which he concluded there is a "clear causal relationship between

ozone and adverse health effects in healthy individuals," EPA Br. 43, 107, -- is insufficient. This explanation cannot be squared with the Administrator's recognition that "important new evidence shows that asthmatics have more serious responses, and are more likely to respond to lower O_3 levels than healthy individuals." 73 Fed. Reg. at 16,480/1. In fact, the Administrator previously recognized this connection in explaining the basis for his proposed standard of 0.070 ppm, a level within the range recommended by CASAC. *See* 72 Fed. Reg. at 37,879-80. It is far from evident that setting a standard 0.005 ppm below the level at which there is a "clear causal relationship between ozone and adverse health effects" in healthy individuals provides an adequate margin of safety not just for healthy individuals, but also for at-risk groups that "are more likely to respond to lower O_3 levels than healthy individuals."

In *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981), this Court upheld EPA's decision to set the primary standard for ozone at 0.12 ppm, 0.3 ppm below the lower end of the range (0.15-0.25 ppm) at which the Administrator concluded at-risk groups were likely to suffer adverse effects. Here, the Administrator never reasonably explained how the 0.005 ppm reduction provides an adequate margin of safety for both healthy and sensitive groups. Just as in *American Farm Bureau*, it is "[n]otably absent from the final rule . . . how the standard will adequately reduce risks" for those that are more susceptible to harm

from exposure to the pollutant. 559 F.3d at 526. Therefore, at a minimum, the determination must be remanded for EPA to provide an explanation for how a standard of 0.075 ppm provides an adequate margin of safety for both healthy and at-risk individuals. *Id.*

Finally, EPA fails to distinguish *American Lung Ass'n v. EPA*, 134 F.3d at 391-92, where the Administrator did not reasonably explain his decision to leave unaddressed those risks from exposure to air pollution that he concluded were adverse. EPA argues that *American Lung Ass'n* involved the agency's failure to explain its decision not to address what it concluded were "significant" effects from exposure to sulfur dioxide, whereas here EPA instead failed to protect against what it deemed "highly uncertain risks." EPA Br. 113. However, the Administrator agreed with his staff that responses demonstrated by healthy adults to exposures at ozone levels of 0.060 ppm "should be considered adverse for asthmatic individuals," 73 Fed. Reg. at 16,455/1, and staff further found that exposure to 0.060 ppm concentrations of ozone "likely to cause" children with asthma to suffer those effects. Staff Paper at 6-59 (J.A._____). Even if there were material uncertainties in this area, the Administrator would still need to explain how his decision to set the standard marginally below the level that healthy individuals experience serious health effects protects children and other at-risk

individuals with an adequate margin of safety. His failure to do so requires a remand. *See American Lung Ass'n*, 134 F.3d at 391-92.

II. The Administrator Adopted a Secondary Standard that Does Not Protect Public Welfare.

A. The eight-hour secondary standard does not adequately protect plants and trees from harms caused by ozone pollution.

EPA contends that the Administrator's adoption of an eight-hour standard instead of the cumulative, seasonal standard recommended by CASAC and EPA staff was justified based on significant uncertainties in the evidence regarding adverse effects to plants and trees caused by ozone, and, because a comparison of benefits between the two standards showed no material difference in terms of air quality protection. Both arguments are meritless.

1. The Administrator's contention that uncertainties in the evidence warrant rejection of the cumulative, seasonal standard is meritless.

EPA relies heavily on purported uncertainties in the evidence to justify the Administrator's rejection of EPA staff's and CASAC's conclusion that adopting a cumulative, seasonal standard is necessary to protect plants and trees from ozone-caused adverse effects, including visible leaf damage, biomass loss in trees, and crop yield loss. EPA Br. 122-26 (*e.g.*, citing "significant uncertainty in determining or quantifying" risks among varying levels of ozone exposure). His stated rationale is contrary to law and fact.

First, the eight-hour secondary standard does not satisfy the statute's requirement that the Administrator address uncertainty by adopting a secondary standard that protects public welfare from "any . . . anticipated adverse effects" from ozone exposure, 42 U.S.C. § 7409(b)(2). EPA staff found that in "forested park lands and other natural areas," plants and trees experience elevated levels of cumulative ozone exposure that would not exceed daily eight-hour peak ozone concentrations of 0.075 ppm. *See* Op. Br. 29; *see also* 73 Fed. Reg. at 16,488/3 (11-30 percent of counties that met an 8-hour level of 0.070 ppm had incidence of visible foliar injury).[2] This led EPA staff to conclude that "phytotoxic exposures sufficient to induce visible foliar injury would still occur in many areas after meeting . . . [an] alternative 0.07 ppm standard." 73 Fed. Reg. at 16,488/3. Given these findings, harm to plants and trees in these areas constitute "anticipated adverse effects" of an eight-hour standard of 0.075 ppm, especially given this Court's admonition that the term "any" has an "expansive reach" under the Act. *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006). The Administrator does not dispute this evidence, and his contention that "the number and size of such areas and the degree of risk were difficult to determine," EPA Br. 123 (citing 73 Fed.

[2] In citing this evidence, State Petitioners are not contending that the Administrator should have adopted a more stringent *eight-hour* standard, EPA Br. 130, but that the standard he chose fails to provide adequate protection, notably in numerous areas EPA itself identified. 73 Fed. Reg. at 16,488/1; *see* Comments of National Association of Clean Air Agencies (Oct. 9, 2007) at 4 (J.A._____).

Reg. at 16,500/1), cannot provide a basis to ignore his obligation under the statute to establish the requisite level of protection. *See Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (EPA cannot avoid its obligations under the Act "by noting uncertainty surrounding various features" of the scientific evidence).

Second, the rationale of "significant uncertainties" upon which the Administrator relied to adopt an eight-hour standard over a cumulative, seasonal standard is also refuted by the record. Despite conceding that a cumulative, seasonal standard provides a "better match" to protect plants and trees from the adverse effects of ozone exposure, EPA Br. 121, EPA contends that, just as in the last ozone NAAQS review, the evidence remains too uncertain to require adoption of such a standard. However, EPA never addresses State Petitioners' argument that both EPA staff and CASAC concluded that significant advances in the scientific evidence since the last review made continued use of an eight-hour secondary standard inappropriate. Op. Br. 28; *see also* Response to Comments at 107 (J.A._____) ("EPA strongly disagrees with the commenters' assertion that the currently available evidence has not materially reduced key uncertainties present in the last review that factored into the Administrator's decision."). This evidence, including a study finding that cottonwood saplings in New York City grew faster than those in downwind rural areas with greater cumulative ozone exposures, addressed one of the key gaps identified by Administrator Browner in 1997: the

need "to obtain additional information to better characterize ozone-related vegetation effects under field conditions from additional research." 73 Fed. Reg. at 16,494/2-3; 72 Fed. Reg. at 37,886/1; Staff Paper at 8-4 (J.A.____). Similarly, while in 1997 CASAC could not agree on a level and form for the secondary standard because of limited scientific evidence at the time, 62 Fed. Reg. at 38,877/1, CASAC unanimously concluded here that in view of the new evidence, "*there is a clear need for a secondary standard which is distinctly different from the primary standard in averaging time, level and form*." CASAC 10/24/06 Letter at 5-6 (J.A.___-___) (emphasis original).

EPA likewise leaves unrebutted State Petitioners' argument that improved analytical methods, including modeling, have increased the ability to quantify harm to plants and trees since the last review. Op. Br. at 28 (citing 73 Fed. Reg. at 16,495-96). The failure of the Administrator to consider these recognized advances in the scientific evidence since 1997 renders his decision arbitrary and capricious. *See Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (failure to consider an important aspect of the problem renders decision arbitrary).

2. The Administrator's decision to adopt an eight-hour secondary standard on grounds that a cumulative, seasonal standard is unlikely to provide more protection is unlawful under *American Farm Bureau*.

As in *American Farm Bureau*, the Administrator here acted contrary to the statute and the record in adopting a secondary standard identical to the primary standard. The Administrator violated the statutory requirement to identify the requisite level of public welfare protection. He also acted contrary to the record by relying on a flawed comparison between a separate secondary standard and one set identical to the primary standard.

In *American Farm Bureau*, the Administrator rejected the advice of EPA staff and CASAC that a separate secondary standard for particulate matter was necessary to protect public welfare (visibility) and instead adopted a standard identical to the primary standard. In ruling that EPA's decision was unlawful, the Court held that by failing to determine "what level of visibility protection is requisite," the Administrator violated the statute. *Id.* at 530. In addition, the Court held that the Administrator erred by (i) failing to explain why he considered only one of several levels of the separate secondary standard in comparing it to an identical primary standard and (ii) by relying "almost exclusively" on this comparison in selecting the secondary standard despite being cautioned about limitations in the data. *Id.* EPA's decision on the secondary standard for ozone,

made a year before this Court's decision in *American Farm Bureau*, is flawed in these same respects.

First, the Administrator acted contrary to the statutory requirement that he "*shall specify a level of air quality* the attainment and maintenance of *which . . . is requisite to protect the public welfare* from any known or adverse effects." *American Farm Bureau*, 559 F.3d at 530 (quoting in part 42 U.S.C. § 7409(b)(2)) (emphasis added by the Court). EPA argues that, unlike in *American Farm Bureau*, here the Administrator identified a requisite, or "target," level of welfare protection. EPA Br. 124-26. But EPA does not point to any place in the record where the Administrator stated what adverse effect (*e.g.*, amount of foliar injury, tree biomass loss, crop loss), a standard of 0.075 ppm is "requisite" to protect against; he merely stated that such a standard would provide significantly more protection than the previous standard. 73 Fed. Reg. at 16,499/3.

Second, in comparing air quality benefits anticipated under a cumulative, seasonal standard with those of an eight-hour standard, the Administrator repeated several of the record-based errors that resulted in this Court's remand in *American Farm Bureau* to reconsider the particulate matter secondary standard. Specifically, the Administrator here arbitrarily chose an insufficiently protective level for the separate secondary standard to use in the comparison. EPA argues that unlike in *American Farm Bureau*, the Administrator reasonably explained his choice of a

cumulative, seasonal standard at the less protective level (21 ppm-hours). EPA Br. 124-25. That argument is erroneous.

The 21-ppm-hour level was largely based on crop yield loss data from the 1997 ozone NAAQS review. *See* Staff Paper at 8-8 (J.A.____). But EPA staff concluded in this review that the secondary standard should *not* focus on that measure of public welfare. *Id.* at 8-26 (J.A.___) ("[S]taff concludes that from a public welfare perspective, greater concern should be placed on the impacts of O_3 exposures on vegetation in less heavily managed and unmanaged ecosystems such as tree seedlings, mature trees, and forested ecosystems in general"). The Administrator did not dispute this conclusion.

Additionally, EPA staff and CASAC found that a more protective level, within the range of 7-15 ppm-hours, is necessary to guard against the adverse welfare effects of foliar injury and biomass loss in plants and trees. *See* 72 Fed. Reg. at 37,902-03; [3] CASAC 10/24/06 letter at 6 (J.A._____). EPA staff particularly noted the need for additional welfare protection in areas in which plants and trees are valued for aesthetic purposes. *See* 72 Fed. Reg. at 37,903/2 (the "level of ambient ozone that is requisite in a federally designated Class I area [such as a national park or wilderness area] may be lower than the level that is

[3] EPA staff cited newly available field studies -- not the studies cited in EPA's brief from the 1997 review, EPA Br. 124-25 -- as supporting a standard of 7-13 ppm-hours to protect tree seedlings in forests. 72 Fed. Reg. at 37,902/3.

requisite in a cropland area"). The Administrator recognized this distinction by stating his agreement that whether an effect is "adverse" under the statute should incorporate the concept of "intended use" of the ecological receptors and resources that are affected. 73 Fed. Reg. at 16,496/3. Moreover, he specifically solicited comment on a "suite" of cumulative, seasonal standards, which could include "a lower, more protective level to provide the requisite degree of protection against a broad array of ozone-related effects on important sensitive species" in areas "valued for their aesthetic beauty and/or important ecological functions," and a "higher level" established "to provide the requisite degree of crop protection" for agricultural areas. 72 Fed. Reg. at 37,903/2-3.

Despite recognizing that a more protective level was warranted in parks and wilderness areas than in croplands, the Administrator arbitrarily chose 21 ppm-hours as the appropriate level to protect against *all* of these welfare effects in determining the relative merits of a cumulative, seasonal standard versus an eight-hour standard of 0.075 ppm. 73 Fed. Reg. at 16,499-500. In the Administrator's cursory explanation for choosing the 21 ppm-hour level -- that there remain "significant uncertainties" in the evidence, EPA Br. at 125 (citing 73 Fed. Reg. at 16,499/3) -- he made no attempt to explain how a 21 ppm-hour standard designed to protect against crop loss would offer the necessary protection against foliar injury and biomass loss in trees in national parks. His decision to compare the air

quality benefits of a cumulative, seasonal standard of 21 ppm-hours to the eight-hour standard therefore "fails on its own terms," just as the similar comparison of standards did in *American Farm Bureau*, 559 F.3d at 530.

The Administrator's decision to rely heavily on this comparison in selecting the secondary standard also lacks rationality because, as in *American Farm Bureau*, he unreasonably disregarded EPA staff's recommendation to use "caution" in using the comparison. *See* 72 Fed. Reg. 37,904/1-2. As staff had correctly observed, there was a "lack of consistent degree of overlap between the two forms in different air quality years" such that there were "widely different degrees of protection" provided by an eight-hour standard against cumulative harm in a relatively good year for ozone pollution versus a bad one. *Id.* at 37,904/2 & 37,893/1. In addition, "the effects of attainment of an 8-hour standard in upwind urban areas on rural air quality distributions cannot be characterized with confidence due to the lack of monitoring data in rural and remote areas." *Id.* at 37,893/2. The Administrator's decision to disregard the flaws in the comparison and rely on it "almost exclusively" in selecting the standard rendered his decision arbitrary and capricious. *See American Farm Bureau*, 559 F.3d at 530.

B. An eight-hour secondary standard cannot be upheld based on OMB's view of the evidence or the statute.

EPA characterizes the last-minute back-and-forth with OMB regarding the choice of the secondary standard as "not remarkable" and even fully consistent with the statute, EPA Br. 131. But EPA does not deny that, in the span of less than one week, with no new evidence presented, the Administrator abandoned his determination that a cumulative, seasonal standard was required to protect public welfare in favor of the position of OMB and the President that the secondary standard should be identical to the primary standard. Op. Br. 33. EPA previously did not view the choice of the standard to be even a close scientific question. A week before the final rule was signed, the Deputy Administrator stated EPA's conclusion (which was unanimously supported by CASAC) that a cumulative, seasonal standard was "necessary" to protect public welfare and that "ozone effects on vegetation are clearly linked to cumulative, seasonal exposures and are not appropriately characterized by the use of a short-term (8-hour) daily [standard]." Memorandum from Marcus Peacock, EPA to Susan Dudley, OMB (Mar. 7, 2008) at 1-4 (J.A.___-____). Congress specifically gave the *Administrator* authority to make the judgment on the standard requisite to protect public welfare, not OMB. 42 U.S.C. § 7409(b)(2). To the extent that the Administrator relied on OMB's view of the evidence and concerns about implementation costs to change course

and adopt the eight-hour secondary standard, his decision is not entitled to deference.[4] Regardless, the adoption of an eight-hour secondary standard is not supported by the record and therefore must be remanded to EPA, as explained in Point II.A, *supra*.

III. The Court Should Remand the Rule to EPA without Vacatur and Order It to Promulgate Revised Standards on an Expedited Basis.

EPA agrees that if the Court were to grant State Petitioner's petition, vacating the 2008 ozone standards would not be appropriate; however, it opposes State Petitioners' request for the Court to order EPA to issue revised primary and secondary standards on an expedited basis. EPA Br. 133. Contrary to EPA's representation, EPA Br. 134, State Petitioners do not seek a court-ordered deadline requiring EPA to complete its next statutorily-mandated five-year review of the ozone NAAQS. State Petitioners provided the Court with information regarding EPA's announced timeframes for completing that review to give a practical context to our requested order requiring EPA to act on an expedited basis and to point out that delaying revised standards until July 2014, as planned by EPA, would unnecessarily prolong the exposure of millions of Americans to unsafe ozone levels. Op. Br. 38-39. Regardless of EPA's plans for its five-year statutory

[4] *Catawba County, N.C. v. EPA*, 571 F.3d 20, 27-28 (D.C. Cir. 2009), EPA Br. 132, has no relevance here because in that case, EPA relied on OMB only for its established definition of "consolidated metropolitan statistical areas," an area outside EPA's expertise.

review, the circumstances here warrant setting an expedited schedule for reconsideration on remand. The choice of how to respond -- resuming the previous reconsideration process based on the existing record or expediting the current NAAQS review to meet the Court's deadline -- would be left up to EPA.

This Court undoubtedly has jurisdiction to set deadlines for EPA action on remand. *See, e.g.*, *Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988) (Court imposed an expedited schedule on remand based on "EPA's history of delay and missed deadlines"). EPA's attempt to distinguish *Environmental Defense Fund* is unavailing. As in that case, EPA has a history of delay and missed deadlines with respect to its statutory obligations to review ozone NAAQS every five years. Op. Br. 39. EPA issued the 2008 ozone NAAQS pursuant to a consent decree after failing to complete a review of the prior 1997 standards for six years beyond the 2002 statutory deadline, and then delayed this litigation for three more years ostensibly to reconsider the inadequately-protective 2008 standards before abandoning those efforts. *See* Dkts. 1211554, 1261654, 1274843, 1281979, 1324030, and 1327617. And as in *Environmental Defense Fund*, the remand contemplates notice and comment rulemaking. 852 F.2d at 1331. Finally, as in that case, that EPA is now undertaking its required five-year review does not render court-imposed deadlines unnecessary.

Given EPA's delays in this litigation and the adverse public health and welfare impacts of further delay, the expedited remand sought by State Petitioners is fully justified.

CONCLUSION

For the reasons explained above and in State Petitioners' opening brief, the Court should remand the standards to EPA, order EPA to issue revised standards on an expedited basis, and retain jurisdiction to ensure that the agency adheres to the Court's deadline.

Dated: August 13, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD-VOLUME LIMITATIONS

I hereby certify that the foregoing brief of State Petitioners complies with Fed. R. App. P. 32(a)(7), as modified by the Court's Orders of December 23, 2008 and February 16, 2012 (which permit State Petitioners to file an opening brief of up to 4,500 words). The word count function of the word processing system used to prepare this brief indicates that it contains 4,490 words (inclusive of footnotes and citations but exclusive of tables of contents and authorities, glossary, and attorney's certificates).

/s/ Michael J. Myers

MICHAEL J. MYERS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State Petitioners' Reply Brief was filed on August 13, 2012 using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Michael J. Myers

MICHAEL J. MYERS