

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al.

Petitioners,

v.

No. 06-1410
(and consolidated
cases)

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

**PETITION FOR A WRIT OF MANDAMUS
COMPELLING EPA TO COMPLY
WITH THIS COURT'S MANDATE**

To protect public health, the Clean Air Act (“CAA”) requires the Environmental Protection Agency (“EPA”) to set national ambient air quality standards (“NAAQS”) for air pollutants. 42 U.S.C. § 7408(a)(1). More than two and a half years ago, this Court ordered EPA to reconsider its primary annual standard for fine particulate matter, a form of air pollution that endangers public health, because the agency failed to show that its standard adequately prevented harm to vulnerable and at-risk populations like children and the elderly, as the CAA requires. *American Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 525 (D.C. Cir. 2009) (*per curiam*).

Although EPA subsequently confirmed that its current standard, established in 1997, authorizes unhealthy levels of exposure to air pollution

(that could result in over 10,000 deaths per year according to the agency's own estimates) and EPA staff has recommended that the current annual standard be significantly lowered, the agency has not yet complied with this Court's 2009 order and has not committed to a future date by which it will comply. Moreover, by virtue of its prolonged delay, EPA has now missed the CAA's statutory deadline for the next NAAQS review, which requires EPA to review existing NAAQS and make appropriate revisions every five years. 42 U.S.C. § 7409(d)(1). This duty is required by statute even when, unlike here, the prior NAAQS adequately addressed the risks to public health.

In light of the fact that EPA has not committed to a future date for compliance, and because further delay will leave in place an insufficiently protective and statutorily outdated standard that jeopardizes the lives and health of their citizens, New York, Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Rhode Island, and Vermont, petitioners or supporting amici in the original action ("Government Petitioners"),¹ request a writ of mandamus from this Court under 28 U.S.C. § 1651(a) establishing firm and enforceable deadlines for EPA's issuance of a new primary annual standard for fine-particulates.

¹ Supporting amici joining this petition are Maryland and Massachusetts.

To ensure timely compliance with the CAA and to avoid irreparable harm to public health, Government Petitioners ask this Court to issue an order requiring EPA to promptly comply with the Court's judgment. The importance of a firm mandate is underscored by EPA's indication that it will give priority to other rulemakings for which it has court deadlines—leading the White House Office of Management and Budget (“OMB”), which reviews the NAAQS prior to their proposal and promulgation, to downgrade issuance of revised particulate-matter NAAQS to a “long-term action” with no set deadline. As explained below, requiring EPA to issue proposed standards within forty-five days of the Court's order and to promulgate final standards within seven months of the proposal is both reasonable given past agency rulemakings and representations and necessary to protect public health from the serious harms caused by exposure to fine particulate matter pollution.

BACKGROUND

The facts, statutory background, and procedural history of the particulate-matter NAAQS are detailed in this Court's prior decision in *American Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) (*per curiam*). They are summarized here for the Court's convenience.

A. The Role of NAAQS in Protecting Human Health

The CAA requires EPA to establish primary and secondary NAAQS for any air pollutant that “may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7408(a)(1). “As the name suggests, NAAQS are meant to set a uniform level of air quality across the country in order to guarantee both a healthy populace and a healthy environment.” *North Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 299 (4th Cir. 2010). “Primary” (health-based) NAAQS are intended to protect individuals by establishing standards that protect “public health” with “an adequate margin of safety.” “Secondary” (welfare-based) NAAQS are designed to protect the surrounding environment by establishing standards sufficient to protect “public welfare.” 42 U.S.C. § 7409(b)(1)-(2).

Once EPA issues NAAQS for a pollutant, States are required to provide for enforcement of the standards in EPA-approved “state implementation plans.” 42 U.S.C. § 7410. Moreover, to ensure that NAAQS serve their intended protective function, the CAA imposes a continuing obligation on EPA to review issued NAAQS every five years and to revise and update the standards to meet CAA requirements. *Id.*, § 7409(d)(1). To conduct the required review, EPA is required to appoint a

seven-member independent scientific review committee to advise it in the process and to recommend revisions. *Id.* § 7409(d)(1)-(2).

B. EPA's 2006 NAAQS for Fine Particulate Matter

This case concerns particulate matter, a form of air pollution associated with increased rates of premature death, cardiovascular disease, and decreased lung function. *American Farm Bureau Fed'n*, 559 F.3d at 86. EPA first issued NAAQS for particulate matter in 1971. 36 Fed. Reg. 8,186 (Apr. 30, 1971). In 1997, the agency promulgated separate NAAQS for fine particulate matter ("PM_{2.5}"), and in October 2006, based on its mandatory five-year review, EPA revised some aspects of the 1997 PM_{2.5} NAAQS. *See* 62 Fed. Reg. 38,652 (July 18, 1997); 71 Fed. Reg. 61,143 (Oct. 17, 2006).

But, contrary to recommendations made by the scientific review committee, EPA staff, and medical and public health groups, EPA left in place the existing primary annual standard of 15 micrograms per cubic meter ("µg/m³") for PM_{2.5} in issuing the 2006 NAAQS. *Id.* at 61,172-77. The scientific review committee had recommended that EPA lower that standard to between 13 and 14 µg/m³, and medical and public health groups had argued that an even more stringent standard of 12 µg/m³ was necessary to provide an adequate margin of safety, especially for vulnerable populations such as children, the elderly, and the infirm. *Id.* at 61,173, 61,176.

C. *American Farm Bureau Fed'n v. EPA*

States, environmental groups, and other parties subsequently filed petitions for review of the 2006 particulate-matter NAAQS in this Court. In February 2009, the Court granted the petitions in part—ruling, among other things, that EPA had failed to explain how the existing annual standard for PM_{2.5} provided adequate protection from both short and long-term exposure to fine-particulate pollution, including sufficient protection for at-risk populations. *American Farm Bureau Fed'n*, 559 F.3d at 524.

In finding the 2006 NAAQS to be “contrary to law,” *id.* at 515, this Court emphasized EPA’s statutory obligation under the CAA to ensure that the NAAQS protected “not only average healthy individuals, but also ‘sensitive citizens.’” *Id.* at 524 (quoting *American Lung Assoc. v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998)). This Court noted in particular that EPA had acted arbitrarily in discounting a study showing lung damage to children exposed to PM_{2.5} concentrations at and below 15 µg/m³, the level permitted by the 2006 annual standard. *Id.* at 528. Accordingly, the Court remanded the 2006 annual PM_{2.5} standard to EPA for reconsideration—declining to vacate the existing standard only because the vacatur would have eliminated the only existing protection even if “insufficiently protective.” *Id.*

D. EPA's Failure to Comply with this Court's Order

In its 2009 decision, this Court found EPA's 2006 PM_{2.5} standard unreasonable in light of current studies and data in the record. Although EPA could have reconsidered the standard based on the existing administrative record, the agency decided not to conduct its review based on preexisting, available information. Instead, EPA indicated in October 2009—eight months after this Court's decision—that it would reconsider the annual standard for PM_{2.5} in the course of its five-year review of particulate-matter NAAQS, which the CAA required the agency to complete by October 17, 2011, five years from the date EPA had issued the 2006 NAAQS. *See* EPA Staff Presentation to CASAC PM Panel at 2 (Oct. 5, 2009) (*Exhibit A*).

Recognizing the lengthy delay that would result under such an approach, EPA indicated that it would accelerate review of all the particulate matter NAAQS (both fine and coarse particulate matter) in response to the Court's order and issue proposed NAAQS by July 2010 and final NAAQS by April 2011. *Id.* at 5.² EPA proceeded to complete the technical work required to review the NAAQS, including an integrated science assessment in December 2009, a health risk assessment in June 2010, and a visibility

² EPA has since announced that it does not plan to propose any revisions to the coarse particulate matter NAAQS. *See* Letter from Administrator to Sen. Stabenow (October 14, 2011), available at: <http://epa.gov/pm/pdfs/20111014Stabenow.pdf>.

assessment in July 2010. *See* 76 Fed. Reg. at 22,666. In March 2010, based on the evidence in those assessments, EPA staff issued a draft policy assessment making recommendations to the Administrator. The scientific review committee reviewed EPA's initial draft policy assessment in April 2010 and a second draft policy assessment in July 2010. *Id.* EPA completed its final policy assessment in April of this year, yet the agency has yet to issue proposed standards. *Id.*

1. EPA's further confirmation of serious risks to human health from exposure to fine particulate matter.

Rather than providing any justification for continued delay, EPA's own technical evaluations during its current NAAQS review verified that exposure to PM_{2.5} at the level of the existing annual standard likely causes serious harm to human health and therefore confirmed the urgent need for revision of the existing standard. EPA found that new studies provided even stronger evidence of "cardiovascular and respiratory effects associated with short and long term PM exposures." EPA, *Policy Assessment for the Review of the Particulate Matter National Ambient Air Quality Standards (PA)*("Policy Assessment") at 2-18.³

³ Available at <http://www.epa.gov/ttn/naaqs/standards/pm/data/20110419/pmpafinal.pdf>

For example, EPA collected data from fifteen urban areas and analyzed health risks associated with particulate matter in those areas. The agency found that exposure to PM_{2.5} at the level of 15 µg/m³ (the existing standard) could result in over 8,000 deaths per year due to long-term exposure, over 2,500 deaths per year due to short-term exposure, and over 2,700 hospital admissions per year due to respiratory and cardiovascular illness from short-term exposure. EPA, “*Quantitative Health Risk Assessment for Particulate Matter*” at E-13, E-76, E-103 and E-1.⁴ EPA’s own study suggested that adopting an annual standard of 12 µg/m³ could save over 5,000 lives per year in those areas. *Id.* at E-13 and E-76.

EPA’s NAAQS review also included a comprehensive research report by the Health Effects Institute (“HEI”), a well-respected research organization jointly funded by EPA and industry. The HEI report was based on two-decades of epidemiological data on particulate-matter exposure in more than one hundred American cities. Krewski, et al., *Extended Analysis of the American Cancer Society Study Linking Particulate Air Pollution and Mortality* (2009) (HEI Research Report No. 140). The report found that the association between particulate-matter pollution and premature death from

⁴ Available at www.epa.gov/ttnnaqs/standards/pm/data/PM_RA_FINAL_June_2010.pdf.

heart attacks was even greater than previously estimated. Policy Assessment at 2-19.

2. EPA's repeated failures to meet promised deadlines for responding to the Court's remand.

Notwithstanding the existence of compelling evidence showing that fine particulate matter causes serious risks to human health, EPA has not acted with appropriate urgency and set firm deadlines for revising the primary annual standard. Instead, it has delayed complying with this Court's order and completing full NAAQS review. Despite its initial promise in October 2009 of expedited consideration of the NAAQS, and its June 2010 health risk assessment showing thousands of lives at risk from exposure to fine particulate matter pollution at the existing standard, EPA postponed the date for proposing and promulgating revised NAAQS from July 2010 and April 2011, respectively, to March 2011 and November 2011. 75 Fed. Reg. at 79,645 (Dec. 10, 2010).

The agency did not justify its delay in terms of its statutory duties under the CAA or any new and unexpected scientific evidence or developments. To the contrary, EPA's own final policy assessment—issued in April 2011—acknowledged that there is even “stronger and broader body of evidence” now than in 2006 that exposure to PM_{2.5} kills people and is

linked to breathing problems and heart disease. Policy Assessment at 2-35, 2-18.

Based on the comprehensive available data, EPA itself recognized that the existing NAAQS is insufficiently protective and agency staff recommended lowering the current annual standard for PM_{2.5} to between 11 and 13 µg/m.³ *Id.* Despite this acknowledgement in April 2011 that the current standard results in serious risks to human health (which likely lead to avoidable deaths and serious illness each day the standard remains in place), EPA once again delayed in proposing and promulgating the fine particulate matter NAAQS, indicating that it would not issue revised standards until July 2011.⁵

Concerned about these repeated delays and also by a statement made by an Assistant Administrator suggesting that the agency's attention to this Court's order and compliance with this Court's 2009 judgment had been diverted to other rulemakings for which the agency had actual deadlines,⁶ Government Petitioners sent a letter to EPA in March 2011 requesting a firm

⁵ See "*EPA Staffers Recommend a Crackdown on Soot*," (Apr. 20, 2011), available at <http://www.eenews.net/Greenwire/2011/04/20/archive/2?terms=EPA+Staffers+Recommend+a+Crackdown+on+Soot>.

⁶ See "*Soot Crackdown Lags as EPA Wrestles Other Deadlines*," (Jan. 27, 2011), available at <http://www.eenews.net/Greenwire/2011/01/27/archive/1?terms=PM+NAAQS>.

timetable for issuance of new NAAQS (*Exhibit B*). On May 13, 2011, EPA responded that it would issue proposed NAAQS “later this year” and final standards in “the spring of 2012” (*Exhibit C*).

As with the July 2010, March 2011, and July 2011 deadlines for proposing the NAAQS, it now appears that EPA will not meet its most recent self-imposed deadline. To date, it has not yet issued proposed NAAQS, nor has it even sent proposed NAAQS to OMB, which reviews proposed regulations before they are issued, pursuant to Executive Order 12,886 (Sept. 30, 1993). Because OMB’s review typically takes at least thirty days to review, it is extremely unlikely EPA will issue proposed NAAQS this year. Moreover, the agency’s delay has been so protracted that it has now additionally violated the CAA’s statutory deadline of October 17, 2011 for completing the next mandatory five-year NAAQS review. Despite missing the statutory deadline, EPA has given no indication that its pattern of delay will end. Apparently as a result of EPA’s inaction, OMB has downgraded issuance of the new NAAQS from a rulemaking with dates certain to a “long-term action” with deadlines for proposed and final standards “to be determined.”⁷

⁷ See

<http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=2060-AO47>.

ARGUMENT

THIS COURT SHOULD ORDER IMMEDIATE COMPLIANCE WITH ITS 2009 JUDGMENT AND SET A MANDATORY TIMETABLE FOR ISSUANCE OF NEW NAAQS

This Court has authority under the All Writs Act, 28 U.S.C. § 1651(a), to enforce the terms of its mandates in cases that have been remanded to an administrative agency, and that authority includes the power to compel the agency's compliance with the Court's prior order. *In re Core Communications, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008); *Atlantic City Electric Co. v. FERC*, 329 F.3d 856, 858 (D.C. Cir. 2003); *see also Potomac Electric Power Co. v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1032-33 (D.C. Cir. 1983) ("Congress has empowered federal courts to issue a writ such as mandamus . . . if necessary to effectuate or prevent the frustration of orders previously issued") (citations omitted).

As a general matter, "timeliness is implicit in every remand by this Court." *In re Core Communications*, 531 F.3d at 857, n.7 (citation omitted). That duty of timeliness is further underscored in cases such as this one, in which the Court has remanded a rulemaking without vacatur, because agency inaction "effectively nullifies" the Court's decision. *Id.* at 856. Therefore, mandamus relief may be appropriate when a delay in the agency's compliance violates "the rule of reason," taking into account

relevant factors, including whether the agency's delay detrimentally impacts human health or welfare and whether the agency has reasonably given priority to other administrative actions of higher or competing priority. *In re Core Communications*, 531 F.3d at 855 (internal quotation marks and citations omitted). These considerations warrant immediate action by this Court to enforce its 2009 judgment and impose a mandatory timetable for EPA's issuance of new NAAQS.

A. EPA's Delay in Complying with the Court's Order is Unreasonable.

The unreasonableness of the delay "must be judged in the context of the statute that authorizes the agency action." *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) (internal quotes and citation omitted).

According to EPA's own data and findings, its delay in reconsidering the annual standard for PM_{2.5} places human life and health at risk, an overriding factor that supports immediate enforcement of this Court's 2009 judgment.

Administrative delays which may be reasonable "in the sphere of economic regulation" are "less tolerable when human lives are at stake." *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983); *see also Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

Here, as explained above, EPA's delay undeniably affects human life and health, risking over 10,000 deaths each year the existing PM_{2.5} standard remains in place, according to the agency's own health risk assessment. This Court determined in 2009 that EPA had failed to show that the existing primary annual standard was sufficiently protective. Ample evidence existed in that rulemaking record, including the independent scientific committee's recommendations setting forth specific scientific, legal and policy bases for a more protective annual standard, establishing the need for prompt and immediate review. EPA chose instead to address this Court's concerns in the course of its statutorily-mandated five-year NAAQS review, which involved compiling a new administrative record.

That choice could have been within the "rule of reason"—despite the resulting delay—if EPA had, as it initially promised, completed an accelerated review. Instead, even though EPA has completed the technical work on new standards, EPA has postponed action several times without justification, has not even proposed revised NAAQS or set a future date for doing so, and has now even missed the CAA's statutory deadline of October 17, 2011 for completing the next NAAQS review.

EPA's continued, indefinite delay is especially unreasonable because the new data before the agency unambiguously confirms that the existing

primary annual standard authorizes an unsafe level of fine particulate matter pollution in violation of the CAA. As EPA staff recognized in its final policy assessment, recommending that the current NAAQS be significantly lowered: “studies have reported consistent increases in morbidity and/or mortality related to ambient PM_{2.5} concentrations” *currently authorized* by EPA’s existing standard. Policy Assessment at 2-35, 2-18.

Given the uncontroverted evidence that the existing standard imposes unacceptable health risks—and the agency’s own confirmation that it has more than sufficient evidence to reach that conclusion—any further delay in EPA’s compliance with the Court’s order, which has already stretched to almost *three years*, is unwarranted. *See In re American Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004) (“a reasonable time for agency action is typically counted in weeks or months, not years”); *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987) (“[W]e also understand, because we have seen it happen time and time again, that action Congress has ordered for the protection of the public health all too easily becomes hostage to bureaucratic recalcitrance, factional infighting, and special interest politics. At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough”).

B. Ordering EPA to Comply with the Court's Order Will Not Hamper Agency Activities of Higher or Competing Priority.

Moreover, because EPA has completed the technical work necessary to issue a proposed rule and, indeed, has identified no further technical or scientific work that needs to be completed as part of its NAAQS review, requiring immediate compliance with this Court's 2009 order and imposing a mandatory timetable for issuance of revised NAAQS will not impede other agency activities of higher or competing priority.

As a threshold matter, EPA has not identified any specific administrative actions that deserve higher priority. And, in any event, given EPA's own finding that the level of PM_{2.5} permitted by the existing standard increases human disease and death, it is difficult to imagine a more significant administrative priority than promptly revising that standard. Indeed, EPA Administrator Jackson stated last year that "strengthen[ing] our ambient air quality standards for pollutants such as PM" was one of her top priorities for the Agency. Memorandum from Lisa P. Jackson, Administrator, EPA, to All EPA Employees (Jan. 12, 2010).⁸

⁸ Available at blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/

C. Government Petitioners' Proposed Deadlines are Reasonable Based on Previous Agency Rulemakings and Representations.

Government Petitioners seek an order requiring EPA to issue a primary annual standard for PM_{2.5} within forty-five days of the Court's order granting relief and to finalize the standard within seven months of proposal. Both of these deadlines are achievable and warranted in light of the serious public health harms caused by exposure to fine particulate matter pollution at the level of the current NAAQS.

As discussed above, agency staff have already completed technical work on the standard and made their final recommendations to the Administrator in the policy assessment issued in April 2011. Assuming that briefing of this mandamus petition results in a decision from the Court in January, EPA would have until sometime in February or March to issue the proposed standard, approximately ten months after issuance of the policy assessment. This period is well within the range of administrative achievability, as demonstrated by the fact that EPA issued the last proposed NAAQS for particulate matter in January 2006, seven months after issuance of the staff's policy assessment in June 2005. *See* 71 Fed. Reg. at 2,624.

Requiring EPA to issue the final standard within seven months of the proposed standard is also reasonable. EPA has previously indicated that it

can promulgate the final NAAQS within six to nine months of the proposed NAAQS. *See* Ex. A at 5, Ex. C at 1. Given EPA's delays, it is reasonable to hold the agency to a time limit that falls within their estimate and is not at the outer limit of it.

RELIEF REQUESTED

For the foregoing reasons, Government Petitioners ask this Court to issue a writ of mandamus directing EPA to immediately comply with this Court's 2009 judgment. Because the technical work for revising the PM_{2.5} standard has already been completed, and because the agency has now missed several promised deadlines and now the CAA's statutory deadline for NAAQS review without justification, Government Petitioners request that the Court impose a mandatory, enforceable timetable requiring EPA to propose a primary annual standard for PM_{2.5} within forty-five days of the Court's order and a final standard within seven months of issuing the proposed standard.

Dated: November 15, 2011

Respectfully submitted,

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Review of the Particulate Matter National Ambient Air Quality Standards

Schedule and Development of Policy Assessment

Presentation for CASAC PM Panel

Lydia N. Wegman, Director, and Beth M. Hassett-Sipple
Health and Environmental Impacts Division
OAQPS, US EPA

October 5, 2009



Schedule

- EPA Administrator Lisa Jackson wants to accelerate schedule for PM NAAQS review to respond to court remand, consistent with the use of good science
 - Recognizes importance of issues raised by the court:
 - Failure to explain adequately why final decisions differed from CASAC's recommendations
 - Failure to explain adequately why primary annual standard is sufficient to protect public health with an adequate margin of safety
 - Decision to set secondary standards identical to primary standards was unreasonable and contrary to the law
 - Desires to provide important public health protections as soon as possible



Commitment to Good Science

- EPA Administrator is committed to full consideration of best available science in all assessments

"Science is one of the key factors that the President asked us to focus on when shaping our environmental agenda. Our decisions have to be guided by the most thorough research, the most accurate data, and the strongest evidence."

- Under an accelerated schedule:
 - Schedule for Integrated Science Assessment (ISA) is unchanged
 - Schedule for assessment documents would be accelerated by having CASAC review/public comment on current external review drafts only
 - Public comment period extended until Nov 9, 2009
 - Schedule for Policy Assessment (PA) includes discussion on preliminary draft and CASAC review/public comment on 1 external review draft



Policy Assessment

- Administrator Jackson reinstated Policy Assessment document ("Staff Paper") in lieu of issuing policy assessment as an Advanced Notice of Proposed Rulemaking (ANPR) – May 21, 2009
 - Transparent staff analysis of scientific basis for alternative policy options
 - Integrates and interprets information from ISA and REA to "bridge the gap" between the scientific assessments and judgments required of Administrator in determining whether to retain or revise the NAAQS
 - Facilitates CASAC advice to EPA and recommendations to Administrator on any new standards or revisions to existing standards as may be appropriate
 - CASAC review and public comment on draft Policy Assessment



Target Dates for Accelerated Schedule

- Final ISA – December 2009
- Final Risk Assessment and Urban-Focused Visibility Assessment – December 2009
- External Review Draft Policy Assessment (PA) – December 2009
 - Will include draft staff conclusions for elements of the primary and secondary standards based on the evidence/quantitative analyses
- CASAC review of External Review Draft PA – January 2010
 - Would provide opportunity for CASAC comment on final RA and UFVA
- Final PA – February 2010
 - Will include final staff conclusions
- Proposed rule – July 2010
- Final rule – April 2011



Preliminary Draft Policy Assessment – Sept 2009

- Modeled after 2005 PM Staff Paper
- Released for informational purposes only and to facilitate discussion with CASAC on:
 - Overall structure
 - Areas of focus
 - Level of detail
- Contains 4 early draft chapters (**bolded**); outlines for 3 additional chapters
 - **Chapter 1 – Introduction; Background**
 - **Chapter 2 – Characterization of Ambient PM**
 - **Chapter 3 – Policy-Relevant Assessment of Health Effects Evidence**
 - Chapter 4 – Characterization of Health Risks
 - Chapter 5 – Staff Conclusions on Primary PM Standards
 - **Chapter 6 – Policy-Relevant Assessment of Welfare Effects Evidence**
 - Chapter 7 – Staff Conclusions on Secondary PM Standards



Additional Work Planned for External Review Draft Policy Assessment

- Preliminary draft is clearly a work-in-progress
- Identify and potentially adapt ISA figures to sharpen focus and discussion of health effects evidence in Chapter 3
- Consider restructuring Chapters 6 and 7 into separate discussion of qualitative welfare effects evidence and quantitative analyses
- Continue joint NCEA/OAQPS efforts to obtain relevant air quality data from epidemiologic study authors to inform evidence-based considerations
- Consider CASAC review and public comment on second draft ISA and draft risk/visibility assessment documents to focus presentation of scientific evidence and quantitative analyses



Additional Work Planned for External Review Draft Policy Assessment (cont.)

- Synthesize entire breadth of evidence as well as results from quantitative assessments to inform basis for considering alternative standards
- Develop staff conclusions for basic elements of the primary and secondary standards based on the evidence/quantitative analyses
 - Indicators
 - Averaging times
 - Ranges of levels
 - Form
- Present options for Administrator to consider in reaching decisions on suite of PM standards to propose

**ATTORNEYS GENERAL OF NEW YORK, CALIFORNIA, CONNECTICUT,
DELAWARE, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE,
NEW JERSEY, NEW MEXICO, OREGON, RHODE ISLAND, and VERMONT**

March 23, 2011

Via Electronic Mail And First Class Mail

Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Fine Particulate Matter NAAQS/EPA Response to Remand in
American Farm Bureau Federation v. EPA (D.C. Cir 06-1410)

Dear Administrator Jackson:

The States of New York, California, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, and Vermont, petitioners in American Farm Bureau Federation v. EPA, 559 F.3d 512 (D.C. Cir. 2009), submit this letter to urge prompt action by the Environmental Protection Agency on the D.C. Circuit's remand of the national ambient air quality standards ("NAAQS") for fine particulate matter ("PM_{2.5}"). It has been more than two years since the Court's February 2009 decision, and EPA has not yet responded to the remand. Given the Agency's recognition of the link between reducing PM_{2.5} and saving lives, we ask that EPA take steps to expeditiously comply with the Court's remand order, and inform us of the agency's schedule for the proposal and promulgation of the standards so that we may be assured of EPA's commitment to act promptly.

As you are aware, in 2006, states and local governments, public health organizations, and others challenged the EPA's 2006 NAAQS for Particulate Matter, 71 Fed. Reg. 61,143 (Oct. 17, 2006) ("the Rule"). With respect to the primary annual standard for PM_{2.5}, then Administrator Johnson chose to keep the standard at 15 micrograms per cubic meter ("ug/m³"), the level EPA established in 1997, contrary to the recommendation of the Clean Air Scientific Advisory Committee ("CASAC"), which was created by statute to provide EPA with independent scientific analysis. CASAC had concluded that the standard needed to be strengthened in the range of 13-14 ug/m³ to protect public health with an adequate margin of safety. As we pointed out in their brief, for example, strengthening the standard by just 1-2 ug/m³ would prevent several hundred premature deaths annually and result in annual savings of tens of millions of dollars in health care costs in the New York City area alone.

After briefing and oral argument, the Court held that the Rule was contrary to the Clean Air Act and unsupported by reasoned decision making. The Court held that the EPA did not adequately explain how an annual standard of 15 ug/m³ protects public health, especially the health of children, with an adequate margin of safety, as required by

the statute. 559 F.3d at 519 (citing 42 U.S.C. § 7409(b)(1)). Accordingly, the Court remanded the NAAQS to the EPA for reconsideration. *Id.* at 519-29.

Following the Court's decision, the Health Effects Institute, a well-respected research organization that is jointly funded by EPA and industry, issued a report finding the association between particulate matter pollution and premature death from heart attacks to be twice as high as previously estimated. Krewski, et al., *Extended Analysis of the American Cancer Society Study of Particulate Air Pollution and Mortality* (HEI Research Report No. 140) (May 2009) (based on epidemiological data collected over nearly two decades from more than 100 American cities). Moreover, earlier this month EPA issued a report in which it found that the particulate matter reductions required under the Clean Air Act saved about 160,000 lives in 2010 and are projected to save more than 230,000 lives in 2020. U.S. EPA, *The Benefits and Costs of the Clean Air Act from 1990 to 2020: Final Report* (March 2011). The agency also concluded in its report that by the end of that period, "[m]ost of the \$2 trillion in economic benefits (about 85 percent) are attributable to reductions in premature mortality associated with reductions in ambient particulate matter."

Despite the new evidence that particulate matter pollution is even more dangerous to public health than previously thought and EPA's findings regarding how reductions in fine particulates save countless lives at the fraction of the cost, EPA has not moved swiftly to address the flaws in the Rule. After the Court's decision, EPA announced that, rather than reconsidering the Rule based on the existing administrative record (as it is doing in the ozone NAAQS context) it would address the D.C. Circuit's remand in the context of the next PM_{2.5} NAAQS review, which at that point was well underway. After stating initially that it would complete that review ahead of the statutory five-year maximum period, EPA subsequently announced in July that it would not in fact propose the standard until February 2011 and promulgate it until October 2011, the deadline under the Clean Air Act. *See* 42 U.S.C. § 7409(d) (requiring five-year review for ambient air quality standards).

However, it appears increasing unlikely that EPA will in fact meet the October 2011 deadline. Not only did EPA fail to issue a proposed rule last month, it has not announced when it will do so. Just as troubling, in recent comments to the press, Assistant Administrator McCarthy suggested that the absence of a court deadline on remand excused the agency from adhering to the schedule it had previously announced. *See* Greenwire, "Soot Crackdown Lags as EPA Wrestles Other Deadlines," (Jan. 27, 2011). The Assistant Administrator did say that addressing particulate matter pollution was a priority for EPA, but the resulting delay makes it increasingly unlikely that the Agency will promulgate a standard as promised by October 2011. Although it is correct that the D.C. Circuit has not yet required the Agency to complete its reconsideration by a date certain, the passage of time combined with the serious harms posed by PM_{2.5} suggest that mandamus relief for unreasonable delay may be appropriate now or in the near future. *See Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) (the "deference traditionally accorded an agency to develop its own schedule is sharply reduced when injury likely will result from avoidable delay").

Moreover, although there may be no deadline at this time for EPA to respond to the remand, the five-year deadline for EPA to issue revised NAAQS for particulate matter, October 2011, is fast approaching. We therefore call on EPA to propose and promulgate the standard as soon as possible, and to provide us with its proposed timetable for doing so within two weeks of this letter. This information will enable us to evaluate our options, including seeking appropriate relief from the court, regarding how best to protect the health of our citizens against the harms caused by particulate matter pollution, an interest that we all share in common.

Thank you for your consideration of this letter. If you would like to discuss this matter, feel free to contact us through New York Assistant Attorney General Michael J. Myers at the address below.

Sincerely,

FOR THE STATE OF NEW YORK

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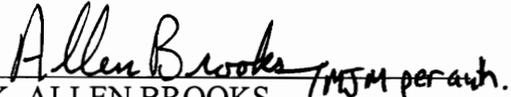
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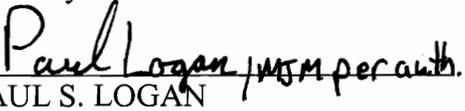
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cc: Gina McCarthy, Assistant Administrator for Air And Radiation



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

MAY 13 2011

MAY 11 2011

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ALBANYOFFICE OF
AIR AND RADIATION

The Honorable Michaels J. Myers
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Albany, New York 12224

Dear Mr. Myers:

Thank you for your letter of March 23, 2011, co-signed by 12 of your colleagues, expressing your concerns over the timing of the ongoing review of the National Ambient Air Quality Standards (NAAQS) for particulate matter (PM). Specifically, you asked questions regarding the schedule for the current PM NAAQS review which includes a response to the remand of the primary annual PM_{2.5} standard as well as the secondary PM_{2.5} standards. The Administrator asked that I respond to your letter.

We appreciate the importance of PM NAAQS decisions to states and understand the importance of completing this review as soon as possible. With regard to the rulemaking schedule, as you noted, we did not release a proposed rule in February 2011 and it will not be possible to meet a final rule date of October 2011. However, I want to assure you that one of Administrator Jackson's top priorities for the Agency is improving air quality. As such, the Administrator plans to issue a proposed decision later this year. We will be seeking written comments and holding public hearings on the proposed rule to gather as much input as we can before making final decisions on whether to retain or revise the PM NAAQS. Following consideration of public comments on the proposal, we anticipate the Administrator will issue a notice of final rulemaking in the spring of 2012.

Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Gina McCarthy
Assistant Administrator

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2011, one copy of this Petition for Writ of Mandamus Compelling EPA to Comply with this Court's Mandate was served by first class mail the counsel of record at the addresses below:

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