

**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.,

Intervenors.

No. 16-1430 (consolidated with
No. 16-1447)

**Motion to Compel Agencies to Submit Detailed Status Report and Timeline
for Completion of Administrative Review**

Petitioner Truck Trailer Manufacturers Association, Inc. (“TTMA”) moves to compel the respondent Agencies to submit a status report detailing the progress that they have made toward reconsidering the Final Rule at issue in this case, and providing a timeline for completion of their administrative reconsideration processes. If the Agencies are unable to commit to either issuing a new proposed rule or announcing that they intend to retain the current Final Rule within the next

90 days, TTMA will consider moving this Court to lift the abeyance and set a briefing schedule in this case.

I. Background

TTMA seeks judicial review of a final rule—Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2 (“Final Rule”)—promulgated by the U.S. Environmental Protection Agency (“EPA”) and the National Highway Traffic Safety Administration (“NHTSA”) (collectively, the “Agencies”). TTMA challenges only the provisions in that Final Rule that pertain to heavy-duty trailers.

TTMA filed the petition for review on December 22, 2016, more than a year and a half ago. Since that time, the Agencies have sought repeated delays and abeyances. On August 17, 2017, the Agencies sent letters to TTMA indicating that they intended to revisit or reconsider the Final Rule’s trailer provisions. Letter from E. Scott Pruitt, EPA Administrator, to J. Martel and J. Sims (Aug. 17, 2017); Letter from Jack Danielson, Acting Deputy Administrator, NHTSA, to J. Sims (Aug. 17, 2017). In light of those letters, on September 18, 2017, the Agencies sought an indefinite abeyance “pending completion of administrative proceedings regarding the challenged rule.” Motion at 2 (Sept. 18, 2017).

The same day, TTMA filed a conditional opposition to the abeyances, stating that it agreed to the abeyance request if the Court granted TTMA’s

forthcoming request to stay the EPA portions of the rule. Conditional Opposition to Motion to Continue Abeyance at 2-4 (Sept. 18, 2017). TTMA then moved on September 25, 2017 for a stay of the EPA portions of the rule. TTMA did not at that time seek a stay of the NHTSA portions of the rule, which take effect on January 1, 2021. 81 Fed. Reg. 74,328 (Oct. 25, 2016); 49 C.F.R. 535.3(d)(5)(iv).

On October 27, 2017, the Court granted TTMA's motion to stay the EPA portions of the rule pending judicial review, and granted the Agencies' motion to continue the abeyance. Order at 2 (Oct. 27, 2017). The Court directed the parties to file status reports at 90-day intervals beginning 90 days from the date of this order. *Id.* Since that time, the Agencies have filed three status reports, on January 22, 2018, April 25, 2018, and most recently on July 24, 2018. The first report, after recounting the procedural history, stated:

EPA is working to develop a proposed rule to revisit the Rule's trailer provisions. NHTSA continues to assess next steps after granting Trailer Petitioner's request for rulemaking. Respondents will submit their next 90-day status report on April 25.

Status Report at 3 (Jan. 22, 2018) (footnote omitted). The two subsequent status reports repeat the same language verbatim, except that they change the date for the next status report. Status Report at 3 (July 24, 2018); Status Report at 3 (April 25, 2018).

Counsel for TTMA have conferred with counsel for the Agencies, but counsel for the Agencies have not provided additional information concerning the

status or timing of their decisionmaking process. The Agencies take no position on this motion, pending their review of the motion.

II. The Court Should Order the Agencies to Provide a Detailed Status Report Setting a Timeline for Reaching a Decision

TTMA respectfully requests that the Court order the Agencies to provide a more detailed status report, setting forth the progress to date that each Agency has made in reconsidering or deciding whether to reconsider the Rule's trailer provisions, and setting forth a specific timeline for reaching a decision. It has now been nearly a year since the Agencies advised TTMA that they were revisiting the Rule. *See* Letters of August 17, 2017, *supra*. Since that time, the Agencies have issued three status reports covering a nine-month period that each simply say "we're working on it." None of the status reports offer any information about the Agencies' progress; what if anything has been accomplished; or what if any schedule the Agencies have in mind for completing their review or even completing any initial step in their review. If, as it appears, the Agencies intend to continue issuing content-less status reports, those reports serve no purpose at all.

The Court should order the Agencies to provide a new status report detailing their progress thus far and setting a timeline for reaching a decision, as it has done in other cases. *See, e.g.,* Order at 1, *Utility Solid Waste Activities Group v. EPA*, No. 15-1219 (D.C. Cir. Sept. 27, 2017) (delaying oral argument but ordering EPA to file a status report "setting forth with specificity the timeline for

reconsideration” to justify any additional abeyance); Statement of Judge Wilkins and Judge Millett Concurring in Abeyance at 3, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. June 26, 2018) (expressing disinclination to grant further abeyances where “EPA has offered no indication of when it expects its review of the [rule] to be complete”).

The continuing uncertainty as to what the Agencies will do, with no end in sight, is untenable for TTMA’s members. It also is unwarranted. In granting a stay, this Court already necessarily concluded that TTMA is likely to succeed on the merits of its challenge to the EPA portions of the Rule, because the Clean Air Act does not authorize EPA to regulate trailers. Order at 1 (Oct. 27, 2017). While TTMA would prefer to resolve this matter without litigation, its members should not have to wait in an indefinite holding pattern without any indication from EPA as to when and whether it intends to announce a reconsideration of the Rule.

The filing of content-less status reports also has the potential to prejudice TTMA’s members in connection with the fuel economy portions of the Rule, which were promulgated by NHTSA. TTMA has not yet sought a stay of the NHTSA provisions because the mandatory fuel economy requirements do not take effect until January 1, 2021. 81 Fed. Reg. 74,328 (Oct. 25, 2016). NHTSA established an effective date of January 1, 2021 because the statutory provision under which it claims authority to regulate trailers requires “not less than ... 4 full

model years of regulatory lead-time.” 49 U.S.C. § 32902(k)(3)(A). That statutory mandate ensures that regulated parties have plenty of time to challenge new fuel economy rules in court and to come into compliance if the challenges fail. But the Agencies’ content-less status reports have a serious potential to undermine the four-year lead period that Congress mandated. TTMA has already lost 19 months, which is nearly half of the four-year period. With each passing month, it becomes more probable that this Court will lack time to adjudicate the merits of TTMA’s challenge before the compliance deadline, if NHTSA ultimately decides to leave the Rule in place. *See, e.g.*, NHTSA Letter at 1 (advising that its decision “granting [the] petition [for reconsideration] does not prejudice the outcome of the rulemaking or necessarily mean that a final rule will be issued”).

Accordingly, this Court should order the Agencies to provide a more detailed status report that sets forth a timeline for the Agencies’ decisions on these matters. If the Agencies are unable to commit to reaching a decision within the next 90 days, either by issuing a proposed rule or announcing that they are not going to do so, TTMA will consider asking the Court to lift the abeyance and set a briefing schedule to adjudicate TTMA’s challenges to the Final Rule.

Dated: August 6, 2018

Respectfully submitted,

/s/ Elisabeth S. Theodore

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,292 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(f). The filing complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because it was prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: August 6, 2018

/s/ Elisabeth S. Theodore
Elisabeth S. Theodore

CERTIFICATE OF SERVICE

I hereby certify that, on August 6, 2018, the foregoing was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on counsel of record by operation of the CM/ECF system on the same date.

Dated: August 6, 2018

/s/ Elisabeth S. Theodore
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