

ORAL ARGUMENT NOT YET SCHEDULED

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

TRUCK TRAILER MANUFACTURERS
ASSOCIATION, INC.,

Petitioner,

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 Lift Abeyance and Set Briefing Schedule

Petitioner Truck Trailer Manufacturers Association, Inc. (“TTMA”) moves this Court to lift the abeyance and to set a briefing schedule in this case. TTMA filed this action in December 2016 for review of a joint rule promulgated by the U.S. Environmental Protection Agency (“EPA”) and the National Highway Traffic Safety Administration (“NHTSA”). That rule for the first time imposes “emissions” and “fuel economy” standards on trailers, which emit nothing and

consume no fuel. TTMA contends that the EPA and NHTSA (collectively, the “Agencies”) lack statutory authority to regulate trailers and that the joint rule is arbitrary and capricious.

This case has been in an indefinite abeyance for three years at the request of the Agencies, which advised the court that they are reconsidering the rules and that their reconsideration could obviate the need for judicial review. But the Agencies have made no discernible progress and there is no prospect of progress in sight. No notice of proposed rulemaking has even issued. The Agencies have published regulatory agendas indicating potential dates for the issuance of a notice of proposed rulemaking, only to push back those dates in the next regulatory agenda. In this Court, the Agencies have filed court-ordered status reports every three months or so which merely repeat that the Agencies are “assess[ing] next steps.” The status report filed in October 2019 was materially identical to the status report filed in January 2018 and to every other status report.

TTMA has a right to judicial review and can no longer afford to wait given the approaching compliance deadline of January 2021 for the NHTSA fuel economy standards. If the Court does not lift the abeyance now, it is likely that those standards will take effect before the parties could complete briefing and this Court could hold oral argument and issue a decision. Any delay beyond mid-2020 will begin to cause significant prejudice to TTMA’s members. TTMA respectfully

requests that the Court lift the abeyance and issue the briefing schedule set forth below, which would allow the Court to schedule argument for its May 2019 sitting.

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 jointly by the EPA and NHTSA. 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, almost three years 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, which were set to take

effect in 2018. 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. *Id.* 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 next two status reports repeated the initial report essentially verbatim, simply changing the date on which the next status report was due. Status Report at 3 (April 25, 2018); Status Report at 3 (July 24, 2018).

On August 6, 2018, TTMA filed a motion to compel the Agencies to submit a detailed status report and a timeline for completion of the administrative review process. At the Agencies' request, however, TTMA withdrew that motion on

September 24, 2018, after the Agencies offered to meet with TTMA to discuss the rulemaking process.

Since then, no apparent progress has been made. The Agencies have filed five more materially identical status reports repeating that the “agencies continue to assess next steps in their administrative process.” Status Report at 3 (October 22, 2018); Status Report at 3 (February 8, 2019); Status Report at 3 (May 9, 2019); Status Report at 3 (August 7, 2019); Status Report at 3 (November 5, 2019).

On May 22, 2019, the Trump Administration published the Spring 2019 edition of the *Unified Agenda and Regulatory Plan*, a semi-annual publication that sets forth “the actions administrative agencies plan to issue.” Office of Info. & Reg. Affs., *Fall 2019 Unified Agenda of Regulatory and Deregulatory Actions*, <https://www.reginfo.gov/public/do/eAgendaMain>. The Spring 2019 agenda indicated that both Agencies planned to publish notices of proposed rulemaking in October 2019 to revisit the Rule’s trailer provisions.¹ October came and went with no notice of proposed rulemaking. The Fall 2019 agenda, published November 18, 2019, again referenced the challenged Rule, but indicated that NHTSA does not plan to *initiate* rulemaking until January 2020.²

¹ See Dep’t of Transportation, *Medium and Heavy-Duty Trailer Fuel Efficiency Standards*, RIN 2127-AM17 (Spring 2019), <https://bit.ly/2r8h4eC>; EPA, *On-Highway Heavy-Duty Trailers: Review of Standards and Requirements*, RIN 2060-AU50 (Spring 2019), <https://bit.ly/2rWqfPt>.

² See Dep’t of Transportation, *Medium- and Heavy-Duty Trailer Fuel Efficiency Standards*, RIN 2127-AM17 (Fall 2019), <https://bit.ly/2qntTBO>.

EPA's most recent agenda, meanwhile, indicated that the agency has made negative progress in its reconsideration of the rules. The Spring 2019 agenda stated that EPA's reconsideration of the trailer rule was at the "Proposed Rule Stage" and that a proposed rule would issue in October 2019³; the Fall 2019 agenda downgrades the rulemaking to the "Long-Term Actions" stage and indicates that a schedule for an NPRM is "to be determined."⁴

The EPA and NHTSA reserve their position on this motion pending their review of it. State-Intervenors the California Air Resources Board, Oregon, Rhode Island, Vermont, and Massachusetts take no position on the request to lift the abeyance, reserve the right to respond after reviewing the motion, and oppose the proposed briefing and hearing schedule; the other state intervenors have not yet provided their position. The non-governmental intervenors take no position on the request to lift the abeyance, oppose the proposed briefing schedule, and intend to file a response.

ARGUMENT

I. The Court Should Lift the Abeyance and Set a Briefing Schedule

TTMA respectfully requests that the Court lift the abeyance and set a briefing schedule in this case. It has been three years since this lawsuit was filed,

³ See *supra* note 2.

⁴ EPA, *On-Highway Heavy-Duty Trailers: Review of Standards and Requirements*, RIN 2060-AU50 (Fall 2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AU50>

and over two years since the Agencies advised TTMA that they were revisiting the Rule. *See* Letters of August 17, 2017, *supra*. Since that time, the Agencies have filed eight consecutive 90-day status reports, each of which says, in essence, “we’re working on it.” None of the status reports offer any meaningful 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. The Agencies last May indicated that they planned to publish a notice of proposed rulemaking in October, but they have already missed that deadline and have since revised their estimate to January 2020 (for NHTSA) and “long term” (for EPA).

The continuing uncertainty as to what the Agencies will do, with no end in sight, is untenable for TTMA’s members. This case has been in an indefinite abeyance since 2017 because the Agencies advised this Court that their supposedly forthcoming rulemakings might obviate the need for review, but it is now clear that the rulemakings will not likely do so on a schedule that will provide TTMA’s members with any certainty on resolution of the issues presented in TTMA’s petition. The NHTSA portion of the Rule, which this Court has not stayed, takes effect on January 1, 2021. Trailers are highly customized and are ordered months in advance because they are built to order, meaning that TTMA’s members will begin taking orders for 2021 in the coming months. TTMA’s members need to

know whether the Rule will apply to the trailers they sell for the 2021 model year, and they cannot realistically continue to wait for the Agencies to engage in the rulemaking that has been promised since 2017.

Indeed, 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’ indefinite delay—and the ensuing uncertainty for TTMA’s members—has already eliminated three of the four years that Congress mandated. By the Agencies’ most recent estimate, NHTSA will publish a *proposed* rulemaking—not even a final rule—less than a year before the Rule will take effect. And the Agencies’ previous estimate on that score proved unreliable. If a briefing schedule is not issued soon, it may be impossible for the Court to adjudicate TTMA’s challenge before the compliance deadline, if NHTSA ultimately decides to leave its Rule in place. *See, e.g.*, NHTSA Letter at 1 (advising that its decision “granting [the] petition [for reconsideration] does not prejudge the outcome of the rulemaking or necessarily mean that a final rule will be issued”).

TTMA has a statutory right to judicial review in this Court of the Agencies' rules. This case could have been heard long ago if the Agencies had not convinced this Court to impose an indefinite abeyance based on illusory promises about a forthcoming rulemaking. Continued delay without any prospect of resolution deprives TTMA of its right to judicial review, is unwarranted, and will prejudice TTMA's members.

Accordingly, this Court should lift the abeyance and set a briefing schedule to adjudicate TTMA's challenges to the Final Rule. TTMA respectfully requests that the Court enter the briefing schedule set forth below and set argument for May 2019, which would give the Court the ability to resolve TTMA's challenges in advance of the January 2021 effective date of the NHTSA Rule.

Proposed Schedule

Brief	Due Date
Petitioner's Brief	30 days after order lifting abeyance
Agencies' Response Brief and Intervenor-Respondents' Brief	30 days after Petitioner's Brief due
Petitioner's Reply Brief	21 days after Response Briefs due
Deferred Joint Appendix	7 days after Petitioner's Reply Brief due
Final Briefs	7 days after Deferred Joint Appendix due
Argument	May 2019

CONCLUSION

The Court should lift the abeyance and set a briefing schedule.

Dated: December 3, 2019

Respectfully submitted,

/s/ Elisabeth S. Theodore

S. Zachary Fayne
ARNOLD & PORTER
KAYE SCHOLER LLP
Three Embarcadero Center
San Francisco, CA 94111
Tel: (415) 471-3114
Fax: (415) 471-3400
zachary.fayne@
arnoldporter.com

Jonathan S. Martel
Elisabeth S. Theodore
Samuel F. Callahan
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, D.C. 20001
Tel: (202) 942-5000
Fax: (202) 942-5999
elisabeth.theodore@
arnoldporter.com

Attorneys for Petitioner Truck Trailer Manufacturers Association, Inc.

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 1,918 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 in Times New Roman 14-point font.

Dated: December 3, 2019

/s/ Elisabeth S. Theodore
Elisabeth S. Theodore

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2019 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: December 3, 2019

/s/ Elisabeth S. Theodore
Elisabeth S. Theodore