

**ORAL ARGUMENT HELD NOVEMBER 9, 1999
DECIDED MARCH 3, 2000**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF MICHIGAN, <u>et al.</u> ,)	
)	
Petitioner,)	
)	
v.)	No. 98-1497, and
)	consolidated cases
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	
)	

RESPONDENT’S MOTION TO LIFT PARTIAL STAY ENTERED MAY 25, 1999

Respondent United States Environmental Protection Agency (“EPA”) hereby moves the Court for an Order lifting, as of April 27, 2000, the partial stay of the NOx SIP Call final rule¹ entered by the Court on May 25, 1999 (“Stay Order”). As is explained more fully below, the Court’s March 3, 2000, judgment in this matter rejected all of the merits arguments made by the Petitioners who originally sought a stay. See Michigan v. EPA, No. 98-1497 (D.C. Cir. March 3, 2000). Accordingly, there is no longer any plausible justification for the stay, nor any reason to further delay implementation of the SIP Call Rule, in a manner consistent with the Court’s March 3 decision.

¹ “Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group for Purposes of Reducing Regional Transport of Ozone,” 63 Fed. Reg. 57,356 (Oct. 27, 1998) (“Final Rule” or “SIP Call Rule”).

BACKGROUND

The NO_x SIP Call is a rulemaking with tremendous public health significance. When implemented, the emissions reductions called for in the rule will effect long-overdue improvements in air quality, including ozone levels, throughout much of the eastern half of the United States, beginning with the 2003 ozone season. As this Court recently recognized in denying the bulk of the challenges to the SIP Call, interstate ozone transport has been a chronic problem for many years, and the SIP Call represents the culmination of a multi-year effort by Congress, EPA and the States to develop solutions to the problem. Michigan v. EPA, No. 98-1497, slip op. at 10 (D.C. Cir. Mar. 3, 2000). Unfortunately, implementation of the SIP Call has, to date, been put on hold as a result of a Partial Stay requested by certain Petitioning States -- all of whose petitions for review have now been denied.²

On February 10, 1999, eight State Petitioners -- Alabama, Indiana, Michigan, North Carolina, Ohio, South Carolina, Virginia, and West Virginia ("Petitioning States") -- filed a motion seeking a stay of the deadline for submission of revised State Implementation Plans ("SIPs") to April 27, 2000. See Petitioning States' Motion For A Partial Stay Of the NO_x SIP Call ("Stay Motion") (Feb. 10, 1999). EPA opposed the Stay Motion, arguing that Petitioning States in fact had little likelihood of success on the merits, that Petitioning States would not suffer any irreparable injury if the stay was denied, and that the public interest would be harmed by any delay in the implementation of the SIP Call. See EPA's Opposition to Petitioning States' Motion

² The Court did grant portions of the petitions for review filed by other Petitioners on certain discrete record issues. As we explain below, however, the Court's decision on these issues should not affect the ability of the Petitioning States to meet the SIP submission deadline. See infra Part III.B.

for Partial Stay of the NO_x SIP Call (March 5, 1999). Nonetheless, on May 25, 1999, the Court's motions panel granted the Petitioning States' motion in part, staying the Rule's original SIP submittal deadline -- September 30, 1999 -- "pending further order of the court." Stay Order at 1. Despite the fact that the Court's March 3, 2000 judgment denied the vast majority of the challenges to the SIP Call, the Court did not address the stay issue in that decision or in any other orders to date, thus necessitating this motion.

ARGUMENT

I. THE COURT HAS REJECTED ALL OF THE MERITS ISSUES RAISED BY PETITIONING STATES IN SUPPORT OF THEIR MOTION FOR PARTIAL STAY

In the Stay Motion, Petitioning States asserted that they had a high likelihood of success on a number of potential merits issues, and specifically highlighted two: (1) that EPA adopted an impermissible interpretation of the term "contribute significantly," as used in section 110(a)(2)(D) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7410(a)(2)(D); and (2) that the NO_x SIP Call impermissibly infringed on State authority under the CAA, as articulated in this Court's decision in Virginia v. EPA, 108 F.3d 1397 (D.C. Cir. 1997). Stay Motion at 5-8. The Stay Motion also vaguely referenced other merits issues raised in an earlier motion seeking expedited briefing. Stay Motion at 5. This reference, to the extent not duplicative of the two issues discussed in the Stay Motion itself, appears to refer to challenges on the following issues: (1) EPA's decision to issue the SIP Call without first convening a transport commission pursuant to sections 176A and 184 of the Act; and (2) whether EPA's general analytical approach was sufficiently State-specific.³

³ Another challenge concerned EPA's decision to base the NO_x SIP Call on the 8-hour as well as the 1-hour ozone National Ambient Air Quality Standard ("NAAQS"), but this

All of these merits challenges (and many more) were rejected by the Court in its March 3, 2000 decision. See, e.g., Michigan v. EPA, slip op. at 13-26 (upholding EPA’s approach to determining “significant” contributions), 34-39 (rejecting federalism arguments based on Virginia v. EPA); 8-11 (rejecting Petitioners’ transport commission arguments); 11-13 (finding EPA’s technical analysis appropriate and sufficiently State-specific). In light of the Court’s judgment clearly disposing of these issues, the substantive rationale for Petitioning States’ stay request no longer exists.

II. THE CLEAN AIR ACT AND PETITIONING STATES’ OWN REPRESENTATIONS TO THE COURT SUPPORT A LIFTING OF THE PARTIAL STAY AS OF APRIL 27, 2000, AND EXPEDITIOUS IMPLEMENTATION OF THE SIP CALL

As noted above, the NOx SIP Call was published in the Federal Register on October 27, 1998. As promulgated, the Rule required affected States to submit SIP revisions by September 30, 1999, a period of approximately 12 months from the date the rule was signed and 11 months from the date of the Rule’s publication. In seeking the Partial Stay, Petitioning States argued that, for various pragmatic reasons, EPA should instead have allowed States 18 months from publication -- the maximum amount of time allowed under any interpretation of the Act -- to make their SIP submittals in response to the SIP Call. Stay Motion at 1; see 42 U.S.C. § 7410(k)(5).⁴ Petitioning States accordingly sought to stay the SIP submittal deadline until April

issue was obviated by the Agency’s decision to stay the 8-hour findings of the SIP Call, and the Court instead focused its analysis on the basis for the SIP Call under the 1-hour ozone NAAQS. Michigan v. EPA, No. 98-1497, Slip op. at 7-8.

⁴ We note that the issue of whether SIP submission deadlines should be measured from the date of signature or the date of publication was discussed by EPA during the rulemaking. 63 Fed. Reg. at 57,451/1. EPA’s premise in the final rule was that States had 12 months to complete their SIP submissions, as it is appropriate to measure the time period from the date of signature. Id. at 57,450, n.68. This issue is now moot. As is explained in the text, the date by

27, 2000 (which is 18 months from the date the final rule was published in the Federal Register), stating that “an April 2000 deadline would allow much needed additional time to formulate a SIP with appropriate legislative and public input.” Stay Motion at 1, 15.⁵

Petitioning States also asserted that a stay to April 27, 2000 would not harm third parties because it would still allow for compliance with emissions limitations by the date called for in the SIP Call -- May 1, 2003. Stay Motion at 14. In fact, Petitioning States stressed that they were “not seeking a modification of that deadline by this [Stay] motion.” Id.; see also State Petitioners’ Reply Memorandum in Support of Their Motion For A Partial Stay (“Stay Reply”) at 12 (“The Petitioning States are not asking the Court to stay any deadline other than that of the initial SIP submittal.”). To support this argument, Petitioning States cited -- with apparent approval -- statements in the record by EPA that “[e]ven if a facility delayed planning for the installation of control technologies until April 2000, it would still be possible to meet the compliance deadline of May 2003.” Stay Motion at 14.

Moreover, despite the vast number and variety of merits challenges argued by State and Industry petitioners in this case, no petitioner challenged any of the final rule’s compliance

which EPA is requesting that the Court lift the stay -- April 27, 2000 -- is 18 months from the date the final rule was published. In other words, given the 18 month time limit in section 110(k)(5) of the Act, 42 U.S.C. § 7410(k)(5), the April 27, 2000 date is the latest date for SIP submissions under any interpretation of when the statutory time period begins to run.

⁵ Industry Petitioners filed a short response in support of the Stay Motion, explaining that “[s]taying the SIP submission deadline until April 27, 2000, will give affected States the time that they need to conduct the notice-and-comment rulemakings that must precede adoption of the complex rules called for by the NOx SIP Call.” Industry Petitioners also noted that “[t]he additional time will also allow Appalachian Power Company, et al., and other affected sources more of an opportunity to participate meaningfully in those rulemakings.” Response of Appalachian Power Company, et al., To Petitioning States Motion For A Partial Stay of the NOx SIP Call, at 2 (Feb. 22, 1999) (“Industry Stay Response”).

deadlines in their merits briefs. Indeed, in their concurrence with the Stay Motion, Industry Petitioners specifically stated that to the extent they had any challenges to the compliance schedules, they would raise these issues in their merits briefing. Industry Stay Response at 3, n.2. Therefore, having decided not to challenge the compliance dates in their merits briefing, State and Industry Petitioners may not do so now that their other challenges have been denied. Cf. Swanks v. WMATA, 179 F.3d 929, 937 (D.C. Cir. 1999) (Court will not consider issues not raised in opening briefs).

From the above, a number of conclusions regarding the basis for the Partial Stay must be drawn. First, even the Petitioning States themselves acknowledged that section 110(k)(5) of the Act, 42 U.S.C. § 7410(k)(5), required their SIP revisions to be submitted no later than April 27, 2000 (18 months from the date of publication of the SIP Call). Second, Petitioning States represented to the Court that this additional time would be sufficient to enable them to prepare their SIP revisions. Third, Petitioning States pointed out that the requested extension of the SIP submittal deadline would not prevent the other deadlines in the SIP Call from being met, and in fact, stressed that they were not seeking to alter or challenge any of these other deadlines in the Stay Motion. Further, no petitioners raised any such challenges in their merits briefing.

In light of this background, EPA's request that the Court lift the Partial Stay as of April 27, 2000, is well-justified. Under the circumstances, it is the approach that is most consistent with the deadlines set forth in the Act.⁶ It is also fair, insofar as it merely holds Petitioning States

⁶ Now that the Court has rejected all of the merits arguments posited by Petitioning States in support of their request for a Partial Stay, the Act arguably requires States to submit their SIP revisions no later than April 27, 2000 (18 months from the date of publication of the SIP Call in the Federal Register). As will be discussed in the next section, however, EPA acknowledges that given the circumstances occasioned by this litigation, it is reasonable to

(and their Industry supporters) to the representations they made to the Court in support of the Stay Motion, allowing for implementation of the SIP Call on a schedule as consistent as possible with the public health goals of the Rule.

III. EPA HAS TAKEN APPROPRIATE AND REASONABLE STEPS TO ADDRESS ANY PRACTICAL TIMING ISSUES, AND THE SIP SUBMITTAL DATE SHOULD NOT BE AFFECTED BY ANY OF THE ISSUES ON WHICH EPA DID NOT PREVAIL

A. The Timing of Revised SIP Submissions.

Since the Court has rejected all of Petitioning States' merits challenges to the SIP Call, SIP revisions should be due no later than April 27, 2000 -- which, as discussed above, represents the maximum amount of time allowed under any interpretation of section 110(k)(5) of the Act, 42 U.S.C. § 7410(k)(5). Furthermore, in light of this statutory requirement as well as Petitioning States' own representations to the Court in support of the Stay Motion, all States should have been making use of the time afforded by the stay to take whatever regulatory actions were necessary to meet this deadline. This is particularly true here, where the Petitioning States expressly sought, and the Court granted, a stay only of one narrow requirement -- the SIP submission date -- not any other provisions or deadlines in the final rule. Indeed, as of this date, four States -- Connecticut, New Jersey, Massachusetts, and Rhode Island -- have already made SIP submissions in response to the final rule. For these reasons, the Court should lift the stay of the SIP submission deadline as of April 27, 2000.

Nonetheless, EPA acknowledges that as a practical matter, many States may still have some additional work to do in completing their SIP submissions. Because of the significant health

provide States some additional time to finalize and submit their SIP revisions, and EPA accordingly will accept SIP revisions until September 1, 2000.

benefits that will be secured by timely implementation of the NOx SIP Call, States should have continued their work notwithstanding this litigation. On the other hand, EPA is committed to balancing the need for timely implementation of the SIP Call with the anticipated need for additional time that some States may have.

In light of the above considerations, EPA believes that while the Court should lift the stay of the SIP submission deadline as of April 27, 2000, it is appropriate for EPA to take reasonable administrative steps after the stay is lifted to assist States in their efforts to complete their SIP submissions. While not technically relevant to the considerations supporting EPA's motion to lift the stay, EPA will describe its approach here in more detail for the convenience (and assurance) of the Court, States, and the regulated community.

EPA today sent letters to each of the Governors whose States are subject to the SIP Call informing them generally of EPA's plans. In addition, EPA provided more detailed information to the heads of each State's environmental agency, providing that while SIP submissions technically will be due on April 27, 2000 (if the Court grants EPA's motion to lift the stay as of that date), EPA will accept revised SIP submissions as late as September 1, 2000. Representative copies of these letters are attached hereto.⁷ More specifically, EPA will refrain from making a finding of deficiency under sections 110(c)(1)(A) and 179(a) of the Act, 42 U.S.C. §§ 7410(c)(1)(A), 7509(a), between the time the Court lifts the stay and September 1, 2000, for any of the States

⁷ Slightly different versions of these letters have been sent to different States, depending on the specific factual circumstances (*e.g.*, whether or not the State has already made a SIP submission) relevant to the particular State. For the Court's convenience, one example of each of the different types of letters is attached. *See* Attachs. 1-5 hereto (letters to Governors Ridge (PA), Cellucci (MA), Barnes (GA), Thompson (WI), Engler (MI), respectively); Attach. 6 hereto (letter to James Warr, Director, Alabama Department of Environmental Management, with explanatory attachment sent to all State Commissioners).

subject to the SIP Call whose submissions are overdue. EPA is, however, reserving its right to make such findings after September 1, 2000, and thus to subsequently promulgate a federal implementation plan (“FIP”) pursuant to section 110(c)(1) of the Act, 42 U.S.C. § 7410(c)(1). In its letter to the States, EPA also has made clear that it is prepared and willing to assist States in any way possible in helping them to complete their SIP submissions by September 1, 2000.

EPA believes the September 1, 2000 date is appropriate for a number of reasons. First, Petitioning States are already on record as committing to making SIP submissions by the statutory deadline (which is no later than April 27, 2000), and the feasibility of this timeframe is underscored by the fact that four States have already made their SIP submissions. Second, all parties have been on notice since the Court’s decision on March 3, 2000, that the SIP Call is, for all relevant purposes, valid and enforceable, and delaying findings of deficiency until September 1, 2000 will thus provide approximately six months from the date of that decision for States to complete their SIP submissions. Third, by September 1, 2000, States will have had approximately 23 months to prepare their SIP submissions since the date the rule was signed, during approximately fourteen months of which the Partial Stay was not even in effect. Fourth, and finally, the period of time from April 27, 2000 to September 1, 2000, is approximately the same as the period of time from May 25, 1999, to September 30, 1999, *i.e.*, approximately the same amount of time as was remaining for SIP submissions when the Partial Stay was initially entered. In other words, EPA’s contemplated approach can be considered comparable, in practical terms, to treating the Court’s Stay Order as if it tolled the running of the time remaining in the SIP submission period.

B. States’ Ability To Meet The SIP Submission Deadline Will Not Be Affected By

The Issues On Which EPA Did Not Prevail.

In its March 3 decision, the Court vacated the NOx SIP Call with respect to Wisconsin, Missouri, and Georgia. Michigan v. EPA, No. 98-1497, slip op. at 52. Accordingly, absent further rulemaking by EPA to address the remanded issues, it is clear that these states do not have to submit SIP revisions pursuant to the rule. EPA confirmed this understanding in the letters, described above, sent to the States today. Obviously, however, this aspect of the decision in no way affects the obligations of other States to submit SIPs.⁸

The Court also found that EPA failed to provide adequate notice of a change in the definition of an electric generating unit and that EPA did not provide adequate notice of a change in the control level assumed for large stationary internal combustion engines. Id. Generally, these findings implicate a relatively small portion of the NOx emissions budget for each State still subject to the SIP Call. To address this issue, EPA advised States that pending further

⁸ The Court vacated the NOx SIP Call with respect to Missouri and Georgia on grounds that the record before the Agency did not adequately support EPA's decision to base these States' NOx budgets on emissions from the entire State, rather than simply the OTAG "fine grid" portion of those States. Michigan v. EPA, No. 98-1497, slip op. at 33, 52. In the interest of fairness, EPA intends to apply the reasoning of this decision to two other States -- Alabama and Michigan -- that also had OTAG "fine grid" and "coarse grid" portions (even though neither these States nor their affected industry challenged this part of the NOx SIP Call). Thus, in the letters to the Governors of Alabama and Michigan sent on April 11, 2000, EPA stated that it intends to conduct rulemaking to adjust the budgets for those States accordingly, and to approve SIPs submitted by those States, consistent with the schedule described in this Motion, even if those SIPs do not reflect reductions from sources in the coarse grid portions of those States. The fact that Michigan and Alabama may, if they wish, make SIP submissions premised on such "fine grid" budgets, which if anything will be less restrictive than the original budgets, does not, however, constitute a reason for these States to delay their SIP submissions.

rulemaking by EPA,⁹ SIP submissions may be based on budgets that do not reflect the assumed inclusion of emissions reductions from sources affected by the remanded issues. In all cases, these budgets will be no more restrictive, and in many cases will be slightly less restrictive, than the original SIP Call budgets. In its letters to the States, EPA also provided guidance on the emissions adjustments that EPA believes are appropriate in light of the Court's decision, based on information already in the record of the SIP Call rulemaking.

These technical adjustments provide no basis for States to argue that they need more time to prepare their SIP submissions. First, the adjustments merely will make each State's budget no more restrictive, and in most cases slightly less restrictive, than the original budgets, which presumably should be easier for the States to meet. Second, in the letters to the States, EPA provided each State with EPA's view of the appropriate adjusted budget based on information in the existing SIP Call record, and EPA is prepared to offer whatever assistance States need to submit plans that meet these budgets. Third, even if States were to argue that any adjustments from the original budgets will impact the planning they will have already done, it must be remembered that States are always free to adopt SIP revisions meeting the original budgets if they wish -- the SIP Call only specifies the minimum amount of emissions reductions that States need to achieve.

CONCLUSION

For all the foregoing reasons, EPA respectfully requests that the Court lift the Partial Stay

⁹ EPA intends to conduct rulemaking in the near future to address the issues remanded by the Court.

entered May 25, 1999, as of April 27, 2000.

Respectfully submitted,

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ATTACHMENT 1

EPA Letter to Governor Tom Ridge of Pennsylvania

(Example of State that has not yet made a SIP submittal.)

ATTACHMENT 2

EPA Letter to Governor Paul Cellucci of Massachusetts
(Example of State that has already made a SIP submittal.)

ATTACHMENT 3

EPA Letter to Governor Roy Barnes of Georgia

(Example of “Split State.”)

ATTACHMENT 4

EPA Letter to Governor Tommy G. Thompson of Wisconsin

ATTACHMENT 5

EPA Letter to Governor John Engler of Michigan

**(Example of State with “fine grid” and “coarse grid” portions that
did not raise “split State” issue in this litigation.)**

ATTACHMENT 6

EPA Letter to James Warr, Director, Alabama Department of Environmental Management

**(Example of letter to environmental commissioners sent to all States,
with attachment setting forth specific details of EPA's approach.)**