

ORAL ARGUMENT NOT YET SCHEDULED  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUCK TRAILER  
MANUFACTURERS ASS'N, INC.,

Petitioner,

v.

U.S. ENVIRONMENTAL  
PROTECTION AGENCY; ANDREW  
R. WHEELER, in his official capacity  
as Administrator, U.S. Environmental  
Protection Agency; NATIONAL  
HIGHWAY TRAFFIC SAFETY  
ADMINISTRATION; and JAMES C.  
OWENS, in his official capacity as  
Acting Administrator, National Highway  
Traffic Safety Administration,

Respondents, and

CALIFORNIA AIR RESOURCES  
BOARD, et al.,

Intervenors.

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

**United States' Response to Motion to Lift Abeyance and Set Briefing Schedule**

Respondents EPA and NHTSA do not oppose Trailer Petitioner's motion to lift the abeyance. But briefing should proceed in the ordinary course and the Court should adopt our more reasonable proposed schedule (set forth below).

Trailer Petitioner has given no good reason to rush. Part of the challenged rule has already been judicially stayed. And if Trailer Petitioner needs more interim relief to avoid prejudice, it could request a stay of other parts of the rule pending a merits decision.

## **Background**

Three years ago, EPA and NHTSA<sup>1</sup> jointly promulgated the rule “Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2,” 81 Fed. Reg. 73,478 (Oct. 25, 2016). Trailer Petitioner sued, challenging the rule's trailer provisions. Petition for Review (Dec. 22, 2016).

Since then, Trailer Petitioner has persuaded EPA to revisit its portion of the rule and NHTSA to grant a rulemaking request. Respondents' Mot. to Govern at 3 (Aug. 17, 2017). In response to Trailer Petitioner's motion, this Court stayed EPA's portion of the rule. Per Curiam Order (Oct. 27, 2017). Trailer Petitioner

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<sup>1</sup> The National Highway Traffic Safety Administration is an agency within the Department of Transportation.

then met with EPA's leadership in September 2018 and with NHTSA's leadership in March 2019 to discuss its concerns. *See, e.g.*, Status Report at 3 (May 9, 2019).

Meanwhile, having agreed to reconsider the trailer issues, the agencies asked the Court to continue abeyance in this case. Respondents' Mot. to Continue Abeyance (Sept. 18, 2017); Per Curiam Order (Oct. 27, 2017); Trailer Petitioner's Conditional Opp. to Mot. to Continue Abeyance (Sept. 18, 2017) (stating no objection to abeyance if Court stays EPA's portion of rule). As the agencies have reported, they continue to assess next steps in their administrative processes. *See, e.g.*, Status Report (Nov. 5, 2019).

**The Court should deny Trailer Petitioner's proposed schedule.**

The Court should reject Trailer Petitioner's proposed briefing schedule.<sup>2</sup> That schedule is extremely compressed, giving the agencies just 30 days to file their responsive brief—half the 60 days given to EPA in typical petitions for review. And this is not a typical case: It involves a major rule jointly promulgated by EPA and NHTSA. To prepare their joint brief, the agencies will need to coordinate their responses, and to complete review and approval within EPA, NHTSA, and two divisions of the Justice Department.

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<sup>2</sup> Trailer Petitioner made no effort to consult with anyone about its proposal. Had it done so, it would have learned, for example, that lead counsel for EPA has a trial starting March 2 and will be out of town for most of that month.

At heart, Trailer Petitioner's proposed schedule is a motion to expedite. Those motions are "very rarely" granted. D.C. Cir. Handbook of Practice & Internal Procedures at 34. To win expedition, Trailer Petitioner must show not only that the rule is subject to "substantial challenge," but that delay will cause "irreparable injury." *Id.*<sup>3</sup>

Trailer Petitioner has not made that showing. It says only that a delay past mid 2020 will "begin to cause significant prejudice." Mot. to Lift Abeyance at 2 (Dec. 3, 2019). That bare-bones allegation is not enough to show irreparable injury. *See, e.g., Wisconsin Gas Co. v. FERC*, 758 F.3d 669, 674 (D.C. Cir. 1985) (per curiam) (requiring proof of irreparable injury).

Instead, Trailer Petitioner tries to justify its request by blaming the continued uncertainty in the administrative process. Mot. to Lift Abeyance at 7. On that basis, it urges the Court to make everyone file briefs quickly and hold argument by May (and, it goes without saying, decide in its favor soon).

But that course is unwarranted here. The uncertainty Trailer Petitioner describes is nothing new: It could have moved to lift the abeyance and set a regular briefing schedule at any time in the last two years. Yet it waited until now

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<sup>3</sup> "The Court also may expedite cases in which the public generally, or in which persons not before the Court, have an unusual interest in prompt disposition." D.C. Cir. Handbook of Practice & Internal Procedures at 34. Trailer Petitioner does not suggest that this consideration applies here.

to ask for an expedited schedule. The Court should reject this attempt to jam the agencies' briefing period, especially when Trailer Petitioner could have acted earlier to avoid a time crunch. Besides, Trailer Petitioner has other recourse: If it does face irreparable injury, it can seek a stay of NHTSA's portion of the rule.<sup>4</sup>

That said, we understand Trailer Petitioner's interest in moving this litigation forward. To accommodate everyone's interests, we propose this schedule:

- Trailer Petitioner's opening brief: March 20
- Agencies' answering brief: May 29
- Intervenors' briefs: June 5
- Trailer Petitioners' reply: June 26
- Deferred joint appendix: July 2
- Final briefs: July 9

This schedule would give the agencies time to coordinate and draft their brief, as well as obtain the necessary approvals within multiple government components.

At the same time, briefing would be completed by early July. That would still make it possible for the Court to hold argument and issue an opinion before 2021.

*See* Trailer Petitioner's Conditional Opp. to Mot. to Continue Abeyance (not moving for stay on EPA's portion of rule until about three months before compliance date).

Submitted on December 13, 2019.

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<sup>4</sup> NHTSA's portion generally applies to trailers built on or after January 1, 2021. *See* 49 C.F.R. § 535.3(d)(5)(iv).

