

ORAL ARGUMENT NOT YET SCHEDULED

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

)	
RMS OF GEORGIA, LLC,)	
)	
<i>Petitioner,</i>)	
)	No. 22-1025 (consolidated with
v.)	No. 23-1104)
)	
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY and)	
MICHAEL REGAN,)	
Administrator, U.S. Environmental)	
Protection Agency,)	
)	
<i>Respondents.</i>)	
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**RESPONDENTS' RESPONSE TO PETITIONERS' MOTION TO GOVERN
FURTHER PROCEEDINGS**

In compliance with the Court's April 14, 2023, Order (ECF No. 1994785), Respondents United States Environmental Protection Agency ("EPA") and EPA Administrator Michael Regan (collectively, "EPA"), filed a motion to govern further proceedings in the above-captioned cases on April 28, 2023 (Doc. 1997137). Petitioner RMS of Georgia, LLC ("RMS") filed its own motion the same day. (Doc. 1997149). EPA responds to that motion as follows:

1. EPA concurs with RMS that Case Nos. 22-1025 and 23-1104, RMS's petitions for review of EPA's 2022 Allocation Action, and Case No. 22-1313, RMS's petition for review of the 2023 Allocation Action, should be consolidated.

See RMS Motion to Govern at 12. EPA also concurs that briefing on those cases can also be consolidated. See RMS Motion to Govern at 15. Furthermore, if, as EPA requested in its own Motion to Govern, the two petitions challenging EPA's 2023 Allocation Action, Case Nos. 22-1313 and 22-1314, remain consolidated, EPA does not object to the petitioners filing separate briefs.

2. EPA believes it is unnecessary for it to refile the certified index to the administrative record for the 2022 Allocation Action in Case Nos. 22-1025 and 23-1104, because that record was already filed the Eleventh Circuit prior to the transfer of RMS's challenge to this Court. That record is a part of the transferred materials from the Eleventh Circuit. See Case No. 23-1104, Doc. No. 1994780-4 at 440-59. Nonetheless, EPA has no objection to re-filing the certified index in its own docket entry within 7 days of the Court entering an order on the parties' motions to consolidate and govern.

3. However, as set forth in EPA's Motion to Govern (Doc. 1997137), the Court should defer entering a merits briefing schedule in the consolidated cases until the pending dispositive motions in *Williams v. Regan*, Case No. 22-1314, have been decided. As set forth in EPA's Motion to Govern and in EPA's opposition to Petitioner RMS's separate Motion to Sever, Case No. 22-1313(L), Doc. 1983489, EPA opposes severing *Williams v. Regan*, Case No. 22-1314, which also challenges the 2023 Allocation Action, among others, because severing

matters that challenge the same agency action would waste judicial resources and could potentially result in contradictory rulings on the same action.

4. EPA also opposes Petitioner RMS's request that the Court order the parties to refile their Eleventh Circuit briefs as their merits briefs on the consolidated D.C. Circuit petitions. The briefs before the Eleventh Circuit addressed, in part, the proper forum for RMS's challenge, an issue that is now moot following that court's order transferring the case here. Now that the petition is presented to the proper forum, the merits issues should be rebriefed to remove moot material and apply appropriate D.C. Circuit precedent. Additionally, the Eleventh Circuit briefs addressed only the 2022 Allocation Action, not the 2023 Allocation Action that, if the cases are consolidated as the parties request, is also at issue in these cases.

5. Finally, EPA opposes Petitioner RMS's improper request to dictate the contents of the administrative record for the two challenged agency actions. EPA has filed the certified index to the administrative record for the 2023 Allocation Action, *see* Case No. 22-1313(L), Doc. 1995115. Compiling the administrative record comprising the documents considered by EPA in making its decision is the Agency's prerogative. *James Madison Ltd. By Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) ("The administrative record includes all materials 'compiled' by the agency." (quoting *Citizens to Preserve Overton Park, Inc. v.*

Volpe, 401 U.S. 402, 420 (1971)). Moreover, the certification of the administrative record is entitled to a presumption of regularity. *Oceana Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019); *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.3d 788, 792 (D.C. Cir. 1984).¹

6. RMS does not contend that the EPA Response to Comments document and others that it seeks to exclude from the record, *see, e.g.*, RMS Motion to Govern at 18, 21–22, are post-hoc rationalizations that were not before the Agency at the time of decision. *See Oceana*, 920 F.3d at 865. In fact, all of the documents RMS seeks to exclude predate and address the subject matter of the agency actions challenged here. Nor does RMS contend that the record, as certified before the Eleventh Circuit, is “incomplete,” *id.*; it contends instead that the record is overinclusive. RMS provides no basis to conclude that EPA did not in fact consider the documents that it certified.

7. The record includes documents relating to other recipients of allowances in the 2022 and 2023 Allocation Actions because, as the Eleventh Circuit concluded, those actions assigned allowances to firms nationwide. *See RMS*

¹ RMS’s assertion that it is somehow prejudiced by the purportedly different numbering of the administrative record for the 2023 Allocation Action is false. EPA incorporated the entirety of the 2022 Allocation Action Administrative Record into the 2023 Allocation Action Administrative Record, maintaining the same numbering. *Compare* Case No. 23-1104, Doc. No. 1994780-4 at 445–59 (2022 Allocation Action Administrative Record Index), *with* Case. No. 22-1313, Doc. No. 1995155 at 19–31 (incorporation of 2022 Allocation Action Administrative Record into 2023 Allocation Action Administrative Record).

of *Georgia, LLC v. EPA*, 64 F.4th 1368, 1373 (11th Cir. 2023). To the extent these are not pertinent to RMS's particular claims, *see* RMS Motion to Govern at 18, RMS need not refer to them in its brief or include them in a joint appendix.

8. Further, with respect to the Response to Comment document that RMS seeks to exclude from the record, RMS itself cited to that document within its Eleventh Circuit brief (that it now proposes to refile). Indeed, when EPA initially inadvertently omitted comments on the Framework Rule and EPA's response to those comments from its original certified administrative record, RMS argued that those documents "were available to the agency for its consideration of allowance allocations" and should have been included in the record. *See* Case. No. 23-1104, Doc. No. 1994780-4 at 189 n.9. EPA agreed, and corrected the administrative record. *See id.* at 440, 458–59. *Both* parties then cited extensively to the comments and response to comments in their Eleventh Circuit briefs. *See id.* at 191–203, 214, 220, 485, 492, 513–16, 520, 525–27, 677, 682, 689–90. After explicitly arguing to the Eleventh Circuit that these documents should have been considered in the administrative record, RMS cannot now claim they were erroneously included.²

² The fact that RMS attempts to exclude EPA's response to comments, but not the comments themselves, reveals the unprincipled and self-serving nature of RMS's position. *See Boswell Mem. Hosp.*, 749 F.2d at 792 ("To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of 'the whole record.'").

9. In sum, EPA urges the Court: (1) to consolidate RMS's challenges to the 2022 Allocation Action (Case Nos. 22-1025 and 23-1104) with the consolidated RMS and Williams challenges to the 2023 Allocation Action (Case Nos. 22-1313 and 22-1314); (2) deny RMS's request to sever the Williams case; (3) deny RMS's request to require the parties to refile their Eleventh Circuit briefs; and (4) deny RMS's attempt to exclude materials that are properly part of the agency's record for the 2022 and 2023 Allocation Actions. To streamline review, EPA further requests the Court defer entering a merits briefing schedule until pending dispositive motions in *Williams v. Regan*, Case No. 22-1313, have been decided.

Respectfully submitted,

May 8, 2023

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the requirements of Fed. R. App. P. 27(d) because it contains 1,245 words and is formatted in double-spaced, 14-point Times New Roman font.

Dated: May 8, 2023

Respectfully submitted

/s/ Sarah A. Buckley
Sarah A. Buckley

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2023, I filed the foregoing motion via the Court's CM/ECF system, which will provide electronic notice to all registered counsel.

/s/ Sarah A. Buckley
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