

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NEW YORK; STATE)
OF CALIFORNIA; STATE OF)
CONNECTICUT; DISTRICT OF)
COLUMBIA; STATE OF ILLINOIS;)
STATE OF MARYLAND;)
COMMONWEALTH OF)
MASSACHUSETTS; STATE OF)
MINNESOTA; STATE OF NEW)
JERSEY; STATE OF OREGON;)
COMMONWEALTH OF)
PENNSYLVANIA; STATE OF)
RHODE ISLAND; STATE OF)
VERMONT; COMMONWEALTH)
OF VIRGINIA; STATE OF)
WASHINGTON; STATE OF)
WISCONSIN; CITY OF NEW YORK,)
Petitioners)

v.)

No. 21-1028 (consolidated with
No. 21-1060 and No. 21-1073)

ENVIRONMENTAL PROTECTION)
AGENCY; JANE NISHIDA, IN HER)
OFFICIAL CAPACITY AS ACTING)
ADMINISTRATOR OF THE UNITED)
STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondents)

**[PROPOSED] MOTION BY THE STATES OF TEXAS, ARKANSAS,
LOUISIANA, MISSISSIPPI, MISSOURI, AND MONTANA
TO GOVERN FURTHER PROCEEDINGS**

INTRODUCTION AND BACKGROUND

In response to this Court's latest order dated August 6, 2021, extending the deadline for filing motions to govern further proceedings, the States of Texas, Arkansas, Louisiana, Mississippi, Missouri, and Montana, (the "State Intervenors") respectfully submit this motion to govern further proceedings in these consolidated cases, which concern petitions to challenge the United States Environmental Protection Agency's ("the EPA's") most recent review of the Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 87,256 (Dec. 31, 2020) (the "Ozone NAAQS Decision").

The Clean Air Act (the "Act") obligates the EPA to set NAAQS for criteria pollutants, including ozone. As part of this responsibility, the EPA conducts five-year reviews of relevant scientific and technical information to determine whether existing NAAQS appropriately protect public health and welfare. 42 U.S.C. § 7409(d)(1). In its 2015 review of the Ozone NAAQS, the EPA established new primary and secondary baselines for ozone pollution at 70 parts per billion. In 2020, the EPA duly reassessed the Ozone NAAQS and, after careful review of the most recent available scientific and technical information, consultation with its independent advisors, and consideration of over 50,000 comments, determined that the 2015 standards appropriately protected public health and welfare. Accordingly,

in its Ozone NAAQS Decision the EPA retained the 2015 Ozone NAAQS without revision. 85 Fed. Reg. at 87,256.

Approximately three weeks later, on January 19, 2021, the State of New York along with sixteen other States and one municipality sought review of the Ozone NAAQS Decision. Thereafter, this Court issued an order setting certain case-management deadlines, Order, Doc. No. 1881731, and later consolidated this case with a similar case brought by the American Academy of Pediatrics and several other organizations, Doc. No. 1887219. On February 17, 2021, the EPA filed an unopposed motion to hold these consolidated cases in abeyance for 90 days. Doc. No. 1885865.

As justification for the abeyance, the EPA cited an executive order by then newly-elected President Biden directing review of certain federal agency actions related to the environment taken during the Trump administration. Exec. Order No. 13990; 86 Fed. Reg. 7037 (Jan. 20, 2021). That executive order identified a non-exclusive list of federal agency actions for agency heads to review, including the EPA's Ozone NAAQS Decision.

The State Intervenors filed a timely motion to intervene in these proceedings, arguing that they have a direct and substantial interest in this action warranting intervention under Fed. R. App. Proc. 15(d), that the liberal intervention policies underlying Fed. R. Civ. P. 24 support granting intervention as of right, and that they

would be entitled to permissive intervention under relevant case law. Doc. No. 1886099. The United States Chamber of Commerce, the American Forest & Paper Association, the American Petroleum Institute, the American Wood Council, and the American Chemistry Council also moved for leave to intervene. Doc. No. 1886030.

On February 22, 2021, before any party responded to the intervention motions, the Court issued an order granting the EPA's motion to hold these consolidated cases in abeyance and directing the parties to file motions to govern further proceedings no later than May 21, 2021. Doc. No. 1885866. In response to two additional EPA motions to extend the deadline for filing motions to govern further proceedings, the current filing deadline is September 9, 2021.

To date, the Court has not yet ruled on the intervention motions.

Counsel for the State Intervenors have conferred with known counsel for the parties. As of the date of this filing: (1) State Petitioners have advised that they oppose the State Intervenors' proposed motion to place the case back on track for briefing, take no position on the State Intervenors' request for the Court to address the motion to intervene, and reserve their right to file a response once they have reviewed the filed motion; (2) Petitioner Center for Biological Diversity has advised that it takes no position on the motion to file for leave to file a motion to govern; (3) Respondents EPA, et al. have advised that "EPA takes no position on State Movant

Intervenors' motion for leave to file a motion to govern. In the event such leave is granted, EPA expects to oppose any motion to govern that seeks to lift the abeyance or proceed with active litigation at this time, and reserves its right to file an opposition;" (4) Although they are not yet parties, Industry Movants for intervention advise that they take no position on the motion of the State Intervenors for leave to file a motion to govern, do not agree to place the case back on track for briefing, reserve their right to file a response to such a motion, and take no position on State Intervenors' motion to intervene and state that if the Court addresses that intervention motion it should also address the motion to intervene of Industry Intervenors; and (5) Environmental Petitioners in Case No. 21-1060 have advised that they take no position on State Intervenors' motion for leave to file a motion to govern and they reserve their right to respond to the motion to govern, should it be filed. No other responses have been received by Counsel for the State Intervenors.

ARGUMENT

For five reasons, the State Intervenors ask this Court to place this case back on track for briefing on the merits without further delay and to address their motion to intervene.

First, all parties and potential parties are now in place, and the issue of whether the EPA's Ozone NAAQS Decision is legally sustainable is fully ripe for review. *See N.Y. State Ophthalmological Soc'y v. Bowen*, 854 F.2d 1379, 1386

(D.C. Cir. 1988) (“A controversy is ripe if further administrative process will not aid in the development of facts needed by the court to decide the question it is asked to consider.”). Although the possible filing of additional petitions to review the Ozone NAAQS Decision was cited by the EPA in support of its unopposed motion for abeyance, the time for filing such petitions has elapsed. Accordingly, any additional petitions would be untimely. Furthermore, the deadline for filing intervention motions has also passed. Moreover, no new facts are required to aid the court in deciding the sole issue in this case: whether the Ozone NAAQS Decision was lawfully made by the EPA. And the issue of whether the EPA can lawfully rescind or revise the Ozone NAAQS Decision is not before this Court.

Second, the parties will not be injured if the current litigation continues while the EPA reevaluates the Ozone NAAQS Decision. This Court has already afforded the EPA the courtesy of holding this case in abeyance for over 180 days in order to allow the new administration to reconsider the Ozone NAAQS Decision. If the EPA believes that it has the authority to review the Ozone NAAQS Decision, it may seek to initiate that review, if it so chooses, independent of this Court’s resolution of the instant case. If this Court upholds the Decision, the EPA can still pursue whatever administrative review processes are available under law to revise it. And the EPA’s use of those processes would be substantially aided by guidance from this Court as to the scope of the EPA’s obligations under the Clean Air Act.

Third, the State Intervenors face serious potential injuries if the stay continues. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (noting that a court ruling on a motion to stay should consider whether the stay “will substantially injure the other parties interested in the proceeding; and . . . where the public interest lies”) (citation omitted).

Under the Clean Air Act, each of the State Intervenors has the “primary responsibility for assuring air quality within” its borders “by submitting an implementation plan” that “specif[ies] the manner in which primary and secondary ambient air quality standards will be achieved and maintained within” its borders. 42 U.S.C. § 7407(a); *see Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 470 (2001). And if the States do not submit acceptable plans to the EPA within three years, they risk the imposition of federal implementation plans—which would deprive the State Intervenors of control over how Ozone NAAQs are implemented in their sovereign territory. *See* 42 U.S.C. § 7410(a), (c). But as long as the Ozone NAAQS Decision remains subject to challenge, the State Intervenors will not have clear guidance about what specific actions, if any, are appropriate with to ensure that their state implementation plans achieve and maintain the Ozone NAAQS. Knowing which specific federal mandates are required is essential to the sound operation of state government to ensure the type of “cooperative federalism” envisioned by Congress in the Clean Air Act. *Del. Dep’t. of Nat. Res. & Envtl. Control v. EPA*, 895 F.3d 90,

102 (D.C. Cir. 2018) (citation omitted). The uncertainty caused by this litigation thus poses serious injuries to the States, who must continually ensure that they provide for the health, safety, and economic well-being of their residents. These potential injuries by the State Intervenors thus weigh in favor of this Court rejecting efforts to keep this case in abeyance. *See Nken*, 556 U.S. at 434.

Fourth, the EPA cannot keep this case in abeyance forever while it reviews the Ozone NAAQS Decision. *Cf. Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (noting that an agency cannot “stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking” because that would mean “a savvy agency could perpetually dodge review”). The EPA could periodically continue to ask for delays which could last for years while it determines the extent to which it wishes to tighten the Ozone NAAQS standard, thereby indefinitely leaving open the question of whether the Ozone NAAQS Decision is a valid exercise of agency authority.

Fifth, “where a movant seeks relief that would delay court proceedings by other litigants he must make a strong showing of necessity because the relief would severely affect the rights of others.” *Commodity Futures Trading Comm’n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983). Here, there are no facts establishing a “strong necessity” for further delay.

CONCLUSION

For the foregoing reasons, the State Intervenors ask this Court:

- 1.) not to extend beyond September 9, 2021, the order granting the motion to hold in abeyance;
- 2.) to grant their motion to intervene and;
- 3.) to issue a briefing and scheduling order moving this case forward.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A) and 32(f) and (g), I hereby certify that the foregoing complies with the type-volume limitation because it contains 1,736 words, excluding exempted portions, according to the count of Microsoft Word.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on September 9, 2021, with the Clerk of the Court using the CM/ECF system, which will send a notification to all registered users.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

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CERTIFICATE AS TO PARTIES AND AMICI

As governmental parties, the proposed intervenors are not subject to the requirements of Federal Rule of Appellate Procedure 26.1. In accordance with D.C. Circuit Rule 27(a)(4), they certify that the parties, intervenors, and amici are:

Petitioners in 21-1028: State of New York; State of California; State of Connecticut; District of Columbia; State of Illinois; State of Maryland; Commonwealth of Massachusetts; State of Minnesota; State of New Jersey; State of Oregon; Commonwealth of Pennsylvania; State of Rhode Island; State of Vermont; Commonwealth of Virginia; State of Washington; State of Wisconsin; City of New York

Petitioners in 21-1060: American Academy of Pediatrics; American Lung Association; American Public Health Association; Appalachian Mountain Club; Chesapeake Bay Foundation, Inc.; Clean Air Council; Conservation Law Foundation; Environment America; Environmental Defense Fund; Environmental Law and Policy Center; National Parks Conservation Association; Natural Resources Council of Maine; Natural Resources Defense Council; Sierra Club

Petitioners in 21-1073: Center for Biological Diversity

Respondents: Environmental Protection Agency; Michael S. Regan, in his official capacity as Administrator of the United States Environmental Protection Agency

Movant- Intervenors (motions filed): State of Texas; State of Arkansas; State of Louisiana; State of Missouri; State of Montana; State of Mississippi

Chamber of Commerce of United States of America; American Petroleum Institute, American Forest & Paper Association; American Wood Council; American Chemistry Council

Movant-Amicus Curiae (motion filed): Energy Policy Advocates

Rulings Under Review: The petition in this proceeding challenges EPA's final rule entitled "Review of the Ozone National Ambient Air Quality Standards," published in the Federal Register at 85 Fed. Reg. 87,256 (Dec. 31, 2020).

Related Cases: This case has never appeared before this Court or any other court. By Order of this Court dated February 25, 2021, the above-captioned case (No. 21-1028) was consolidated with American Academy of Pediatrics et al. (No. 21-1060), and Center for Biological Diversity (No. 21-1073) in which the petitioners are challenging the same final EPA rule that is at issue in the present proceeding.

Respectfully submitted,

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