

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

AMERICAN LUNG ASSOCIATION,)	
<i>et al.</i> ,)	
)	
<i>Petitioners,</i>)	
)	Case No. 17-1172 (and consolidated
v.)	cases)
)	
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
<i>Respondents.</i>)	

**REPLY IN SUPPORT OF MOTION FOR SUMMARY VACATUR OR, IN
THE ALTERNATIVE, FOR STAY PENDING JUDICIAL REVIEW;
RESPONSE TO EPA MOTION TO DISMISS AS MOOT; AND
CROSS-MOTION FOR ALTERNATIVE RELIEF**

This Court now has before it two motions that would resolve this case, which challenges the Designations Delay that EPA effected at 82 FR 29,246 (June 28, 2017) and by letter sent to the state governors. The first, Petitioners’ Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review (“Motion for Summary Relief”),¹ is undisputed, for EPA has made no arguments against it on its merits. The second, EPA’s Motion to Dismiss on mootness grounds, should be denied and, if the Court does not grant the Motion for Summary Relief and vacate the Designations Delay, these cases should be held in

¹ Petitioners in No. 17-1185 joined that motion by notice filed August 10. Petitioner in No. 17-1187 hereby joins that motion as well.

abeyance, as explained below, until November 8, 2017, with motions to govern due no later than that date.² But if the Court holds this case is moot, Public Health and Environmental Groups respectfully request that the Court formally vacate and declare void *ab initio* the Designations Delay.

The Court should deny EPA's Motion to Dismiss for mootness. The purported mooting event is EPA's own action withdrawing the Designations Delay, 82 FR 37,318 (Aug. 10, 2017) ("Withdrawal Notice"), signed on August 2, the eve of the due date for EPA's response to the Motion for Summary Relief. Thus, whether this case actually is moot depends on whether EPA has carried its heavy burden of demonstrating that the voluntary cessation exception to mootness does not apply: that the challenged action cannot be reasonably expected to recur, and that its effects have been "completely and irrevocably eradicated." *E.g.*, *Aref v. Lynch*, 833 F.3d 242, 251 (D.C. Cir. 2016) (internal quotation marks omitted); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *see also Friends of the Earth v. Laidlaw Env'tl. Servs. (TOC)*, 528 U.S. 167, 189 (2000) ("The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (alteration in original)).

² Public Health and Environmental Groups respectfully submit that resolution of their Motion for Summary Relief should be deferred while these cases are held in abeyance, until the filing of any motion to govern. Public Health and Environmental Groups consist of the Petitioners in Nos. 17-1172 and 17-1187.

EPA has not carried its burden. As an initial matter, the Withdrawal Notice neither avers EPA will avoid future action (such as withdrawing the Withdrawal Notice) to delay designations again on the same or similar grounds, nor does it commit to issuing any designations anywhere at any time. To the contrary, the Notice's language is notably equivocal. *See* 82 FR 37,319/2-3 (there "may be areas...for which designations could be promulgated in the next few month," but EPA "may still" delay designations). Further, the Withdrawal Notice was published in the Federal Register only last Thursday, and the period for seeking judicial review of it thus does not expire until October 10.³ *See* 42 U.S.C. § 7607(b)(1) (60-day limitations period runs from date of publication in Federal Register); 82 FR 37,318 (published in Federal Register on August 10). Accordingly, EPA may still withdraw the Withdrawal Notice,⁴ and the Withdrawal Notice remains subject to challenge in court and could be struck down if such a challenge were successful. *See Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1997) (holding that EPA did not carry its burden of overcoming voluntary cessation exception to mootness where purportedly mooted action "could be withdrawn" or "could be stricken down by a reviewing court"). Because

³ October 9 is Columbus Day.

⁴ Like the Designations Delay, the Withdrawal Notice was not the subject of notice and comment rulemaking. *See Hardaway v. Dist. of Columbia Housing Agency*, 843 F.3d 973, 979-80 (D.C. Cir. 2016) (case not moot where agency could revisit purportedly mooted decision at any time).

the case is not moot and because EPA has offered no defense on the merits, for all the reasons offered in the Motion for Summary Relief, if it chose to rule on the Motion for Summary Relief at this time, the Court should grant the motion and vacate the Designations Delay.

If this Court does not decide the merits now, Public Health and Environmental Groups respectfully submit that it should hold these cases in abeyance for 90 days from the date the Withdrawal Notice was published in the Federal Register (*i.e.*, until November 8), with motions to govern due no later than the end of the abeyance period. This abeyance period would extend through both the once-again effective deadline for EPA to promulgate designations (October 1) and the expiration of the period for seeking judicial review of the Withdrawal Notice (October 9). If the Withdrawal Notice is itself withdrawn or challenged, the parties in these cases would thus have an opportunity to consult on the proper course of action in these cases. Petitioners would have reasonable protection against the prejudice of the Designations Delay's springing back while avoiding the need for use of any additional judicial resources. By contrast, such an abeyance would not harm EPA in the slightest.

Though the Court should deny EPA's Motion to Dismiss, it may instead opt not to rule on EPA's Motion at this time but rather hold these cases in abeyance on the terms requested above. This Court has inherent authority to hold these cases in

abeyance for a reasonable period “to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”

Landis v. N. Am. Co., 299 U.S. 248, 254 (1936); *see also, e.g., Dellinger v.*

Mitchell, 442 F.2d 782, 786 (D.C. Cir. 1971), and it would be appropriate to do so for the reasons given above.

In the event that the Court dismisses this case as moot, it should vacate the Designations Delay and declare it void *ab initio*. Without that relief, the Designations Delay could spring back into effect if the Withdrawal Notice is struck down. *See, e.g., Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) (vacatur “restore[s] the status quo ante”). Coupled with dismissal of this case, that result would unfairly prejudice Petitioners, who are irreparably harmed by the Designations Delay. To avoid such prejudice, it is appropriate to vacate the Designations Delay and declare it void *ab initio*. *See, e.g., Fund for Animals v. Hogan*, 428 F.3d 1059, 1065 (D.C. Cir. 2005) (to avoid prejudice, vacating challenged agency actions where agency “mooted the claims then pending before us”).

For the foregoing reasons, Public Health and Environmental Groups respectfully request that this Court deny EPA’s Motion to Dismiss and enter judgment for Petitioners or hold these cases in abeyance until November 8, 2017, with motions to govern due no later than that date. Alternatively, this Court should

hold these cases in abeyance on those same terms rather than rule on EPA's Motion. Were the Court to grant EPA's Motion, it should also vacate the Designations Delay and declare it void *ab initio*.

DATED: August 14, 2017

Respectfully submitted,

/s/Ann Brewster Weeks (w/permission)

Ann Brewster Weeks
Clean Air Task Force
18 Tremont St., Ste. 530
Boston, MA 02108
(617) 624-0234
aweeks@catf.us

*Counsel for Clean Air Council and
Ohio Environmental Council*

/s/Seth L. Johnson

Seth L. Johnson
Laura Dumais
David S. Baron
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington, DC 20036
(202) 667-4500
sjohnson@earthjustice.org
ldumais@earthjustice.org
dbaron@earthjustice.org

*Counsel for American Lung
Association, American Public Health
Association, American Thoracic
Society, Appalachian Mountain Club,
National Parks Conservation
Association, Natural Resources
Defense Council, Physicians for Social
Responsibility, Sierra Club, and West
Harlem Environmental Action*

/s/Scott Strand (w/permission)

Scott Strand
Environmental Law and Policy Center
15 South Fifth St., Suite 500
Minneapolis, MN 55402
(612) 386-6409
sstrand@elpc.org

*Counsel for Environmental Law and
Policy Center*

/s/Sean H. Donahue (w/permission)

Sean H. Donahue
Susannah L. Weaver
Donahue & Goldberg, LLP
1111 14th Street, NW, Ste. 510A
Washington, DC 20005
(202) 569-3818
sean@donahuegoldberg.com
susannah@donahuegoldberg.com

Peter Zalzal
Graham McCahan
Rachel Fullmer
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
(303) 447-7214
pzalzal@edf.org
gmccahan@edf.org
rfullmer@edf.org

*Counsel for Environmental Defense
Fund*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies, in accordance with Federal Rules of Appellate Procedure 32(g)(1) and 27(d)(2)(C), that the foregoing **Reply in Support of Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review; Response to EPA Motion to Dismiss as Moot; and Cross-Motion for Alternative Relief** contains 1,179 words, as counted by counsel's word processing system, and thus complies with any applicable word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** using **size 14 Times New Roman** font.

DATED: August 14, 2017

/s/Seth L. Johnson
Seth L. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2017, I have served the foregoing **Reply in Support of Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review; Response to EPA Motion to Dismiss as Moot; and Cross-Motion for Alternative Relief** on all registered counsel through the court's electronic filing system (ECF).

/s/Seth L. Johnson
Seth L. Johnson