

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

AMERICAN LUNG ASSOCIATION,)
et al.,)

Petitioners,)

v.) Case No. 17-1172 (and consolidated
cases)

U.S. ENVIRONMENTAL)
PROTECTION AGENCY, *et al.*,)

Respondents.)

**PUBLIC HEALTH AND ENVIRONMENTAL PETITIONERS’
MOTION TO GOVERN FURTHER PROCEEDINGS**

In this case, Public Health and Environmental Groups¹ challenge EPA’s Designations Delay action, taken at 82 FR 29,246 (June 28, 2017) and by letter sent to the state governors, which extended its deadline for promulgating initial area air quality designations under the 2015 national ambient air quality standards for ozone from October 1, 2017, to October 1, 2018. On the eve of the due date for its response to Petitioners’ Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review (“Motion for Summary Relief”), EPA signed a notice withdrawing the Designations Delay, 82 FR 37,318 (Aug. 10, 2017)

¹ Public Health and Environmental Groups consist of the Petitioners in Nos. 17-1172 and 17-1187.

(“Withdrawal Notice”), thus reinstating the October 1, 2017, deadline for promulgating designations.

October 1 has come and gone. EPA has not promulgated all the required designations, nor has it given any indication of a plan or schedule for doing so. Although two days ago, on November 6, EPA promulgated attainment or unclassifiable designations for some counties, it promulgated no nonattainment designations and instead left hundreds of counties—with an aggregate population far exceeding 100 million people—without any designations at all. *See* https://www.epa.gov/sites/production/files/2017-11/documents/frn_ozonedesignations-attainmentareas.pdf at 3 (EPA “is not yet prepared to issue designations” for areas left undesignated, without providing any details of when EPA may act); <https://www.epa.gov/newsreleases/epa-working-states-and-tribes-makes-final-attainment-designations-2015-ozone-naaqs> (EPA to “move forward on a case-by-case basis”). These areas include the New York City area; Southern California; the Washington-Baltimore area; the Denver area; the Houston area; the San Antonio area; the Philadelphia area; the Atlanta area; the San Francisco Bay area; and many more. *See*

[https://www.epa.gov/sites/production/files/2017-](https://www.epa.gov/sites/production/files/2017-11/documents/frn_ozonedesignations-attainmentareas.pdf)

[11/documents/frn_ozonedesignations-attainmentareas.pdf](https://www.epa.gov/sites/production/files/2017-11/documents/frn_ozonedesignations-attainmentareas.pdf) at 15-102.²

Many of the Public Health and Environmental Groups have informed EPA that they intend to file a lawsuit in federal district court to compel EPA to carry out its duty (*see* Attach.1, copy of notice of intent letter), but the Clean Air Act bars them from filing such suit until early December. *See also* State Petitioners' Corrected Rule 28(j) Letter 1-2 (Oct. 19, 2017) (many State Petitioners, Petitioners in No. 17-1185, have also sent EPA such a notice letter).

Because the same concrete result of the Designations Delay—no nonattainment designations—remains in effect despite the Withdrawal Notice, Public Health and Environmental Groups respectfully submit that this case is not moot, and this Court should accordingly rule on the undisputed merits that the Designations Delay is illegal and arbitrary. In the alternative, Public Health and Environmental Groups request that the Court continue to hold this case in abeyance pending final EPA action completing its duty to promulgate designations for all areas, without prejudice to Petitioners' right to seek an earlier lifting of the abeyance should circumstances warrant.

² The deadline for challenging the Withdrawal Notice has also passed. No timely petitions for review of it were filed.

I. THIS COURT SHOULD RULE THAT THE DESIGNATIONS DELAY IS ILLEGAL AND ARBITRARY.

Recent events make even clearer that EPA has not carried its burden of demonstrating mootness, making this case appropriate for a decision on the merits. As Public Health and Environmental Groups have previously explained, to carry its heavy burden of demonstrating that the voluntary cessation exception to mootness does not apply, EPA must show “that the challenged action cannot be reasonably expected to recur, and that its effects have been ‘completely and irrevocably eradicated.’” Reply in Support of Mot. for Summ. Vacatur or, in the Alternative, for Stay Pending Judicial Review; Response to EPA Mot. to Dismiss as Moot; and Cross-Mot. for Alternative Relief 2 (citing, *e.g.*, *Aref v. Lynch*, 833 F.3d 242, 251 (D.C. Cir. 2016); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); and *Friends of the Earth v. Laidlaw Env'tl. Servs. (TOC)*, 528 U.S. 167, 189 (2000)).

EPA did not make that showing before, and it still has not done so. In the Withdrawal Notice and in its filings in this Court, EPA nowhere committed to actually promulgating designations. *See id.* 3 (noting “equivocal” language of Withdrawal Notice that says “there ‘may be areas...for which designations could be promulgated in the next few months,’ but EPA ‘may still’ delay designations” (quoting 82 FR 37,319/2-3) (typo corrected)); Respondents’ Reply in Further Support of Mot. to Dismiss and Opp. to Petitioners’ Mot. for Conditional Relief 3-

5 (reiterating that EPA may again delay designations, but may issue some designations). And even when EPA promulgated some attainment designations, it provided no commitment to promulgating designations in other areas, including areas that states themselves recognize have unhealthy ozone levels and should be designated nonattainment. *See* https://www.epa.gov/sites/production/files/2017-11/documents/frn_ozonedesignations-attainmentareas.pdf at 3.

EPA cannot carry its burden of demonstrating that it mooted this case. EPA's deadline for promulgating designations has passed, and EPA still has not met its statutory duty to promulgate designations for the entire country. Thus, at least one effect of the Designations Delay—EPA not meeting its October 1, 2017, deadline for promulgating all area designations—remains without being “completely and irrevocably eradicated.” *E.g., County of Los Angeles*, 440 U.S. at 631.

Further, the risk that EPA would seek to reinstate the Designations Delay may have increased. Numerous parties, including many of the parties to the instant case, have now given EPA notice of their intent to bring legal action in federal district court to compel EPA to carry out its overdue duty. *See* Attach.1; *see also* <https://www.epa.gov/noi/notices-intent-sue-us-environmental-protection-agency-documents-2016-2017> (listing notices of intent sent to EPA, including at least three others relating to these designations). But the Clean Air Act bars filing such a suit

until 60 days after the postmark date of such a letter, and with the earliest postmark date being October 3, no such suit can be brought until early December. *See* 42 U.S.C. § 7604(b)(2); 40 C.F.R. § 54.2(d); Attach.1. The timeline for resolving any such suit is unknown, too. But before, or even after, such a suit is filed, EPA could try to reinstate the Designations Delay for the still-undesignated areas—or some substantially similar delay action—as a shield against the lawsuit, forcing a return to this Court for redress. *See* State Petitioners’ Corrected Rule 28(j) Letter 2. A ruling on the merits would protect against such EPA action, thereby facilitating action to compel EPA to fulfill its legal obligation.

The Motion for Summary Relief is fully briefed and ripe for decision. EPA has not contested any of the substantive arguments in it, arguing only that the case is moot. *See* Respondents’ Mot. to Dismiss and Opp. to Petitioners’ Mot. for Summ. Vacatur or, in the Alternative, for Stay Pending Judicial Review 1 (“This filing also constitutes EPA’s Opposition to Petitioners’ Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review....”). As explained above and in that briefing, EPA’s mootness argument is wrong. The Motion for Summary Relief is thus undisputed, and this Court should summarily vacate the Designations Delay.

II. ALTERNATIVELY, THIS CASE SHOULD REMAIN IN ABEYANCE.

If the Court does not summarily vacate the Designations Delay as unlawful and arbitrary, Public Health and Environmental Groups ask in the alternative that the Court hold this case in abeyance until EPA promulgates designations for all areas under the 2015 ozone standards, with motions to govern due no later than 90 days after action fulfilling EPA's nationwide duty. Such a course would provide Petitioners reasonable protection against the prejudice of the Designations Delay returning to effectiveness and being used to attempt to derail efforts to obtain relief. It would not require the use of any judicial resources, nor would it prejudice EPA. The Court has inherent authority to hold this case in abeyance, and it would be appropriate to do so. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (court has inherent authority "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); *see also, e.g., Dellinger v. Mitchell*, 442 F.2d 782, 786 (D.C. Cir. 1971).

CONCLUSION

For the foregoing reasons, Public Health and Environmental Groups respectfully request that the Court rule that the Designations Delay is illegal and arbitrary. In the alternative, Public Health and Environmental Groups respectfully request that the Court hold this case in abeyance pending EPA's promulgation of

designations under the 2015 ozone standards, with motions to govern due no later than 90 days after EPA completes its duty.

DATED: November 8, 2017

Respectfully submitted,

/s/Ann Brewster Weeks (w/permission)

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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)(A), that the foregoing **Public Health And Environmental Petitioners' Motion To Govern Further Proceedings** contains 1,384 words, as counted by counsel's word processing system, and thus complies with the 5,200 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 2016** using size 14 Times New Roman font.

DATED: November 8, 2017

/s/Seth L. Johnson
Seth L. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2017, I have served the foregoing **Public Health And Environmental Petitioners' Motion To Govern Further Proceedings** on all registered counsel through the court's electronic filing system (ECF).

/s/Seth L. Johnson
Seth L. Johnson

Attachment 1



October 3, 2017

Scott Pruitt
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
Mail Code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

By Certified Mail

RE: Notice of intent to sue under the Clean Air Act for failure to designate areas under the 2015 Ozone National Ambient Air Quality Standard as required by 42 U.S.C. § 7407(d)(1)(B)(i).

Dear Administrator Pruitt:

Pursuant to 42 U.S.C. § 7604(a)(2), (b)(2) and 40 C.F.R. Part 54, we hereby give notice of intent to commence a civil action against the Administrator of the United States Environmental Protection Agency (“Administrator,” “EPA,” or “you”) for failing to perform certain nondiscretionary duties under the Clean Air Act (“the Act”). As further specified below, you have failed to carry out your nondiscretionary duty under section 107(d) of the Act, 42 U.S.C. § 7407(d), to promulgate designations of all areas throughout the nation as nonattainment, attainment, or unclassifiable under the primary national ambient air quality standard (“NAAQS”) for ozone, as revised on October 1, 2015, and published in the Federal Register on October 26, 2015. 80 FR 65,292, 65,452 (“2015 Ozone NAAQS”).

Section 107(d)(1)(A) of the Act requires that not later than one year after promulgation of a new or revised NAAQS for any pollutant under section 109 of the Act, the Governor of each State shall submit to the Administrator a list designating all areas (or portions thereof) in the State as nonattainment, attainment, or unclassifiable under that NAAQS. 42 U.S.C. § 7407(d)(1)(A). Section 107(d)(1)(B) of the Act provides that upon promulgation or revision of a NAAQS, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under § 107(d)(1)(A)¹ as expeditiously as practicable, but in no case later than two years from the date of promulgation of the new or revised NAAQS. *Id.* § 7407(d)(1)(B)(i). Such period may be extended for up to one year only when the Administrator has insufficient information to promulgate the designations. *Id.* Pursuant to

¹ If the Governor of a state fails to submit the list in whole or in part, as required under § 107(d)(1)(A), then § 107(d)(1)(B)(ii) requires the Administrator to promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

section 107(d)(2)(A) of the Act, the Administrator must publish a notice in the Federal Register promulgating any designations under § 107(d)(1). *Id.* § 7407(d)(2)(A).

On October 1, 2015, the Administrator promulgated a revision of the primary NAAQS for ozone. 80 FR at 65,452. That promulgation triggered the Administrator's nondiscretionary duty to promulgate designations under the revised ozone NAAQS for all areas pursuant to section 107(d)(1)(B) as expeditiously as practicable, but not later than October 1, 2017, and to publish a notice in the Federal Register promulgating those designations pursuant to section 107(d)(2).

In June 2017, without notice or public input, EPA attempted to extend its deadline for promulgating designations by a year, from October 1, 2017, to October 1, 2018. 82 FR 29,246 (June 28, 2017). After being sued over its failure to satisfy the statutory requirement that would authorize this delay, EPA withdrew its action, thus reinstating the October 1, 2017, deadline. 82 FR 37,318 (Aug. 10, 2017).

October 1, 2017, has passed, and EPA has not satisfied its statutory obligation under § 107(d)(1)(B) of the Act to promulgate the designations or to extend its deadline for promulgating such designations for all areas, nor did it meet its obligation for publishing a Federal Register notice promulgating such designations as required by § 107(d)(2). Accordingly, you are in violation of your nondiscretionary duties under section 107(d)(1)(B) & (d)(2) of the Act to promulgate designations for the 2015 Ozone NAAQS by October 1, 2017, and to publish a Federal Register notice promulgating such designations.

As required by 40 C.F.R. § 54.3, the undersigned submit this notice letter on behalf of the following organizations:

American Lung Association 55 W. Wacker Dr., Suite 1150 Chicago, IL 60601	American Public Health Association 800 I St. NW Washington, DC 20001
American Thoracic Society 25 Broadway, 18th floor New York, NY 10004	Appalachian Mountain Club 5 Joy St. Boston, MA 02108
Environmental Defense Fund 257 Park Ave. South New York, NY 10010	Environmental Law & Policy Center 35 E. Wacker Dr., Suite 1600 Chicago, IL 60601
National Parks Conservation Association 706 Walnut Street, Suite 200 Knoxville, TN 37919	Natural Resources Defense Council 40 W. 20th St., 11th floor New York, NY 10011
Sierra Club 2101 Webster St. Oakland, CA 94612	West Harlem Environmental Action 1854 Amsterdam Ave. 2nd Floor New York, NY 10031

These parties intend to commence a civil action to enforce the nondiscretionary duties described in this letter unless EPA has fully performed these duties within **sixty days** of the postmark date of this letter.

We are acting as legal counsel for the above-named organizations in this matter. We would be happy to discuss the concerns raised in this letter with you; feel free to contact us at the phone numbers or email addresses indicated below.

Sincerely,

/s/Laura Dumais

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