

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NEW YORK, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

Case No. 17-1185

(consolidated with
Case Nos. 17-1172
and 17-1187)

MOTION TO GOVERN FUTURE PROCEEDINGS

In response to this Court's October 6, 2017 Order directing the parties to file motions to govern future proceedings, the undersigned petitioners (State Petitioners) urge the Court to rule on the merits of this case. This Court should grant the previously filed motion to summarily vacate the unlawful decision of Respondent United States Environmental Protection Agency (EPA), articulated in a June 28, 2017 publication (Deadline Extension),¹ to extend by one year its deadline to make designations for the 2015 ozone national ambient air quality

¹ The full title of the rule is: "Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards," 82 Fed. Reg. 9,246 (June 28, 2017).

standards (NAAQS). The consolidated cases challenging the Deadline Extension were not rendered moot by EPA's voluntary withdrawal of the illegal delay. Although EPA claims to have withdrawn the extension, it missed the October 1, 2017 deadline to issue the designations and, on November 6, 2017, issued designations only for areas that are in attainment with the NAAQS or are unclassifiable and, therefore, do not trigger steps to reduce ozone levels. The newly-released designations do not include *any* "nonattainment" areas, which are the designations that trigger steps to achieve meaningful reductions in ozone levels. EPA provided no explanation for not making a single "nonattainment" designation nor did it indicate when these critical outstanding designations will be made. Meanwhile, the public is indefinitely denied the benefits of the 2015 ozone NAAQS. EPA has failed to offer any substantive defense of the Deadline Extension, and this Court should summarily vacate it as illegal.

BACKGROUND

The 2015 ozone NAAQS reduces the upper limit on the concentration of ozone in the air to the level EPA determined is necessary to protect public health with an adequate margin of safety.

National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292, 65,322 (Oct. 26, 2015). Ozone is an air pollutant formed through chemical interactions between solar radiation and manmade and naturally occurring precursor pollutants such as volatile organic compounds and nitrogen oxides. *Id.* at 65,299. Ozone causes a host of short- and long-term health impacts, including lung inflammation, new or worsening asthma attacks or allergic reactions, reduced respiratory functions, increased hospital admissions and emergency room visits, and even death. *Id.* at 65,302-309.

By lowering the acceptable level of ozone pollution, the 2015 ozone NAAQS is expected annually to prevent hundreds of premature deaths, thousands of avoided lost work days, tens of thousands of avoided lost school days, and billions of dollars in avoided health care expenses. *See* EPA, 2015 Ozone NAAQS Regulatory Impact Analysis, at ES-15 to ES-18 (September 2015).² State Petitioners represent some of the most densely populated parts of the country suffering from unhealthy levels of ozone pollution. 80 Fed. Reg. at 65,300. Accordingly, State Petitioners

² Available at <https://www3.epa.gov/ttn/naaqs/standards/ozone/data/20151001ria.pdf> (also attached as Exhibit 12 to Motion for Summary Vacatur, ECF No. 1683742).

have a strong interest in seeing the lower 2015 ozone NAAQS fully implemented as soon as possible.

The Clean Air Act requires EPA to designate areas of the country as in or out of attainment with a NAAQS within two years of that standard being issued. 42 U.S.C. § 7407(d)(1)(B)(i). An area can be designated as “nonattainment” if it does not meet or “contributes to ambient air quality in a nearby area that does not meet” the applicable NAAQS. *Id.* § 7407(d)(a)(A)(i). A designation of “nonattainment” triggers compliance and planning requirements Congress designed to ensure that states work to reduce unhealthy pollution levels and protect public health. *See, e.g., id.* § 7502(b), (c). For the 2015 ozone NAAQS, EPA had a statutory duty to make all of the designations by October 1, 2017. But with that deadline approaching, EPA announced in the Deadline Extension that it would extend the deadline for a year. 82 Fed. Reg. 9,246. Delaying the designations meant that the statutory obligations to attain the 2015 ozone NAAQS would also be delayed, unlawfully extending the time in which the public is deprived of the air quality benefits of the standard.

American Lung Association and other public health and environmental organizations (Public Health Petitioners) commenced the first of these consolidated cases (Case No. 17-1172) seeking review and summary vacatur of the Deadline Extension in July 2017. Petition for Review (July 12, 2017) (ECF No. 1683713); Motion for Summary Vacatur (July 12, 2017) (ECF No. 1683752). State Petitioners filed their own petition for review on August 1, 2017 (ECF No. 1687358) and later joined the Public Health Petitioners' motion for summary vacatur. Notice to Joint Motion (Aug. 10, 2017) (ECF No. 1688249).

Shortly after State Petitioners filed their petition for review, EPA purported to reverse course by issuing a notice withdrawing the Deadline Extension. *See* Withdrawal of Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards, 82 Fed. Reg. 37,318 (Aug. 10, 2017) (the Withdrawal Notice). EPA then filed a combined "Motion to Dismiss and Opposition to Petitioners' Motion for Summary Vacatur" in Case No. 17-1172, arguing that the Withdrawal Notice had rendered the Public Health Petitioners' challenge to the Deadline Extension moot. Motion to

Dismiss (Aug. 3, 2017) (ECF No. 1687141). EPA offered no substantive defense on the merits of the Deadline Extension.

Public Health Petitioners opposed EPA's motion to dismiss, asking the Court either to vacate the Deadline Extension or, in the alternative, to hold the case in abeyance until November 8, 2017. NGO Response to Motion to Dismiss and Cross-Motion (Aug. 14, 2017) (ECF No. 1688688). State Petitioners likewise opposed EPA's motion to dismiss and joined the Public Health Petitioners' alternative request for an abeyance. State Response (Aug. 24, 2017) (ECF No. 1690139). NGO and State Petitioners noted the general rule that an agency's voluntary cessation of illegal conduct does not render a challenge to that conduct moot, and observed that the Withdrawal Notice was unclear as to what designations, if any, would be made by the October 1, 2017 statutory deadline. NGO Response, at 2-5; State Response, at 4-6. Accordingly, both groups of petitioners expressed concern that if the consolidated cases were dismissed as moot, EPA could reverse course again and reintroduce the Deadline Extension or withdraw the Withdrawal Notice. NGO Response, at 3; State Response, at 4. EPA replied that the

cases were moot, but again offered no substantive defense of the Deadline Extension. EPA Reply (Aug. 29, 2017) (ECF No. 1690522).

The Court granted Public Health Petitioners' motion to hold the cases in abeyance, deferred consideration of the remaining motions, and ordered the parties to file motions to govern future proceedings by November 8, 2017. Per Curiam Order (Oct. 6, 2017).

EPA failed to make any of the required 2015 ozone NAAQS designations by the October 1, 2017 deadline.³ State Petitioners filed a letter pursuant to Federal Rule of Appellate Procedure (FRAP) 28(j) informing the Court of EPA's ongoing failure to act. States' FRAP 28(j) Letter (Oct. 19, 2017) (ECF No. 1700036). State Petitioners noted that EPA's ongoing failure to act furthered the policy of illegal delay announced in the Deadline Extension and challenged in the consolidated cases. *Id.* at 2. State Petitioners also informed the Court that many of them had notified EPA of their intent to sue to compel the agency to fulfill its nondiscretionary duty to issue the designations, but noted that the timeframe for judicial review of such a case was

³ EPA also failed to give States advance notice of any modification EPA intends to make to States' recommended designations, as required by Section 107(d)(B)(jj) of the Clean Air Act. 42 U.S.C. § 7407(d)(1)(B)(ii).

uncertain. *Id.* at 2, Attachment A. State Petitioners expressed concern that “[w]ithout a decision in this case, EPA could attempt to shield its ongoing failure to act from judicial review by again imposing an illegal extension of the expired deadline.” *Id.* at 2.

EPA responded to the State Petitioners’ FRAP 28(j) letter by claiming that its ongoing failure to issue designations did not revive the Deadline Extension, and that State Petitioners’ only remedy lies in their threatened citizen suit to force EPA to issue the statutorily required designations. EPA Response to FRAP 28(j) Letter (Oct. 30, 2017) (ECF No. 1702006). EPA also asserted that “[i]f the extension had not been withdrawn, and the deadline had remained extended, it would not yet have passed, and there would be no basis for a citizen suit regarding the missed designation deadline.” *Id.* at 1.

On November 6, 2017, the EPA issued designations for some areas of the country. See EPA, *Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards* (Nov. 6, 2017).⁴ All of the designations issued were for “Attainment” or

⁴ Available at https://www.epa.gov/sites/production/files/2017-11/documents/frn_ozonedesignations-attainmentareas.pdf.

“Attainment/Unclassifiable” areas. *Id.* at 3-4. EPA made none of the nonattainment designations, which are the designations that require state planning and compliance efforts, and said only that it “intends to address these areas in a separate future action.” *Id.* at 3. Many densely populated areas that suffer from the highest levels of ozone were not included in the designations. *See, e.g., id.* at 21 (California: only six counties designated); *id.* at 22-23 (Connecticut: no designations made); *id.* at 62 (New Jersey: no designations made); *id.* at 64-65 (New York: no designations made for New York City, Long Island, or surrounding counties); *id.* at 83-88 (Texas: no designations made for, among others, Houston or Dallas areas). Although EPA claims it was “not extending the time provided” for the remaining designations, it did not disclaim its ability to do so in the future, saying only that it was “not yet prepared” to issue them. *Id.* at 3.

ARGUMENT

Although EPA assured this Court that “[t]here is no basis whatsoever for the suggestion that EPA would, or even could, now simply withdraw the withdrawal without any further analysis or explanation[.]” EPA Reply, at 5, it has effectively done just that by

ignoring, without explanation, the October 1, 2017 deadline and continuing to fail to make critically important “nonattainment” designations. This case is not moot because—whether or not EPA has technically withdrawn the illegal delay policy that it promulgated in June 2016—it continues to abide by the supposedly withdrawn policy to avoid the most crucial aspects of its statutory obligation. EPA’s formalistic position to the contrary should be rejected as an attempt to shield from judicial review a promulgated policy that is still in force. In any event, EPA has not met its heavy burden to show that its voluntary conduct rendered the proceeding moot.

Nothing EPA has said or done since issuing the Deadline Extension indicates that the illegal justifications for that delay are not still motivating its failure to issue meaningful designations. The Deadline Extension was based on EPA’s assessment that there was “insufficient information” to make the designations, based on various factors totally divorced from the Clean Air Act. 82 Fed. Reg. at 29,247; *see* Motion for Summary Vacatur, at 12-24. Since being challenged, EPA has not asserted that the Deadline Extension was lawful. Instead, EPA has attempted to shield the Deadline Extension from judicial review by

purporting to withdraw it on the basis that “the information gaps that formed the basis of the extension *may* not be as expansive as [it] previously believed” and “there *may* be areas of the United States for which designations *could* be promulgated in the next few months.” 82 Fed. Reg. at 37,319 (emphasis added). But, EPA has never offered any explanation as to what “information gaps” are preventing it from issuing the remaining designations, including *all* of the nonattainment designations required to trigger reductions in ozone pollution, suggesting that EPA is still relying on the illegal policy and justifications set forth in the Deadline Extension.

EPA’s assertion that the Deadline Extension, if not withdrawn, would have had the effect of blocking State Petitioners from bringing a citizen suit to compel EPA to act emphasizes the need for a Court decision vacating the Deadline Extension. *See* EPA Response to FRAP 28(j) Letter, at 1. If this Court simply dismissed the case as moot, EPA could issue a new deadline extension for the remaining designations based on the same (or substantially the same) unlawful considerations, and then claim that the extension blocked the citizen suit the State Petitioners intend to commence. *See* State Petitioners’ FRAP 28(j)

letter, Attachment A. Indeed, the Withdrawal Notice specifically contemplates that “[t]he Administrator may still determine that an extension of time to complete designations is necessary[.]” 82 Fed. Reg. at 37,319. Moreover, the threat of a citizen suit against EPA for missing the October 1, 2017, deadline makes it even more likely that EPA will employ that tactic again to avoid judicial review, as EPA has provided no defense or explanation for failing to issue all of the required designations.⁵

This case illustrates the wisdom of the rule that “[a] defendant’s voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). EPA has not met its “heavy burden” to show that “the challenged conduct cannot reasonably be expected to start up again[.]” *Id.* at 189 (internal quotation marks and citation omitted). EPA’s limited designation actions, equivocal statements, and incentive to prevent State Petitioners from vindicating

⁵ Although State Petitioners could then seek judicial review of that extension in this Court, EPA could execute the same evasive maneuvers it used here to avoid a Court decision on the merits.

their legal rights all weigh against a determination that EPA's recent limited steps suffice to moot the case.

The Court should immediately address the merits and vacate the Deadline Extension as unlawful, as the motion for summary vacatur and motion to dismiss are fully briefed.

CONCLUSION

The dispositive issue in this case has been fully briefed. The Court should grant Petitioners' Motion for Summary Vacatur and issue a decision vacating the Deadline Extension as unlawful and arbitrary.

Dated: November 8, 2017

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Brian Lusignan, hereby certifies:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing “Motion to Govern” was filed on November 8, 2017 using the Court’s CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court’s system.

/s/ Brian Lusignan
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