

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

AMERICAN LUNG ASSOCIATION,)
et al.,)

Petitioners,)

v.)

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

Respondents.)

Case No. 17-1172 (and consolidated cases)

**PUBLIC HEALTH AND ENVIRONMENTAL PETITIONERS' RESPONSE
TO EPA'S STATUS REPORT AND SUPPLEMENTAL STATUS REPORT**

In its Supplemental Status Report (ECF No. 1713856), EPA significantly departs from its statements in a Federal Register notice published just 14 days earlier, now claiming to need until August 10, rather than April 30, to fulfill its long overdue statutory duty. This new further delay relies on the same basic rationale of the Designations Delay at issue here. Further, in both status report filings, EPA shows that the Designations Delay continues to have effects. The Status Reports thus confirm that EPA has not carried its heavy burden of demonstrating that the voluntary cessation exception to mootness does not apply, and this Court should instead vacate the Designations Delay on the merits. At the very least, in the alternative, the Status Reports confirm that this case should be held in abeyance pending EPA's completion of designations under the 2015 ozone

standards, with motions to govern due no later than 90 days after EPA completes its duty.

Though EPA contends its Status Report (ECF No. 1712875) supports finding these petitions moot, Status Report 2-3, the Status Report and Supplemental Status Report actually show that EPA's conduct belies this contention and subverts its effort to evade the voluntary cessation exception to mootness. Since June, when EPA announced the Designations Delay under review, the agency has taken actions and made statements that swing wildly:

- June 2017: EPA announces the Designations Delay without showing it lacks any relevant information to timely complete its duty. *See* Mot. for Summ. Vacatur or, in the Alternative, for Stay Pending Judicial Review 2, 11-17 (ECF No. 1683752).
- August 2017: Faced with these lawsuits, EPA purports to withdraw the Designations Delay, conceding it may not lack the necessary information after all. 82 FR 37,318, 37,319/3 (Aug. 10, 2017).
- October 2017: The October 1 deadline for promulgating designations passes without any EPA action.
- November 2017: EPA promulgates attainment and unclassifiable designations, but no nonattainment designations; the agency says it “intends to address [the remaining] areas in a separate future action.” 82 FR 54,232, 54,232/3 (Nov. 16, 2017).
- December 2017: Shortly after publishing multiple statements indicating that it thinks the Designations Delay is still effective, *see* Public Health and Environmental Petitioners’ Rule 28(j) Letter (Dec. 18, 2017, ECF No. 1709307); State Petitioners’ Rule 28(j) Letter (Dec. 18, 2017, ECF No. 1709347), EPA sends “120-day notice” letters to states to continue the designations process, asserting in such letters that it “plans to promulgate final ozone designations in Spring of 2018,” *e.g.*, Letter from

Samuel Coleman, Dep. Reg'l Admin'r, EPA Region 6, to Greg Abbott, Gov'r, Texas, at 2 (Dec. 22, 2017) (Wehrum Dec. attach.5).

- January 5, 2018: EPA puts remaining intended ozone designations out for public comment, stating that it “intends to complete designations for all of the areas addressed in the [120-day notice letters] no later than April 30, 2018. This would complete the designation process for the 2015 Ozone NAAQS.” 83 FR 651, 653/1 (Jan. 5, 2018) (emphasis added).
- January 12, 2018: EPA reiterates that it “stated its goal of finalizing designations by April 30, 2018,” and disclaims as “erroneous” its multiple December statements indicating the Designations Delay still had effect. Status Report 1-2; *accord id.* 4.

Now, in its January 19 filing, EPA changes course yet again. EPA contradicts its statement in the Federal Register that its announced action “would complete the designation process,” 83 FR 653/1, for it says for the first time that it “intends to finalize all pending ozone designations by April 30, 2018, except” that it “intends to finalize the designation for the eight counties comprising the San Antonio area by August 10, 2018.” Suppl. Status Report 2.

EPA’s new plan renews the illegal argument underlying the Designations Delay. For the San Antonio area, EPA premises its desire for more time solely on vague desires for more information. *See id.* 2-3; Wehrum Dec. ¶ 39 (“EPA does not yet know the content or volume of any additional information or revised designation recommendations that Texas will provide....”). EPA’s newly announced course is thus disconnected from the process the Clean Air Act provides for making designations: states have a deadline for making

recommendations (a deadline Texas met), then EPA must promulgate designations as expeditiously as practicable, but by a date certain, unless EPA lacks the information necessary to promulgate a designation. 42 U.S.C. § 7407(d)(1)(A), (B)(i). By extending its deadline for San Antonio based not on any lack of relevant information, but on other considerations, EPA thus returns to the underlying rationale for the Designations Delay.

EPA's ever-shifting story undercuts its ability to show "that the challenged action cannot be reasonably expected to recur." Resp. to EPA Mot. to Dismiss as Moot; and Cross-Mot. for Alternative Relief 2 (ECF No. 1688688). To the contrary, EPA reveals that it is still using the same basic rationale to avoid complying with its duty to promulgate ozone designations as expeditiously as practicable. Its continuing delay in making designations further demonstrates that the Designations Delay's "effects have [not] been 'completely and irrevocably eradicated,'" *id.*, for the concrete effects of the Designations Delay remain: no nonattainment designations. Indeed, EPA still refuses to commit to a date by which the effects will stop and designations will be done. *See* Wehrum Dec. ¶ 35 (leaving open possibility of seeking extensions even beyond the April 30 and August 10 dates EPA currently targets for completion). Thus, EPA has still not demonstrated that the voluntary cessation exception to mootness does not apply. This case is ripe for decision, and should be decided on the merits in Petitioners' favor.

EPA is incorrect in asserting that certain Petitioners' citizen suits somehow "acknowledge[]" mootness here. Status Report 2-3. There is no basis for EPA's contention that certain Public Health and Environmental Groups' pursuit of a remedy to EPA's illegal inaction in district court somehow undermines their pursuit of a remedy against EPA's illegal action here. EPA still has not shown this case to be moot, and the plaintiffs in district court seeking to compel EPA to complete its duty will make the relevant arguments there.

At the very least, EPA's constant amendments and recantations of prior statements supports Public Health and Environmental Groups' alternative request that this Court continue to hold these petitions in abeyance pending EPA's completion of designations under the 2015 ozone standards, with motions to govern due no later than 90 days after EPA completes its duty. Doing so would provide Petitioners some reasonable protection against another EPA volte-face.

DATED: January 24, 2018

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 that the foregoing **Public Health and Environmental Petitioners' Response to EPA's Status Report and Supplemental Status Report** contains 1,070 words, as counted by counsel's word processing system.

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: January 24, 2018

/s/Seth L. Johnson
Seth L. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2018, I have served the foregoing **Public Health and Environmental Petitioners' Response to EPA's Status Report and Supplemental Status Report** on all registered counsel through the court's electronic filing system (ECF).

/s/Seth L. Johnson
Seth L. Johnson