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 Cases No. 17-1172 and 17-1187)

RESPONSE TO EPA'S STATUS REPORT AND SUPPLEMENTAL STATUS REPORT

State Petitioners[1] submit this response to the January 12, 2018 Status Report (ECF#1712875) and January 19, 2018 Supplemental Status Report and supporting declaration of William Wehrum (Wehrum Decl.) (ECF#1713856) filed by Respondents (EPA). EPA fails to explain its ongoing delay in making the 2015 national ambient air quality standards (NAAQS) designations for ozone and appears to still be

[1] State Petitioners are the States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Minnesota, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts and Pennsylvania, and the District of Columbia.

motivated by the illegal justifications for delay set forth in the one-year extension challenged in this proceeding. Because the case is not moot, this Court should summarily vacate the designations extension and make clear that the bases for the extension are illegal.

ARGUMENT

The statutory deadline for 2015 NAAQS designations for ozone came and went almost four months ago, on October 1, 2017. Although EPA purported to withdraw its illegal one-year delay for the designations, 82 Fed. Reg. 37,318, it still has not made a single nonattainment designation, even in many areas where EPA proposes simply to adopt a state's recommended designation. These nonattainment designations are necessary to trigger meaningful reductions in ozone levels. *See* 42 U.S.C. § 7502(b), (c).

Except for the now-withdrawn illegal extension, EPA has never provided a reason for missing the October 1, 2017 deadline. Nor is it clear that all members of EPA staff were even aware, quite recently, that the extension had been withdrawn. *See* State Petitioners' Letter to Clerk (Dec. 18, 2017) (ECF#1709347). Although EPA claims that a recent reference in its Regulatory Agenda to the extension still being in

effect was "erroneous," EPA Status Report, at 2, EPA does not explain the source of this error, i.e., whether EPA staff were operating under the erroneous impression that the extension remained in effect, or what, if anything, EPA might have done to correct that impression.

In the Supplemental Status Report, EPA states that it "intends" to finalize *most* of the remaining designations by April 30, 2018, Supp. Status Report ¶6, walking back its earlier public commitment to "*complete* the designations process for the 2015 Ozone NAAQS" by April 30. 83 Fed. Reg. 651, 653 (Attachment 4 to Supp. Status Report) (emphasis added); *see also* Public Health Petitioners' Response to EPA's Status Reports, at 2-3 (Jan. 24, 2018) (ECF#1714448) (describing EPA's changing positions on when designations would be completed). EPA makes the important caveat that it may further significantly delay the designations as a result of information received during a voluntary public-comment period. Wehrum Decl. ¶35. EPA concedes that the public comment period is not required by statute, Wehrum Decl. ¶27, and does not explain why it waited more than three months from the October 1, 2017 statutory deadline to start a comment period. Nor does EPA offer a standard that it will apply to determine whether any

comments it receives warrant further delay in the designations, leaving open the possibility that it will rely on the same specious justification petitioners are challenging in this case. *See* Wehrum Decl. ¶¶32-35.[2]

This appears to be precisely what EPA has done in delaying the designations for the eight counties in the vicinity of San Antonio, Texas until at least August 30, 2018 – a full 11 months after the statutory deadline. For these designations, EPA will essentially have given itself the full benefit of the "withdrawn" extension, and may well reissue the extension in hopes of insulating the designations from a court-ordered deadline setting an earlier schedule. *See* EPA Status Report, at 2-3 (claiming that if "extension were still in effect, there would be no basis" for State Petitioners' deadline suit in district court).

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[2] In fact, the Clean Air Act does not authorize a designations extension based on the receipt of additional information – to the contrary, it authorizes an extension to the designations deadline only if "the Administrator has insufficient information to promulgate the designations." 42 U.S.C. § 7407(d)(1)(B)(i). If EPA wishes to modify designations – *after* they are made – based on new or additional information, it may, if appropriate, do so pursuant to the Clean Air Act's separate process for "[r]edesignation" of areas, *id.* § 7407(d)(3), and not by continually extending its deadline for issuing the designations.

EPA's justification for the delay of these designations echoes the illegal justification given in the challenged extension. The State of Texas asserted, five days before the October 1, 2017 designations deadline, that Texas should be given "more time to show that additional data and considerations – such as international transport – warrant an 'attainment' or 'unclassifiable/attainment' designation" of the counties in the San Antonio area. Letter from Gov. Greg Abbott to Administrator Scott Pruitt (Sept. 27, 2017), at 2 (Attachment 8 to Wehrum Decl.). Consideration of international transport is not relevant to designations and not a valid basis for an extension. Mot. for Summ. Vacatur, at 18 (ECF#1683752); *see also* 42 U.S.C. § 7509a(b). But it was one of the bases for EPA's original extension, 82 Fed. Reg. at 29,247, which EPA has never substantively defended. Consistent with the reasoning of that extension, EPA sought clarification of Texas's submission. Letter from Anne Idsal, Regional Administrator to Gov. Greg Abbott (Jan. 19, 2018), at 1 (Attachment 9 to Wehrum Decl.) But, perhaps because staff believed the extension was still in place, EPA waited almost four

months to do so, and gave Texas until February 28, 2018 to submit additional materials. *Id.*[3]

EPA has not disavowed the legally flawed reasoning underlying the challenged designations extension, and seems to have relied on that reasoning in delaying the 2015 ozone NAAQS designations. Without an order from this Court, there is nothing to prevent EPA from continuing to rely on the same flawed reasoning to further delay the 2015 ozone NAAQS designations or future NAAQS designations, to grant itself a new unlawful extension, or to rescind its withdrawal of its original unlawful extension. EPA could attempt to shield its reasoning from judicial review – as it has here – by claiming to reverse course when

[3] Nothing in the Clean Air Act permits EPA to extend the amount of time for a state to provide information until eighteen months after the statutory deadline, based on the state's bare assertion at the eleventh hour of "additional data and considerations." The Clean Air Act requires states to provide recommended designations to EPA within one year of the promulgation of revised NAAQS. 42 U.S.C. § 7407(d)(1)(A). If EPA disagrees with a proposed designation, it can provide a 120-day notice letter to the state that EPA intends to modify the recommendation, allowing the state an opportunity to provide supplemental information. *Id.* § 7407(d)(1)(B)(ii). Alternatively, EPA may, if appropriate, "revise[]" designations "at any time" based on additional relevant information. *Id.* § 7407(d)(3)(A).

challenged, while at the same time ignoring the Clean Air Act's statutory process for making designations.

In short, EPA has not established that its voluntary withdrawal of the illegal one-year extension has rendered this proceeding moot. EPA has not met its "heavy burden" to show "the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). A decision from this Court is necessary to ensure that EPA complies with the Clean Air Act's framework for extending designations.

CONCLUSION

This Court should summarily vacate the designations extension and make clear that the bases for the extension are illegal.

Dated: January 26, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed on January 26, 2018 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

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