

**ORAL ARGUMENT NOT YET SCHEDULED**

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

_____	)	
AMERICAN LUNG ASSOCIATION,	)	
et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 17-1172
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, et al.,	)	
	)	
Respondents.	)	
_____	)	

**RESPONDENTS’ MOTION TO DISMISS AND  
OPPOSITION TO PETITIONERS’ MOTION FOR  
SUMMARY VACATUR OR, IN THE ALTERNATIVE,  
FOR STAY PENDING JUDICIAL REVIEW**

Respondents United States Environmental Protection Agency, et al.,  
(collectively “EPA”) hereby move for dismissal of the petition for review on  
grounds of mootness. This filing also constitutes EPA’s Opposition to Petitioners’  
Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial  
Review (ECF No. 1683752).

**BACKGROUND**

This case is a petition for review of action by EPA extending by one year the  
deadline for EPA to promulgate air quality designations for the 2015 revised

national ambient air quality standard (“air quality standard”) for ozone. 82 Fed. Reg. 29,246 (June 28, 2017). However, on August 2, 2017, the EPA Administrator signed a notice for publication in the Federal Register withdrawing that extension. Attachment 1. Because the challenged EPA action has been withdrawn and is no longer of any effect, this case is moot and should be dismissed.

The most recent revision to the ozone air quality standard was signed on October 1, 2015. 80 Fed. Reg. 65,292 (October 26, 2015).<sup>1</sup> The Clean Air Act requires states to submit proposed designations of the attainment status (i.e., attainment, nonattainment, or unclassifiable) of each air quality control area in the state to EPA within one year of the promulgation of a revised air quality standard. 42 U.S.C. § 7407(d)(1)(A). The Act requires EPA to promulgate final designations within two years of promulgation of a revised standard. *Id.* § 7407(d)(1)(B)(i).<sup>2</sup> For the 2015 ozone air quality standard this two-year period ends on October 1, 2017.

The Act further provides that EPA can extend the deadline for promulgating designations “in the event the Administrator has insufficient information to

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<sup>1</sup> The revised standard is the subject of the consolidated petitions for review in *Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir.).

<sup>2</sup> If the Administrator intends to modify a designation proposed by a state, he is required to give the state 120-days notice before promulgating the modified designation. 42 U.S.C. § 7407(d)(1)(B)(ii).

promulgate the designations.” *Id.* On June 28, 2017 EPA published a notice in the Federal Register extending the deadline for promulgating designations for the 2015 ozone standards for one year to October 1, 2018, because the Agency was concerned that it would not have sufficient information to make the final designations by October 1, 2017. 82 Fed. Reg. 29,246. However, the Administrator has now withdrawn the extension. “Withdrawal of Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards,” (Attachment 1). As explained in the withdrawal notice, EPA “now understands that the information gaps that formed the basis of the extension may not be as expansive as [the Agency] previously believed.” *Id.* at 4.

Furthermore, EPA has determined that there may be areas for which designations could be promulgated in the next few months. *Id.* While there may also be areas for which an extension will be required, EPA has made no decision at this time as to which areas may require an extension. *Id.* Accordingly, the 2-year deadline for promulgating designations provided in section 107(d)(1)(B) of the Clean Air Act applies, and “[t]he deadline for the EPA to promulgate initial designations for the 2015 ozone NAAQS is October 1, 2017.” *Id.* at 1.

## ARGUMENT

### **EPA’S WITHDRAWAL OF THE CHALLENGED EXTENSION NOTICE HAS RENDERED THIS CASE MOOT AND IT SHOULD THEREFORE BE DISMISSED**

Because the agency action that is the subject of the petition for review has been withdrawn, there is no longer anything for the Court to review, and therefore the case is moot. As this Court has noted, “[t]he mootness doctrine, deriving from Article III, limits federal courts to deciding actual, ongoing controversies.” *American Bar Ass’n v. FTC*, 636 F.3d 641, 645 (D.C. Cir. 2011), quoting *Clarke v. United States*, 915 F.2d 699, 700-01 (D.C. Cir. 1990) (en banc). Accordingly, if an event occurs during the pendency of a case that makes it impossible for the court to grant any effectual relief, the case must be dismissed. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *Anderson v. Carter*, 802 F.3d 4, 10 (D.C. Cir. 2015); *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990). This Court has recognized, more specifically, that withdrawal of a challenged agency action generally renders a challenge to that action moot. *See, e.g., Center for Science in the Public Interest v. Regan*, 727 F.2d 1161, 1164–65 (D.C. Cir. 1984); *Natural Resources Defense Council, Inc. v. United States Nuclear*

*Regulatory Comm'n*, 680 F.2d 810 (D.C. Cir. 1982); *Relf v. Weinberger*, 565 F.2d 722 (D.C. Cir. 1977).<sup>3</sup>

Petitioners in this case seek to have the Court vacate the extension of the date for promulgating the final ozone designations, thereby returning the deadline for designations to October 1, 2017. However, the Agency's withdrawal of the extension has already done exactly that, and thus there is no additional remedy that the Court can grant. Thus, any decision by the Court would necessarily constitute an impermissible advisory opinion. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (federal court has no power to issue advisory opinions); *see also, e.g., El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 883 (D.C. Cir. 2014) (noting that mootness doctrine is constitutional and that “[b]ecause the exercise of judicial power under Article III depends upon the existence of a case or controversy, a federal court may not render advisory opinions or decide questions that do not affect the rights of parties properly before it.”).

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<sup>3</sup> This case also does not implicate the “capable of repetition but evading review” exception to the mootness doctrine. *See, e.g., Safari Club Int’l v. Jewell*, 842 F.3d 1280, 1288 (D.C. Cir. 2016). As described in the withdrawal notice, EPA is continuing to review the states’ submissions. If, as a result of that review, the Agency decides that an extension is necessary, Petitioners would have the same rights to judicial review of that action that they had here, and any such review would necessarily need to be based on the administrative record specific to that extension, which could differ in material ways from the record here.

**CONCLUSION**

For all the foregoing reasons, the petition for review as a whole, as well as Petitioners' motion for summary vacatur or stay, should be dismissed as moot.

Dated: August 3, 2017

Respectfully submitted,

JEFFREY H. WOOD  
Acting Assistant Attorney General

*/s/ Norman L. Rave, Jr.*  
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**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)**

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,054 words, excluding the parts of the motion exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Norman L. Rave, Jr.  
NORMAN L. RAVE, JR.

**CERTIFICATE OF SERVICE**

I hereby certify that on August 3, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Norman L. Rave, Jr.  
NORMAN L. RAVE, JR.



6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR PART 81****[EPA-HQ-OAR-2017-0223; FRL- ]****Withdrawal of Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Withdrawal of extension of deadline for promulgating designations.

**SUMMARY:** The Environmental Protection Agency (EPA) is announcing that it is withdrawing the 1-year extension of the deadline for promulgating initial area designations for the ozone national ambient air quality standards (NAAQS) that were promulgated in October 2015. Thus, unless and until the Administrator takes additional final action, the 2-year deadline for promulgating designations provided in the Clean Air Act (CAA) applies.

**DATES:** The deadline for the EPA to promulgate initial designations for the 2015 ozone NAAQS is October 1, 2017.

**FOR FURTHER INFORMATION CONTACT:** For questions regarding this action, contact Carla Oldham, Air Quality Planning Division, Office of Air Quality Planning and Standards, Mail Code C539-04, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-3347; email address: [oldham.carla@epa.gov](mailto:oldham.carla@epa.gov)

**SUPPLEMENTARY INFORMATION:****I. General Information***A. Does this action apply to me?*

Entities potentially affected by this action include state, local and tribal governments that would participate in the initial area designation process for the 2015 ozone standards.

*B. Where can I get a copy of this document and other related information?*

The EPA has established a docket for designations for the 2015 ozone NAAQS under Docket ID No. EPA-HQ-OAR-2017-0223. All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

An electronic copy of this notice is also available at <http://www.epa.gov/ozone-designations> along with other information related to designations for the 2015 ozone NAAQS.

## **II. Designations Requirements**

On October 1, 2015, the EPA signed a notice of final rulemaking that revised the 8-hour primary and secondary ozone NAAQS (80 FR 65292; October 26, 2015). Both standards were lowered from 0.075 parts per million (ppm) to a level of 0.070 ppm.

After the EPA establishes or revises a NAAQS pursuant to CAA section 109, the CAA directs the EPA and the states to begin taking steps to ensure that those NAAQS are met. The first step is to identify areas of the country that meet or do not meet that NAAQS. This step is known as the initial area designations. Section 107(d)(1)(A) of the CAA provides that, “By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of

a new or revised national ambient air quality standard for any pollutant under section [109], the Governor of each State shall \* \* \* submit to the Administrator a list of all areas (or portions thereof) in the State” that designates those areas as nonattainment, attainment, or unclassifiable.

The CAA further provides, “Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) \* \* \* as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.” 42 U.S.C. § 7407(d)(1)(B)(i).

In the EPA guidance, “Area Designations for the 2015 Ozone National Ambient Air Quality Standards,” the EPA indicated it expected to complete the initial area designations by October 1, 2017, consistent with the statutory requirement that the EPA designate areas no later than 2 years following promulgation of a revised NAAQS.<sup>1</sup>

### **III. Withdrawal of Extension of Deadline for Promulgating Designations for the 2015 Ozone NAAQS**

In letters sent to states on June 6, 2017, and in a **Federal Register** notice published on June 28, 2017 (82 FR 29246), the EPA Administrator Scott Pruitt announced that he was using his authority under section 107(d)(1)(B)(i) of the CAA to extend by 1 year, to October 1, 2018, the deadline for promulgating initial area designations for the 2015 ozone NAAQS. At that time (i.e., in early June), it was not clear that the agency would be in the position to complete designations for all areas for the 2015 ozone NAAQS in accordance with the 2-year statutory

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<sup>1</sup> Memorandum from Janet G. McCabe, Acting Assistant Administrator, to Regional Administrators, Regions 1-10. February 25, 2016.



deadline of October 1, 2017. For a variety of other NAAQS in the past, previous EPA Administrators have used the authority under section 107(d)(1)(B)(i) to take additional time to complete designations.<sup>2</sup> The Administrator decided to similarly invoke the extension with regard to designations for the 2015 ozone NAAQS.

The EPA has continued to discuss and work with states concerning designations, and now understands that the information gaps that formed the basis of the extension may not be as expansive as we previously believed. The EPA now intends to reassess whether there are areas with underlying technical issues, whether there are state designation recommendations that the EPA intends to modify, and whether for any area there is insufficient information to promulgate the designation. The EPA believes this reevaluation will help ensure that more Americans are living and working in areas that meet national air quality standards. The agency believes that there may be areas of the United States for which designations could be promulgated in the next few months. Therefore, the EPA is withdrawing its prior announced 1-year extension of the deadline for promulgating initial area designations for the 2015 ozone NAAQS, and the 2-year deadline for promulgating designations provided in section 107(d)(1)(B) of the CAA applies. The Administrator may still determine that an extension of time to complete designations is necessary, but is not making such a determination at this time.

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<sup>2</sup> For the 2008 ozone NAAQS, *see* 75 FR 2936 (January 19, 2010); for the 2008 lead NAAQS, *see* 75 FR 71033 (November 22, 2010); for the 2010 sulfur dioxide NAAQS, *see* 77 FR 46295 (August 3, 2012); and for the 2012 fine particulate matter NAAQS, *see* 80 FR 2206 (January 15, 2015).

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**LIST OF SUBJECTS IN 40 CFR PART 81**

Environmental protection, Air pollution control, National parks, Wilderness areas.

**AUG 02 2017**

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Dated:

A handwritten signature in black ink, appearing to read "E. Scott Pruitt", written over a horizontal line.

E. Scott Pruitt,  
Administrator.