

## 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, and MICHAEL S.  
REGAN, in his official capacity as  
Administrator of the United States  
Environmental Protection Agency,*Respondents.*

Case No. 21-1028

Consolidated with  
Case Nos. 21-1060,  
21-1073**State and Municipal Petitioners' Motion to Lift Abeyance and  
Reset Litigation Deadlines**

State and Municipal Petitioners<sup>1</sup> file this unopposed motion to lift the current abeyance over challenges to a December 2020 final decision of respondent U.S. Environmental Protection Agency (EPA) in which EPA declined to revise the national ambient air quality standards (NAAQS) for ozone. *See* 85 Fed. Reg. 87,257 (Dec. 31, 2020).

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<sup>1</sup> State and Municipal Petitioners include New York, California, Connecticut, the District of Columbia, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and New York City.

Following a January 2021 executive order, which directed EPA to reexamine its 2020 ozone decision to make certain it was “guided by the best science” and adopted pursuant to “processes that ensure the integrity of Federal decision-making,” EPA sought and won a series of abeyances. The grounds for the abeyances were that the agency was reexamining the decision consistent with the executive order and subsequently was in fact reconsidering the 2020 ozone decision. EPA further suggested that its timely reconsideration of the 2020 ozone decision would render litigation in this case “unnecessary.” *See, e.g.,* Unopposed Mot. to Hold in Abeyance (Feb. 17, 2021), ECF No. 1885865.

Thirty-one months later, no notice of proposed rulemaking has issued. Instead, in September 2023, EPA informed the parties and this Court that it will take no action regarding the 2020 ozone decision at this time. EPA now intends to leave the challenged decision in place until it conducts a *new* full, statutory review to be completed at an unknown date in the future. *See* EPA Status Report ¶ 13 (Sept. 18, 2023), ECF No. 2017610.

In light of EPA’s change of course, State and Municipal Petitioners now move this Court to lift the abeyance and reset the deadlines for

initial filings and submission of a briefing format. EPA does not oppose lifting the abeyance or the proposed schedule below. The environmental and public health petitioners in No. 21-1060 and the petitioner in No. 21-1073 support lifting the abeyance and the proposed schedule. The industry intervenors in Nos. 21-1028 and 21-1060 take no position on lifting the abeyance or the proposed schedule. State Intervenor have not provided their position.

## BACKGROUND

Ozone, the principal component of “smog,” is a pollutant that is linked to a wide variety of harms to human health and welfare. Scientific studies correlate ozone exposure to numerous medical conditions, including asthma, various chronic lung diseases, and permanent lung damage—effects that can lead to increased hospital admissions and premature death.<sup>2</sup> Recent epidemiological studies have also found a causal relationship between short-term ozone exposure and metabolic harms, including diabetes. *See* Comments of the Attorneys General of New York, et al. at 3 (Oct. 1, 2020), EPA-HQ-OAR-2018-0279-0435.

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<sup>2</sup> *See, e.g.*, U.S. Env’t Prot. Agency, Ozone and Your Health (Feb. 2009), [https://www.epa.gov/sites/default/files/2015-06/documents/ozone\\_and\\_your\\_health.pdf](https://www.epa.gov/sites/default/files/2015-06/documents/ozone_and_your_health.pdf).

Under the Clean Air Act, EPA has an obligation to set national ambient air quality standards for several pollutants, including ozone. *See* 42 U.S.C. § 7409(a)-(b). Pursuant to these requirements, EPA must set “primary” standards for ozone that are “requisite to protect the public health,” *id.* § 7409(b)(1), and “secondary” standards for the pollutant that are “requisite to protect the public welfare,” *id.* § 7409(b)(2). In addition, the agency has a duty to review its ozone standards—and, as necessary, revise them—every five years to ensure that they remain protective of public health and welfare. *Id.* § 7409(d).

In this case, Petitioners challenge EPA’s December 2020 decision not to revise the primary and secondary ozone NAAQS promulgated in 2015. *See* Review of the Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 87,256, 87,256-57 (Dec. 31, 2020). State and Municipal Petitioners filed their petition to review that decision with this Court in January 2021, nearly three years ago.<sup>3</sup> *See* Pet. for Rev. (Jan. 19, 2021), ECF No. 1881728. The following month, EPA filed the first of a series of

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<sup>3</sup> Certain environmental and public health groups subsequently filed additional petitions for review that were consolidated into this action. *See* Order (Feb. 16, 2021), ECF No. 1885376; Order (Feb. 25, 2021), ECF No. 1887219.

requests for 90-day abeyances pending its reconsideration of the 2020 ozone NAAQS decision. *See* Unopposed Mot. to Hold in Abeyance (Feb. 17, 2021), ECF No. 1885865. EPA justified such relief on the grounds that its reconsideration would “avoid[ ] unnecessary adjudication” and “support the integrity of the administrative process.” *Id.* at 3. This Court granted that motion and three subsequent EPA motions to continue the abeyance, all premised on the same rationale. *See* Order (Feb. 22, 2021), ECF No. 1886566; *see also* Order (June 1, 2021), ECF No. 1900860; Order (Sept. 27, 2021), ECF No. 1915685; Order (Dec. 21, 2021), ECF No. 1927582.

In October 2021, EPA informed this Court that it “will be reconsidering the 2020 Ozone NAAQS Decision through a new notice-and-comment rulemaking proceeding” with the “goal” of “complet[ing] this reconsideration by the end of 2023.” *See* Mot. to Hold in Abeyance, at 4 (Oct. 29, 2021), ECF No. 1920265. In response, this Court directed EPA to file regular status reports at 90-day intervals and directed the parties to file motions to govern future proceedings by December 15, 2023. *See* Order (Dec. 21, 2021), ECF No. 1927582.

Subsequently, in its March 2023 and June 2023 status reports, EPA informed the parties and this Court that, while “it intends to work expeditiously to complete its decision-making,” it had “determined that it will need additional time to complete the reconsideration process.” See EPA Status Report ¶ 10 (Mar. 20, 2023), ECF No. 1990870; *see also* EPA Status Report ¶ 10 (June 20, 2023), ECF No. 2004092. It further stated that “the reconsideration cannot be completed any more expeditiously than the end of 2024.” See EPA Status Report ¶ 10 (Mar. 20, 2023), ECF No. 1990870; *see also* EPA Status Report ¶ 10 (June 20, 2023), ECF No. 2004092.

In August 2023, however, EPA changed course, announcing its intent to undertake a “new review” of the ozone NAAQS.<sup>4</sup> It further stated that it would “incorporate” its “ongoing reconsideration” of the 2020 ozone NAAQS decision into this new administrative proceeding.<sup>5</sup> While EPA stated that it intends to “move swiftly,” it set no end date for

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<sup>4</sup> See U.S. Env’t Prot. Agency, EPA Initiates New Review of the Ozone National Ambient Air Quality Standards to Reflect the Latest Science (Aug. 21, 2023), <https://www.epa.gov/newsreleases/epa-initiates-new-review-ozone-national-ambient-air-quality-standards-reflect-latest>.

<sup>5</sup> *Id.*

completion.<sup>6</sup> Subsequently, in September, EPA filed a status report with this Court, confirming that, rather than complete its reexamination of the 2020 ozone NAAQS decision, it “has decided to initiate a new, full statutory review of the Ozone NAAQS and the underlying air quality criteria.” See EPA Status Report ¶ 13 (Sept. 18, 2023), ECF No. 2017610.

Due to the multiple abeyances that began early in the case, the parties have yet to file any initial submissions—including statements of issues, dispositive motions, or the certified index to the record—in this case.

## ARGUMENT

This Court has broad discretion to decline or discontinue a requested abeyance of a legal challenge to an administrative action. See *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414, 426 (D.C. Cir. 2018). As explained below, because the fundamental reason for granting the abeyance—the prospect of relatively prompt final agency action to address Petitioners’ claims—is no longer on the table, this Court should exercise this discretion, terminate the abeyance, and allow the litigation to resume.

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<sup>6</sup> *Id.*

Lifting the abeyance is warranted because EPA's rationale for delaying the litigation no longer applies. EPA justified its requests for abeyance on the premise that its reconsideration could timely resolve Petitioners' legal challenges to the 2020 ozone NAAQS decision, thus rendering litigation "unnecessary." *See* Unopposed Mot. to Hold in Abeyance at 3 (Feb. 17, 2021), ECF No. 1885865. But after nearly three years, EPA has now abandoned the current Executive Order review process and instead plans to begin a new, full statutory review of unknown duration.<sup>7</sup>

Such a review is a lengthy process that often takes many years. For example, it took EPA over six years to review and finalize the 2015 ozone NAAQS. *See* 85 Fed. Reg. at 87,260. And as this case itself demonstrates, EPA's review can take years even when EPA ultimately decides not to change the existing NAAQS. Thus, there is no longer any prospect of a speedy resolution of Petitioner's claims through administrative action. In the meantime, the 2020 ozone NAAQS decision—which Petitioners

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<sup>7</sup> Separate from this litigation, on March 1, 2021, the State and Municipal Petitioners filed a petition for reconsideration of the 2020 Ozone Decision directly with EPA, as did the environmental and public health petitioners. EPA has issued no decisions on those reconsideration petitions.



maintain is procedurally and substantively invalid, as well as insufficiently protective of air quality—remains in place.

Relatedly, this Court has previously declined EPA's attempts to avoid judicial resolution of a challenge to one of its regulations based on its intent to eventually issue a new rule. *See Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1290 (D.C. Cir. 2000). In so ruling, this Court has recognized that, without any indication that EPA intends to address the regulation's defects upon vacatur, EPA could simply revive the unlawful rule. *Id.* Similarly here, EPA has given no indication concerning the ultimate outcome of its new statutory review of the ozone NAAQS. Under these circumstances, the original justification for the abeyance no longer applies, a fact that is underscored by EPA's non-opposition to this motion.

### **RELIEF REQUESTED**

The Court should lift the abeyance, and State and Municipal Petitioners respectfully propose that the Court enter an order setting the following deadlines:

|   |   |
|---|---|
| Certificate as to Parties, Rulings, and Related Cases | 14 days after the date of the Court's order ending the abeyance |
| Entry of Appearance Form                              | 14 days after the date of the Court's order ending the abeyance |

|  |   |
|--|---|
| Docketing Statement Form                               | 14 days after the date of the Court's order ending the abeyance |
| Statement of Intent to Utilize Deferred Joint Appendix | 14 days after the date of the Court's order ending the abeyance |
| Statement of Issues to Be Raised                       | 14 days after the date of the Court's order ending the abeyance |
| Underlying Decision from Which Petition Arises         | 14 days after the date of the Court's order ending the abeyance |
| Procedural Motions, if any                             | 21 days after the date of the Court's order ending the abeyance |
| Dispositive Motions, if any (Original and 4 Copies)    | 30 days after the date of the Court's order ending the abeyance |
| Submission of Proposed Briefing Formats and Schedules  | 45 days after the Court's order ending the abeyance             |

## CONCLUSION

For the reasons set out above, the Court should lift the abeyance and enter a scheduling order consistent with the proposal above.

Dated: October 6, 2023

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing State and Municipal Petitioners' Motion to Lift Abeyance and Reset Litigation Deadlines complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 1,775 words. I further certify that this motion complies with the typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using a proportionally spaced typeface (Century Schoolbook) in 14-point font.

Dated: October 6, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing State and Municipal Petitioners' Motion to Lift Abeyance and Reset Litigation Deadlines was filed on October 6, 2023 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

Dated: October 6, 2023

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