

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN LUNG ASS’N, et al.,)	
)	
Petitioners,)	
)	
v.)	Docket No. 17-1172
)	(and consolidated cases)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
)	
Respondents.)	
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STATUS REPORT

Respondents United States Environmental Protection Agency and Scott Pruitt, Administrator, (collectively “EPA”) submit this Status Report in accordance with the Court’s Order of December 19, 2017 (ECF No. 1709670). As discussed below, EPA is currently in the process of taking public comment on all of the areas addressed in the Agency’s responses that were sent to the States and tribes in late December 2017, and the Agency has stated its goal of finalizing designations by April 30, 2018. However, the exact details of the Agency’s plan for finalizing all remaining designations are still being determined. EPA intends to provide those details to this Court in a further Status Report to be filed on January 19, 2018.

This case consists of consolidated petitions for review of an action by EPA titled “Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards,” which was published in the Federal Register at 82 Fed. Reg. 29,246 (June 28, 2017). That action was subsequently withdrawn by EPA, 82 Fed. Reg. 37,318 (Aug. 10, 2017), and has no legal force or effect. EPA’s motion to dismiss the petitions as moot is currently pending.

Contrary to the assertions of Petitioners in their letters of December 18, 2017, a reference to the extension of the ozone designations deadline in EPA’s Regulatory Agenda does not mean that the extension is still somehow in effect. That statement was erroneous, and, in any event could not supersede EPA’s formal withdrawal of the extension, which was published in the Federal Register, 82 Fed. Reg. 37,318 (Aug. 10, 2017), and later reiterated by the Agency in the Federal Register, 82 Fed. Reg. 54,232, 54,232/2-3 (Nov. 16, 2017). Furthermore, that entry in the Regulatory Agenda has been corrected to remove any reference to the withdrawn extension. *See* <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=2060-AT33> (scheduled to be published in the Federal Register on January 16, 2018).

The erroneous statement in the Regulatory Agenda does not change the fact that the extension has been withdrawn and has no legal effect. Most of the Petitioners have acknowledged as much by filing citizen suits in district court

asserting that EPA has failed to comply with a nondiscretionary duty to promulgate designations by October 1, 2017. *California v. Pruitt*, No. 4:17cv6936 (N.D. Cal.); *American Lung Ass'n v. Pruitt*, No. 4:17cv6900 (N.D. Cal.). If the extension were still in effect, there would be no basis for these actions. These cases are the appropriate forum for addressing this issue, and further reinforce the conclusion that this case is moot.

Section 107(d)(1)(A) of 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). 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. *Id.* § 7407(d)(1)(B)(ii). Although the Act does not require EPA to provide notice to a state if EPA is going to promulgate the designation as requested by the State, and does not require EPA to take public comment on proposed designations, EPA has a long-established policy of doing both. *See, e.g.*, 79 Fed. Reg. 51,517 (Aug. 29, 2014); 76 Fed. Reg. 78,872 (Dec. 20, 2011); 73 Fed. Reg. 51,259 (Sept. 2, 2008). EPA believes that providing notice of EPA's intended actions, and an opportunity

for comment, enhances the Agency's decisionmaking by ensuring that interested parties can raise issues and the Agency can address them in a consistent manner.

In accordance with that established policy, on December 20 and 22, 2017, EPA sent out 120-day letters to all states containing areas for which EPA had not promulgated designations in its action of November 6, 2017, which was published at 82 Fed. Reg. 54,232 (Nov. 16, 2017). EPA's notice of those letters and request for public comment was published in the Federal Register on January 5, 2018. 83 Fed. Reg. 651.

In that notice, EPA stated that its goal is to finalize designations by April 30, 2018, shortly after the end of the 120-day statutory period. *Id.* at 653/1. However, the Agency is still determining the specific details of the Agency's plan for finalizing all remaining designations in order to respond to recently-filed motions for summary judgment in the related *American Lung Ass'n* and *California* district court cases discussed above. The Agency will file its responses to those motions next week. Accordingly, the Agency will file a further status report with the Court on January 19, 2018.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

/s/ Norman L. Rave, Jr.
NORMAN L. RAVE, JR.
Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
Tel: (202) 616-7568
Norman.rave@usdoj.gov

Counsel for Respondents

January 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2018, I caused a copy of the foregoing document to be served by the Court's CM/ECF system on all counsel of record in this matter.

/s/ Norman L. Rave, Jr.
Norman L. Rave, Jr.