

ORAL ARGUMENT POSTPONED FROM APRIL 19, 2017**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Murray Energy Corporation,

Petitioner,

v.

United States Environmental
Protection Agency,

Respondent.

No. 15-1385

(Consolidated with Nos. 15-1392, 15-1490,
15-1491, 15-1494)

EPA’S RESPONSE TO MOTION TO LIFT ABEYANCE

Respondent United States Environmental Protection Agency (“EPA”) hereby responds to the motion to lift the abeyance of this matter filed by State Petitioners and Petitioner-Intervenors in consolidated cases 15-1494 and 15-1392. *See* State Petitioners’ Motion to Lift Abeyance (May 18, 2018) (Doc. 1731770) (hereinafter “Abeyance Motion”). For the reasons stated herein, EPA opposes Petitioners’ request for an immediate lifting of the abeyance, but does not oppose Petitioners’ alternative request to lift the abeyance as of August 1, 2018. Should the Court so order, EPA suggests that it also direct EPA to file a status report on August 1, 2018, and the parties to file a motion or motions to govern further proceedings within 21 days thereafter. In further support of this response, EPA states:

1. This case involves consolidated petitions for review of EPA's revisions to the Clean Air Act ("CAA" or the "Act") national ambient air quality standards ("NAAQS") for ozone, published at 80 Fed. Reg. 65,292 (Oct. 26, 2015) (the "2015 Ozone NAAQS"). Under Section 109 of the CAA, 42 U.S.C. § 7409(d), EPA is directed to review these standards every five years and revise them as the Administrator deems appropriate. The next regularly-scheduled NAAQS review for ozone is therefore due to be completed in late 2020.

2. The case was fully briefed in 2016 and oral argument had been scheduled for April 19, 2017. However, on April 11, 2017, the Court granted EPA's motion to continue the oral argument and hold this case in abeyance pending review of the rule by EPA following the Presidential transition.

3. Petitioners point out, and EPA has itself acknowledged in its status reports in this matter, that EPA has not to date made any final decision whether or not to grant reconsideration of the 2015 Ozone NAAQS. However, as discussed below, EPA's review of the ozone NAAQS has been the subject of recent directives from the President and the Administrator of EPA.

4. First, on April 12, 2018, the President issued a memorandum that, among other things, directed the Administrator of EPA to evaluate whether the agency was fully complying with applicable procedural, scientific and technical requirements pertaining to its periodic 5-year NAAQS reviews under 42 U.S.C. § 7409(d). *See* Memorandum for the Administrator of the Environmental Protection

Agency § 7 (dated April 12, 2018), published at 83 Fed. Reg. 16,761, 16,764 (April 16, 2018) (“Presidential Memo”). The Presidential Memo specifically directed the Administrator to evaluate the sufficiency of the advice received by EPA from the Agency’s statutorily-created NAAQS advisory panel, the Clean Air Scientific Advisory Committee (“CASAC”), “including requirements that the Committee advise the Administrator regarding background concentrations and adverse public health or other effects that may result from implementation of revised air quality standards.”

Id.

5. This latter point has particular relevance to the instant motion by the State Petitioners, because the issue of “background concentrations” is the leading merits issue they have presented in this case. *See* State Petitioners’ Opening Brief at 19-43 (Sept. 26, 2016) (Doc. 1637804).

6. Following up on the Presidential Memo, on May 9, 2018, EPA Administrator E. Scott Pruitt issued a memorandum setting out principles to govern NAAQS reviews. *See* Memorandum: Back-to-Basics Process for Reviewing National Ambient Air Quality Standards (May 9, 2018) (“Pruitt Memo”) (available at: <https://www.epa.gov/criteria-air-pollutants/back-basics-process-reviewing-national-ambient-air-quality-standards>). Among other things, the Pruitt Memo stressed the Agency’s commitment to completing the periodic five-year NAAQS reviews in a timely fashion, and outlined specific steps that the Agency will take to improve the efficiency of the next ozone NAAQS review. *Id.* at 3, Principle 1. The Pruitt Memo

also described specific steps the Agency will take to address “background ozone” and related issues with CASAC. *Id.* at 4-7, Principle 2.

7. As these very recent, high-level directives reflect, EPA has been intensively considering the issues raised by the State Petitioners. Both the Presidential Memo and the Pruitt Memo reflect the Agency’s commitment to a timely NAAQS review that meets all applicable statutory requirements, as well as a more specific commitment to working with CASAC to evaluate and address the “background ozone” issue – State Petitioners’ primary merits issue in this case – in a thorough and procedurally appropriate manner.

8. EPA acknowledges that the Presidential Memo and the Pruitt Memo only specifically address the next periodic 5-year review of the ozone NAAQS, and not the potential reconsideration of the 2015 Ozone NAAQS. As noted above and in EPA’s recent status reports, the Agency has not yet made a final decision whether or not to initiate a reconsideration process for that rule (either in addition to or in conjunction with the next 5-year review). However, in the wake of these very recent directives, that process issue, among many others, is presently under active consideration by the Agency, and EPA is hopeful that by August 1, 2018, the Agency will have made a final decision on its expected *administrative* path forward, which in turn will provide a more solid foundation to decide the appropriate *litigation* path forward here.

9. EPA is sensitive to the fact that this case has now been in abeyance for over a year and regrets the inconvenience caused to stakeholders and the Court by this passage of time. By the same token, however, EPA notes that State Petitioners have identified no specific, tangible injuries they expect to suffer from the continued abeyance of this matter requested herein. See Abeyance Motion at 8.

10. For the foregoing reasons, EPA respectfully suggests that the Court continue the abeyance of this matter to August 1, 2018, with EPA to file a status report on that date fully advising the Court and the parties of the status of the Agency's review.¹ EPA further suggests that the Court direct the parties to file a motion (or motions) to govern further proceedings by August 22, 2018. This will allow the parties a reasonable period of time (three weeks) to evaluate their respective positions in light of the current status of the Agency's review at that time, and to seek agreement on their recommendations to the Court to the extent possible. Should the Court deem oral argument to be appropriate following those submissions, this schedule would still leave ample time for this case to be argued during the Court's Fall 2018 term, thereby minimizing any prejudice from the relatively brief period of continued abeyance suggested by EPA herein.

¹ EPA notes that under the present order of the Court, the Agency's next regularly-scheduled status report is due on July 9, 2018. If the Court accepts EPA's proposal outlined herein, the Agency further proposes that the August 1, 2018, status report take the place of the presently-scheduled July 9 status report.

Dated: June 8, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE AND WORD LIMITS

I hereby certify that on June 8, 2018, 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.

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/s/ Jon M. Lipshultz
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