

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK,
et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION
AGENCY, *et al.*,

Respondents.

No. 21-1028
and consolidated cases

**MOTION FOR ABEYANCE AND EXTENSION TO MOTION
TO GOVERN DEADLINE**

Petitioners seek judicial review of an action titled “Review of the Ozone National Ambient Air Quality Standards,” 85 Fed. Reg. 87,256 (Dec. 31, 2020) (“Ozone NAAQS Decision”). Pursuant to this Court’s August 6, 2021, order, and certain previous orders, these cases have been held in abeyance with a deadline to file motions to govern on September 9, 2021. Respondents United States Environmental Protection Agency, et al., (“EPA”) respectfully move the Court for a further abeyance and to extend the motion to govern deadline until October 29, 2021.

Counsel for Respondents have conferred with Petitioners' counsel and counsel for movant-intervenors. State Petitioners in Case No. 21-1028 do not oppose EPA's request for a limited additional abeyance to October 29, 2021, based on EPA's representation that it expects to make a determination whether to pursue reconsideration by October 22, 2021. Environmental Petitioners in Case No. 21-1060 do not oppose EPA's request for a limited additional abeyance to October 29, 2021, based on EPA's representation that they expect to make a determination whether to pursue reconsideration by October 22, 2021. Petitioner Center for Biological Diversity in Case No. 21-1073 takes no position on EPA's request to extend the abeyance until October 29, 2021. Industry movant-intervenors state that they do not oppose the relief requested in this motion. A coalition of movant intervenors, representing six states ("State Movant-Intervenors") oppose the relief requested in this motion.

On January 20, 2021, President Biden issued an "*Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*," ("Executive Order") which directed review of certain agency actions taken from January 20, 2017, until January 20, 2021.¹ An accompanying

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>

fact sheet provides a non-exclusive list of agency actions that agency heads will review in accordance with that order, including the Ozone NAAQS Decision.²

Consistent with this direction, EPA's Acting General Counsel has requested that stays or abeyances of proceedings be obtained in pending litigation seeking judicial review of any EPA regulation promulgated in the above time period. *See* Motion for Abeyance Ex. 1, Case No. 21-1028, Doc. No. 1885865 (Feb. 17, 2021).

In light of this direction, EPA has requested that these consolidated cases be placed in abeyance to afford time for EPA to determine whether it wishes to reassess the Ozone NAAQS Decision. The Court granted EPA's most recent request to extend the deadline for motions to govern on August 6, 2021, directing that motions to govern be filed by September 9, 2021. *See* Order, *id.*, Doc. No. 1909291 (August 6, 2021).

The Executive Order and accompanying list of agency actions subject to review warrant holding this litigation in abeyance. Consistent with the inherent authority of federal agencies to reconsider past decisions, EPA should be afforded the opportunity to respond to the Executive Order by reviewing the Ozone NAAQS Decision in accordance with the new policies set forth in the Order. Abeyance will further the Court's interests in avoiding unnecessary adjudication,

² <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>

support the integrity of the administrative process, and ensure due respect for the prerogative of the executive branch to reconsider the policy decisions of a prior Administration.

EPA is currently coordinating internally on its consideration of the Ozone NAAQS Decision. In its August 5, 2021, motion for an extension of time to file motions to govern, EPA explained that an extension of time would allow EPA to obtain greater certainty on its process and timeframe for making a decision on whether to reassess the Ozone NAAQS Decision. Unopposed Motion for Abeyance, *id.*, Doc. No. 1909152 (Aug. 5, 2021) (explaining that this would “better position EPA to make a more concrete proposal in advance of an adjusted motion to govern deadline”). EPA now expects that it will reach a decision on whether or not to pursue reconsideration of the Ozone NAAQS decision by October 22, 2021. EPA therefore requests that the Court extend the motion to govern deadline until October 29, 2021, which will allow the parties an opportunity to confer after EPA’s anticipated decision.

Under these circumstances, moving forward with briefing now could easily result in a waste of the parties’ and judicial resources and disrupt the administrative process. These are a set of three consolidated cases regarding an action with a substantial administrative record, and they would likely involve extensive briefing on a number of issues. Moving forward now to begin addressing challenges to an

agency action on an administrative record that might well change should EPA pursue reconsideration would “hardly be sound stewardship of judicial resources.” *Am. Petroleum Inst. v. EPA (“API”)*, 683 F.3d 382, 388 (D.C. Cir. 2012). By contrast, at this stage no meaningful investment of time or resources by either the Court or the parties has occurred.

Continuing the abeyance in light of the possibility that EPA chooses to reconsider the Ozone NAAQS Decision would also further the integrity of the administrative process. Allowing EPA time to consider whether to initiate reconsideration—and to conduct that reconsideration should it decide to do so—would allow EPA to “apply its expertise and correct any errors, preserve[] the integrity of the administrative process, and prevent[] piecemeal and unnecessary judicial review.” *Id.* It would allow EPA the first opportunity to determine which aspects of the Ozone NAAQS Decision, if any, warrant revision or additional explanation. Lifting the abeyance now and proceeding with litigation could subvert the administrative process by pressuring EPA to commit (in its briefs and argument in this Court) to positions on issues relating to the Ozone NAAQS Decision before it has completed its evaluation of its position on those issues.

State Movant Intervenors for Respondents represent that they oppose a further abeyance and have suggested that they intend to seek leave to file a motion to govern requesting that active litigation begin in these consolidated cases. While

EPA reserves its right to file a response to such a motion to govern, if one is filed, there is no basis for this requested relief.

There is no meaningful prejudice to State Movant Intervenors from a brief further abeyance. State Movant Intervenors have sought leave to intervene in support of the lawfulness of the challenged Ozone NAAQS Decision, which is currently in effect. *See* State Motion to Intervene at 1, No. 21-1028, Doc. No. 1886099 (Feb. 18, 2021). And, in the Ozone NAAQS Decision, EPA retained the previous ozone national ambient air quality standards without revision. 85 Fed. Reg. at 87,256. State Movant Intervenors are thus currently subject to the same legal regime that they have operating under for years. In light of this, granting an abeyance until the end of October, when EPA expects to have reached a decision on whether or not to pursue reconsideration of the Ozone NAAQS Decision is asking very little of State Movant Intervenors.

To the extent State Movant Intervenors advocate for proceeding with active litigation now based on some purported regulatory uncertainty in the status of their obligations under the Ozone NAAQS Decision, this argument holds no water. Proceeding with litigation now will not lessen any alleged uncertainty that they

might assert.³ EPA will still be deciding whether or not to reconsider the action subject to challenge in this case, so any uncertainty associated with that decision will remain. Removing this case from abeyance will simply result in moving forward with litigation that could, ultimately, prove unnecessary depending on EPA's further administrative actions.

Furthermore, the timeframe under which EPA now expects its decision on whether to pursue reconsideration is relatively short. It is next to impossible that any material progress could be made in this litigation that could possibly reduce such purported uncertainty before October 29, 2021, particularly because the initial steps in these consolidated cases—*e.g.*, any procedural and dispositive motions, issue statements, and certification of the administrative record—have not occurred. Indeed, given the time it will take to brief and resolve any opposed cross-motion(s) to govern, much of EPA's requested abeyance period will likely elapse before the Court renders any decision on how to proceed, let alone anything of substance could happen in these cases.

Finally, awaiting a decision on such reconsideration is wholly consistent with this Court's precedent. Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law

³ Notably, Petitioners are a much larger coalition of states than State Movant Intervenors, and presumably face the same uncertainties as State Movant Intervenors, but do not oppose a continued abeyance in these consolidated cases.

and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“*State Farm*”). Courts may defer judicial review of a final rule pending completion of reconsideration proceedings. *See API*, 683 F.3d at 384. And this Court has often held challenges to Clean Air Act rules, in particular, in abeyance pending completion of reconsideration proceedings. *See, e.g., Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008); *New York v. EPA*, No. 02-1387, 2003 WL 22326398 at *1 (D.C. Cir. 2003).

Moving forward with litigation now is highly unlikely to serve any useful purpose and is not an efficient approach. EPA respectfully requests that the Court continue the abeyance for a brief period, until October 29, 2021, with motions to govern due on that day.

Respectfully submitted,

Dated: September 9, 2021

/s/ Benjamin Carlisle
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d), I hereby certify that the foregoing complies with the type-volume limitation because it contains 1,556 words, according to the count of Microsoft Word.

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c), that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

/s/ Benjamin Carlisle
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