

ORAL ARGUMENT: FEBRUARY 22, 2021**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

_____)	
ENVIRONMENTAL DEFENSE)	
FUND,)	
)	
<i>Petitioner,</i>)	Case No. 19-1222
)	Consolidated with 19-1227
v.)	
)	
UNITED STATES)	
ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
<i>Respondent.</i>)	
_____)	

**RESPONDENT'S UNOPPOSED MOTION TO CONTINUE
ORAL ARGUMENT DATE**

Respondent the United States Environmental Protection Agency (“EPA”) respectfully moves the Court to issue an order: (a) continuing the oral argument in this case, presently scheduled for February 22, 2021, for a period of 45 days, such that it would not be re-calendared any earlier than April 8, 2021; and (b) requiring the parties to file, within 30 days after the date of this motion (*i.e.*, by Thursday, March 4, 2021) an appropriate motion or motions to govern further proceedings. This motion is unopposed.

1. This petition challenges EPA’s final rule “Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills,” 84 Fed. Reg. 44,547 (Aug. 26, 2019). Petitioner Environmental Defense Fund filed a petition for review of this rule on October 23, 2019 (Case No. 19-1222). The remaining Petitioners—the States of California, by and through Attorney General Xavier Becerra and the California Air Resources Board, Illinois, Maryland, New Jersey, New Mexico, Oregon, Rhode Island, and Vermont, and the Commonwealth of Pennsylvania—filed a petition for review of the rule on October 25, 2019 (Case No. 19-1227). The petitions were consolidated, and merits briefing was completed on December 11, 2020. Oral argument has been scheduled for February 22, 2021. ECF No. 1879430 (Order dated Jan. 11, 2021).

2. Because of intervening events subsequent to the order scheduling oral argument, at this time EPA respectfully requests to continue the argument for 45 days. First, on January 19, 2021, the Court issued its opinion in *American Lung Association, et al. v. EPA*, Case No. 19-1140 (D.C. Cir. Jan. 19, 2021). See ECF No. 1881971 (Petitioners’ letter under Fed. R. App. P. 28(j) attaching a copy of the slip opinion). *American Lung Association* vacates the timing requirements in EPA’s new Clean Air Act section 111(d) implementing regulations, issued in July 2019 (84 Fed. Reg. 32,520). *Id.* Those requirements extended the timelines for state plan submissions, EPA’s review of state plans, and EPA’s promulgation

of federal plans to implement emission guidelines issued under Section 111(d).

Id. The Court found the timing requirements unlawful because EPA “failed to justify substantially extending established compliance timeframes.” Slip Op. at 140. EPA is presently evaluating the *American Lung Association* opinion and its potential impact on the present litigation.

3. Second, there has been a transition in the Executive Branch leadership since the argument was scheduled. On January 20, 2021, President Biden issued an Executive Order that directed the heads of federal agencies (in this case EPA) to conduct an immediate review of any agency regulation or similar agency action promulgated between January 20, 2017 and January 20, 2021, that may affect health and the environment, including specifically regulations relating to clean air as governed by the Clean Air Act. *See* Exec. Order 13990 of January 20, 2021, “Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,” 86 Fed. Reg. 7037 (Jan. 25, 2021), §§ 1, 2(a) (Exhibit A to this motion). That Order further authorized the Attorney General to, as appropriate, request a court to stay proceedings challenging actions such as those identified in the Executive Order. *Id.* § 2(d). In a list of agency actions accompanying the Executive Order, the President specifically identified the rule challenged here as falling within the scope of the Executive Order, requiring that it be reviewed “in accordance with the Executive

Order: ‘Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.’” Ex. B, “Fact Sheet: List of Agency Actions for Review,” at “U.S. Environmental Protection Agency” § 40.

4. On January 21, 2021, EPA’s acting General Counsel issued a letter to the acting Deputy Assistant Attorney General for the Environmental & Natural Resources Division of the Department of Justice (“DOJ”) requesting that, pursuant to the January 20, 2021 Executive Order, DOJ seek abeyances or stays of proceedings in pending challenges to EPA regulations promulgated between January 20, 2017 and January 20, 2021, or other forms of procedural relief as appropriate in particular cases. Ex. C. As explained above, the rule challenged in this case expressly is subject to the Executive Order and, hence, it is also subject to the request issued by EPA’s acting General Counsel.

5. Finally, on February 1, 2021, EPA Acting Assistant Administrator Joe Goffman sent a letter to counsel for the Petitioners in this case identifying an administrative action that EPA intends to take. Ex. D.¹ Previously, EPA had published a notice in the *Federal Register* identifying a number of states as having failed to make a complete plan submission to satisfy the requirements of the 2016 Municipal Solid Waste Landfills Emission Guidelines. 85 Fed. Reg.

¹ Exhibit D was sent to counsel for lead Petitioner the Environmental Defense Fund. *Id.* Identical letters were sent to counsel for each of the other Petitioners.

14,474, 14,476 (Mar. 12, 2020). As communicated by the February 1, 2021 letter, EPA intends to issue a federal plan by May 2021 for any state that does not have an approved state plan for those Guideline. EPA proposed a federal plan in August 2019. 84 Fed. Reg. 43,745 (Aug. 22, 2019).

6. EPA believes it is appropriate under the circumstances described above to continue the oral argument for 45 days, such that it would not be re-calendared any earlier than April 8, 2021. Such procedural relief would allow a reasonable period of time in which EPA's new leadership will have an opportunity to evaluate the recent opinion in *American Lung Association* as well as to consider the rule at issue in light of President Biden's executive order.

7. When an agency seeks to determine whether it wants to reconsider an action or position taken by the agency, the proper course is to seek a stay or abeyance. *See e.g., Anchor Line Ltd. v. Fed. Maritime Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962) (“[W]hen an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency.”); *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 n.3 (D.C. Cir. 1993); *Catawba Cty. v. EPA*, 571 F.3d 20, 29 (D.C. Cir. 2009).

8. This Court has routinely granted stays or abeyance in precisely the situation presented here: when a new Administration acting pursuant to an Executive Order issued by the new President seeks to review and consider its

position with regard to a promulgated regulation that is being challenged.

Moreover, it has done so in cases where oral argument was imminent, as here.

See, e.g., Order (Doc. Nos. 1672987, 1671687),² *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Apr. 27, 2017) (abeyance of challenge to Mercury Air Toxics Standards under the Clean Air Act); Order (Doc. Nos. 1672985), *ARIPPA v. EPA*, No. 15-1180 (D.C. Cir. Apr. 27, 2017) (same); Order (Doc. Nos. 1672430), *Walter Coke Inc. v. EPA*, No. 15-1166 (D.C. Cir. Apr. 24, 2017) (abeyance of consolidated challenges to requirement that thirty-six states amend state implementation plans relating to events at power plants and facilities).

9. Accordingly, as described in Paragraph 6 above, EPA proposes that the Court continue the scheduled oral argument for 45 days from its current date of February 22, 2021, until no earlier than April 8, 2021. EPA also proposes that the Court require the filing of an appropriate motion or motions to govern further proceedings within 30 days from the date of this motion, meaning such motion or motions would be due by Thursday, March 4, 2021. This would enable the parties to inform the Court reasonably in advance of the rescheduled argument date whether it is still necessary to go forward with argument, in light of the above circumstances or any further developments.

² In each of the following citations, the first Document Number refers to the Court's Order and the second refers to EPA's motion for a stay or abeyance.

10. Prior to filing this motion, counsel for EPA conferred with counsel for all of the Petitioners, who confirmed that the Petitioners do not oppose this motion.

11. For the foregoing reasons, EPA respectfully requests that the Court grant this motion and enter an order adopting the relief described in numbered paragraphs 6 and 9 above.

Respectfully submitted,

Dated: February 2, 2021

By:

/s/ Brian H. Lynk

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains 1372 words according to the count of Microsoft Word and therefore is within the word limit of 5,200 words.

Dated: February 2, 2021

/s/ Brian H. Lynk
Brian H. Lynk

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed with the Clerk of the Court this 2nd day of February, 2021, using the appellate CM/ECF System, causing true and correct copies thereof to be sent to all counsel of record through the appellate CM/ECF system.

/s/ Brian H. Lynk
Brian H. Lynk