ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WASHINGTON; STATE OF WISCONSIN; CITY OF NEW YORK, *Petitioners*	)	
v.	)	No. 21-1028 (consolidated with No. 21-1060 and No. 21-1073)
ENVIRONMENTAL PROTECTION AGENCY; JANE NISHIDA, IN HER OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondents*	)	

MOTION BY THE STATES OF TEXAS, ARKANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, AND MONTANA TO GOVERN FURTHER PROCEEDINGS

INTRODUCTION AND BACKGROUND

In response to this Court's latest order dated September 27, 2021, extending the deadline for filing motions to govern further proceedings to October 29, 2021, the States of Texas, Arkansas, Louisiana, Mississippi, Missouri, and Montana, (the "State Intervenors") respectfully submit this motion to govern further proceedings in these consolidated cases, which concern petitions to challenge the United States Environmental Protection Agency's ("the EPA's") most recent review of the Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 87,256 (Dec. 31, 2020) (the "Ozone NAAQS Decision").

The Clean Air Act (the "Act") obligates the EPA to set NAAQS for criteria pollutants, including ozone. As part of this responsibility, the EPA conducts five-year reviews of relevant scientific and technical information to determine whether existing NAAQS appropriately protect public health and welfare. 42 U.S.C. § 7409(d)(1). In its 2015 review of the Ozone NAAQS, the EPA established new primary and secondary baselines for ozone pollution at 70 parts per billion. In 2020, the EPA duly reassessed the Ozone NAAQS and, after careful review of the most recent available scientific and technical information, consultation with its independent advisors, and consideration of over 50,000 comments, determined that the 2015 standards appropriately protected public health and welfare. Accordingly,

in its Ozone NAAQS Decision the EPA retained the 2015 Ozone NAAQS without revision. 85 Fed. Reg. at 87,256.

Approximately three weeks later, on January 19, 2021, the State of New York along with sixteen other States and one municipality sought review of the Ozone NAAQS Decision. Thereafter, this Court issued an order setting certain case-management deadlines, Order, Doc. No. 1881731, and later consolidated this case with a similar case brought by the American Academy of Pediatrics and several other organizations, Doc. No. 1887219. On February 17, 2021, the EPA filed an unopposed motion to hold these consolidated cases in abeyance for 90 days. Doc. No. 1885865.

As justification for that abeyance motion, the EPA cited an executive order by then newly-elected President Biden directing review of certain federal agency actions related to the environment taken during the Trump administration. Exec. Order No. 13990; 86 Fed. Reg. 7037 (Jan. 20, 2021). That executive order identified a non-exclusive list of federal agency actions for agency heads to review, including the EPA's Ozone NAAQS Decision.

The State Intervenors filed a timely motion to intervene in these proceedings, arguing that they have a direct and substantial interest in this action warranting intervention under Fed. R. App. Proc. 15(d), that the liberal intervention policies underlying Fed. R. Civ. P. 24 support granting intervention as of right, and that they

would be entitled to permissive intervention under relevant case law. Doc. No. 1886099. The United States Chamber of Commerce, the American Forest & Paper Association, the American Petroleum Institute, the American Wood Council, and the American Chemistry Council also moved for leave to intervene (the "Industry Intervenors"). Doc. No. 1886030.

On February 22, 2021, before any party responded to the intervention motions, the Court issued an order granting the EPA's motion to hold these consolidated cases in abeyance and directing the parties to file motions to govern further proceedings no later than May 21, 2021. Doc. No. 1885866. In response to two additional EPA motions to extend the deadline for filing motions to govern further proceedings, this Court extended the filing deadline two additional times. By order dated September 21, 2021, this Court granted the intervention motions of the Sate Intervenors and the Industry Intervenors. The Court's most recent order, dated September 27, 2021, requires parties to file motions to govern further proceedings by October 29, 2021.

Counsel for the State Intervenors have conferred with known counsel for the parties. As of the date of this filing: (1) State Petitioners in 21-1028 have advised that they oppose the relief requested by State Intervenors in this motion to govern further proceedings, which asks this Court to place this case back on track for briefing on the merits; (2) Petitioner Center for Biological Diversity has advised that

it supports setting a briefing schedule for resolving the issue of EPA's compliance with Section 7 of the Endangered Species Act, but takes no position at this time as to setting a briefing schedule for any other issues; (3) Respondents EPA, et al. have advised that they oppose the relief requested in this motion to govern; (4) Industry Intervenors have advised that they take no position with regard to this motion to govern; and (5) Environmental Petitioners have advised that they oppose the relief requested in this motion to govern.

ARGUMENT

For five reasons, the State Intervenors ask this Court to place this case back on track for briefing on the merits without further delay.

First, all parties and potential parties are now in place, and the issue of whether the EPA's Ozone NAAQS Decision is legally sustainable is fully ripe for review. *See N.Y. State Ophthalmological Soc'y v. Bowen*, 854 F.2d 1379, 1386 (D.C. Cir. 1988) ("A controversy is ripe if further administrative process will not aid in the development of facts needed by the court to decide the question it is asked to consider."). Although the possible filing of additional petitions to review the Ozone NAAQS Decision was cited by the EPA in support of its original unopposed motion for abeyance, the time for filing such petitions has elapsed. Accordingly, any additional petitions would be untimely. Furthermore, the deadline for filing intervention motions has also passed. Moreover, no new facts are required to aid the

court in deciding the sole issue in this case: whether the Ozone NAAQS Decision was lawfully made by the EPA. And the issue of whether the EPA can lawfully rescind or revise the Ozone NAAQS Decision is not before this Court.

Second, the parties will not be injured if the current litigation continues while the EPA reconsiders the Ozone NAAQS Decision. This Court has already afforded the EPA the courtesy of holding this case in abeyance for well over 180 days in order to allow the new administration to reconsider the Ozone NAAQS Decision. If the EPA believes that it has the authority to review the Ozone NAAQS Decision, it may seek to initiate that review, if it so chooses, independent of this Court's resolution of the instant case. If this Court upholds the Decision, the EPA can still pursue whatever administrative review processes are available under law to revise it. And the EPA's use of those processes would be substantially aided by guidance from this Court as to the scope of the EPA's obligations under the Clean Air Act.

Third, the State Intervenors face serious potential injuries if the stay continues. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (noting that a court ruling on a motion to stay should consider whether the stay "will substantially injure the other parties interested in the proceeding; and . . . where the public interest lies") (citation omitted).

Under the Clean Air Act, each of the State Intervenors has the "primary responsibility for assuring air quality within" its borders "by submitting an

implementation plan" that "specif[ies] the manner in which primary and secondary ambient air quality standards will be achieved and maintained within" its borders. 42 U.S.C. § 7407(a); *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 470 (2001). And if the States do not submit acceptable plans to the EPA within three years, they risk the imposition of federal implementation plans—which would deprive the State Intervenors of control over how Ozone NAAQs are implemented in their sovereign territory. *See* 42 U.S.C. § 7410(a), (c). But as long as the Ozone NAAQS Decision remains subject to challenge, the State Intervenors will not have clear guidance about what specific actions, if any, are appropriate with to ensure that their state implementation plans achieve and maintain the Ozone NAAQS. Knowing which specific federal mandates are required is essential to the sound operation of state government to ensure the type of "cooperative federalism" envisioned by Congress in the Clean Air Act. *Del. Dep't. of Nat. Res. & Envtl. Control v. EPA*, 895 F.3d 90, 102 (D.C. Cir. 2018) (citation omitted). The uncertainty caused by this litigation thus poses serious injuries to the States, who must continually ensure that they provide for the health, safety, and economic well-being of their residents. These potential injuries by the State Intervenors thus weigh in favor of this Court rejecting efforts to keep this case in abeyance. *See Nken*, 556 U.S. at 434.

Fourth, the EPA cannot keep this case in abeyance forever while it reviews the Ozone NAAQS Decision. *Cf. Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388

(D.C. Cir. 2012) (noting that an agency cannot "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking" because that would mean "a savvy agency could perpetually dodge review"). The EPA could periodically continue to ask for delays (as it has several times already) which could last for years while it determines the extent to which it wishes to revise the Ozone NAAQS standard, thereby indefinitely leaving open the question of whether the Ozone NAAQS Decision is a valid exercise of agency authority.

Fifth, "where a movant seeks relief that would delay court proceedings by other litigants he must make a strong showing of necessity because the relief would severely affect the rights of others." *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983). Here, there are no facts establishing a "strong necessity" for further delay.

CONCLUSION

For the foregoing reasons, the State Intervenors ask this Court:

1.) not to extend beyond October 29, 2021, the Order granting the motion to hold in abeyance; and;

2.) to issue a briefing and scheduling order moving this case forward.

DATED: October 29, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A) and 32(f) and (g), I hereby certify that the foregoing complies with the type-volume limitation because it contains 1,624 words, excluding exempted portions, according to the count of Microsoft Word.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on October 29, 2021, with the Clerk of the Court using the CM/ECF system, which will send a notification to all registered users.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH