

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NEW YORK,)	
<i>et al.</i> ,)	
)	
<i>Petitioners</i> ,)	
)	
v.)	No. 21-1028
)	and consolidated cases
ENVIRONMENTAL PROTECTION)	
AGENCY, <i>et al.</i> ,)	
)	
<i>Respondents</i> .)	
)	
)	

MOTION TO HOLD IN ABEYANCE

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) (“2020 Ozone NAAQS Decision”). Pursuant to this Court’s September 27, 2021, order, and certain previous orders, these cases have been held in abeyance with a deadline to file motions to govern on October 29, 2021. Respondents United States Environmental Protection Agency, et al. (“EPA”) have now determined that EPA will be reconsidering the 2020 Ozone NAAQS Decision, with the intention of completing the reconsideration by the end of 2023. EPA therefore respectfully moves that the Court hold these consolidated cases in abeyance until December 15,

2023, with a status report due 90 days after the Court's order placing these cases into abeyance and every 90 days thereafter.

Counsel for Respondents have conferred with Petitioners' counsel and counsel for intervenors. State Petitioners in Case No. 21-1028 take no position at this time on the relief requested by EPA and intend to file a response in support or opposition by Friday, November 5, 2021. Environmental Petitioners in No. 21-1060 intend to file a response to EPA's motion by Friday, November 5, 2021, after they have had an opportunity to gain further clarity on EPA's timeline for reconsidering the ozone NAAQS. Petitioner Center for Biological Diversity in Case No. 21-1073 states that it opposes an abeyance as to the issues raised in its petition, and takes no position on an abeyance as to the other petitions in these consolidated cases. Industry intervenors state that they take no position on the relief requested in this motion. A coalition of intervenors, representing six states oppose the relief requested in this motion.

BACKGROUND

The Clean Air Act, 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program to protect and enhance the Nation's air quality through a system of shared federal and state responsibility. *Id.* § 7401(b)(1). Central to this program are the national ambient air quality standards (NAAQS), which EPA sets to limit the concentration of certain air pollutants in the ambient air to protect against the

pollutants' effects on public health and welfare. *Id.* §§ 7408-09. EPA has established NAAQS for six common air pollutants, including ozone. 40 C.F.R. pt. 50. EPA is required to periodically review its standards to ensure that they provide the requisite protection. 42 U.S.C. § 7409(d). The Act further requires that EPA appoint an independent scientific review committee, the Clean Air Scientific Advisory Committee (CASAC), and requires that committee to advise EPA on its review of the science and on appropriate revisions to the NAAQS. *Id.* § 7409(d)(2).

EPA most recently revised the ozone NAAQS in a rule promulgated in 2015. 80 Fed. Reg. 65,292 (Oct. 26, 2015). In the 2020 Ozone NAAQS Decision challenged here, EPA completed a review of the body of currently available scientific evidence and decided to retain the existing ozone NAAQS promulgated in 2015.

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 2020 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).

EPA has now determined that it will be reconsidering the 2020 Ozone NAAQS Decision through a new notice-and-comment rulemaking proceeding, and its expected timetable for this reconsideration confirms its intention to move as expeditiously as practicable. Goffman Decl. ¶ 20-21. EPA's goal is to complete this reconsideration by the end of 2023. *Id.* ¶¶ 20. In an effort to obtain even more robust input from CASAC regarding policy-relevant science during the forthcoming reconsideration, EPA anticipates that it will convene an ozone-specific panel supporting CASAC for this reconsideration, as the review of the Ozone NAAQS culminating in the 2020 Ozone NAAQS Decision was completed without the benefit of such a panel. *Id.* ¶ 21. During the review leading up to the 2020 decision CASAC had noted the absence of an ozone review panel, stating:

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

“interactive discussion between the CASAC and a pollutant-specific review panel, enables significantly more discussion and deliberation among experts with differing backgrounds and opinions, potentially resulting in a more comprehensive examination of some controversial topics.”³ *Id.* ¶ 22. Convening an ozone-specific review panel and seeking its advice, which includes a public meeting and the development of the CASAC’s advice to the Administrator, requires time, and completing that process and the rulemaking process by December 2023 would be an expeditious schedule. *Id.* ¶ 23; *see also id.* ¶¶ 7-9 (describing the types of documents and analysis that EPA may prepare in the course of NAAQS reviews, including to facilitate the CASAC’s advisory role); *id.* ¶¶ 12-14 (discussing the significant process involved in determining whether to revise a NAAQS and, as appropriate, revising a NAAQS).

ARGUMENT

The Court should grant EPA’s motion for an abeyance. Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation.

³ Letter from Louis Anthony Cox, Jr., Chair, Clean Air Scientific Advisory Committee, to Administrator Andrew R. Wheeler, Re: CASAC Review of the EPA’s *Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards (External Review Draft – October 2019)*, Consensus Responses to Charge Questions at 1 (February 19, 2020). Available at: [https://yosemite.epa.gov/sab/sabproduct.nsf/264cb1227d55e02c85257402007446a4/4713D217BC07103485258515006359BA/\\$File/EPA-CASAC-20-003.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/264cb1227d55e02c85257402007446a4/4713D217BC07103485258515006359BA/$File/EPA-CASAC-20-003.pdf)

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*”). Here, EPA intends to reconsider the 2020 Ozone NAAQS Decision with the goal of completing that reconsideration by 2023. Moreover, a revised rulemaking based “on a reevaluation of which policy would be better in light of the facts” is “well within an agency’s discretion,” and “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.” *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)); see also *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted).

Courts may defer judicial review of a final rule pending completion of reconsideration proceedings. See *Am. Petroleum Inst. v. EPA* (“*API*”), 683 F.3d 382 (D.C. Cir. 2012). 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).

With these principles in mind, abeyance is warranted in this case. EPA reviewed the 2020 Ozone NAAQS Decision following the direction of the President of the United States and decided to reconsider the 2020 Ozone NAAQS Decision after determining that there are aspects of the 2020 Ozone NAAQS Decision that it wishes to reassess. Thus, “[i]t would hardly be sound stewardship of judicial resources to decide this case now.” *API*, 683 F.3d at 388. Abeyance 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 2020 Ozone NAAQS Decision, if any, warrant revision or additional explanation, and thus serve the proper function of the administrative process.

EPA’s determination to reconsider the 2020 Ozone NAAQS Decision comes at the very beginning stages of this case, before any meaningful investment of time or resources by either the Court or the parties has occurred. As a corollary, this means that granting an abeyance will essentially conserve *all* of the resources normally expended by the parties and the Court in litigating a petition for judicial review of agency action. While EPA cannot prejudge the outcome of its reconsideration process, litigating these consolidated cases risks wasting these resources in review of an action that may be mooted, or a record that may be changed, through a final action that completes the reconsideration process. Given

EPA's intended timetable, such changes may occur shortly after (or even before) any Court decision.

In addition, EPA has expressed its intention to act expeditiously in conducting reconsideration and expects to issue a final decision by the end of 2023. Allowing this case to proceed would not be an efficient approach. This case has not yet been briefed. Given EPA's intended timetable, reconsideration would be well underway prior to briefing, argument and decision. EPA's decision on reconsideration could moot the present challenges. An abeyance is thus an efficient approach, which allows EPA's final decision on reconsideration to serve as the proper vehicle for any remaining challenges and which ensures that the Court will have the benefit of EPA's most up-to-date views and explanations for its decision.

By contrast, 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 2020 Ozone NAAQS Decision before it has completed its reconsideration of its position on those issues. It would also result in moving forward with litigation that could, ultimately, prove unnecessary depending on EPA's further administrative actions.

In view of such considerations, this Court has routinely granted abeyance requests in litigation challenging agency rulemaking where a change in presidential

administrations has prompted or directed the agency to reconsider the underlying action. *See, e.g., California v EPA*, Case No. 21-1014 & consol. cases, ECF No. 1916444 (D.C. Cir. Oct. 1, 2021). *Competitive Enterprise Institute v. EPA*, ECF No. 1892931 (D.C. Cir. 20-1145) (granting abeyance in case challenging motor vehicle emissions standards); *Union of Concerned Scientists v. EPA*, ECF No. 1884115 (D.C. Cir. 19-1230) (granting abeyance in case challenging withdrawal of motor vehicle standard preemption waiver)

For the reasons stated above, and good cause shown, EPA respectfully requests that the Court order that these consolidated cases be placed into abeyance until December 15, 2023, with status reports due 90 days after the Court's entry of this order and every 90 days thereafter. EPA expects that the parties will confer in advance of the expiration of the abeyance period and submit proposals to the Court.⁴

Respectfully submitted,

⁴ EPA's request for an abeyance until December 15, 2023 is without prejudice to any relief it may request following the expiration of the abeyance period.

Dated: October 29, 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 1,831 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
Benjamin Carlisle

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DECLARATION OF JOSEPH GOFFMAN

I, Joseph Goffman, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief, and are based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency (EPA) or supplied to me by EPA employees under my supervision.

1. I am Principal Deputy Assistant Administrator and Acting Assistant Administrator for the United States Environmental Protection Agency Office of Air and Radiation (OAR), which is located at 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460.

2. OAR is the EPA headquarters-based unit with primary responsibility for administration of the Clean Air Act (CAA or the Act). As the Principal Deputy Assistant Administrator and Acting Assistant Administrator for OAR, I serve as the principal advisor to the Administrator of EPA on matters pertaining to air and radiation programs, and I am responsible for managing

these programs, including program policy development and evaluation; development of emissions standards; program policy guidance and overview; and technical support and evaluation of regional air and radiation program activities.

3. As part of my duties as Principal Deputy Assistant Administrator and Acting Assistant Administrator of OAR, I oversee the development and implementation of actions, regulations, policy, and guidance associated with the review and establishment of National Ambient Air Quality Standards (NAAQS) under sections 108 and 109 of the CAA, 42 U.S.C. §§ 7408 and 7409.

4. This declaration is filed in support of EPA's motion for an abeyance in *State of New York et al. v. EPA*, No. 21-1028 (D.C. Cir.) and consolidated cases.

NAAQS Background

5. Section 108 of the Clean Air Act, 42 U.S.C. 7408, requires EPA to identify certain ubiquitous air pollutants that may reasonably be anticipated to endanger public health and welfare and to issue comprehensive assessments of scientific information bearing on their effects. As described in section 108, these comprehensive assessments, referred to as "air quality criteria," must "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air." Section 109 of the Clean Air Act, 42 U.S.C. 7409, in turn, requires EPA to promulgate NAAQS based on the air quality criteria for each such pollutant. Section 109(d)(1) requires EPA to periodically review and, as appropriate, revise existing air quality criteria and NAAQS. Section 109(d)(2) requires that EPA appoint an independent scientific review committee and further requires that committee to advise EPA on its review of the air quality criteria and on appropriate revisions to the NAAQS. The Clean Air

Scientific Advisory Committee (CASAC) of EPA's Science Advisory Board was accordingly established pursuant to section 109(d) to provide independent scientific advice on NAAQS matters.

6. In general terms, the NAAQS define levels of ambient air quality whose attainment and maintenance are, in the judgment of the EPA Administrator, required to protect the public health and public welfare from a variety effects, ranging, for example, from reduced lung function and aggravation of respiratory diseases to damage to sensitive plant species and broader ecosystem-level effects.

7. NAAQS reviews typically include an assessment phase which precedes and informs the decision-making phase of a review. To help facilitate CASAC's advisory role during the assessment phase, EPA has developed a practice of preparing various types of scientific and technical documents for CASAC's review. These documents include scientific assessments, policy assessments, and assessments of exposure and risk, as appropriate. In recent NAAQS reviews, these documents have included Integrated Science Assessments (ISA), which provide a comprehensive assessment of the current scientific literature pertaining to known and anticipated effects on public health and welfare associated with the pollutant in the ambient air and which form the scientific foundation for each NAAQS review.

8. EPA may also prepare analyses to assess exposure and risk to public health and to the environment, as appropriate, from various ambient levels of the pollutant. These analyses use the science from the ISA along with information about exposure of sensitive human population groups or, in some cases, sensitive plant or animal species to different ambient levels of the pollutant, to provide a quantified analysis of risks to public health and welfare at various levels of ambient air quality.

9. The documents prepared during the assessment phase in recent NAAQS reviews have also included Policy Assessments (PA), which use the information from the scientific assessment and exposure/risk analyses and weigh the strengths and limitations of the scientific and technical information, as well as the quantitative estimates of exposure and risks. The PA frames this information in a manner that informs policy judgments to be made in the review concerning the adequacy of the current standards and identifies various options, as appropriate, in terms of possible alternative standards for consideration.

10. EPA is frequently conducting a number of NAAQS reviews simultaneously and thus is obtaining the CASAC's advice on different pollutants in the same timeframe. In light of the potential for multiple simultaneous reviews, and the breadth of scientific issues covered by each review, EPA has historically followed the practice of establishing pollutant-specific review panels to assist the CASAC in fulfilling its review and advisory functions for a particular pollutant.

11. For example, before constituting the CASAC Panel for the reconsideration currently underway of the agency's final action in 2020 addressing the Particulate Matter (PM) NAAQS, EPA published a Federal Register notice seeking nominations for individuals to serve on a PM-specific review panel in the following fields: air quality and climate responses, atmospheric science and chemistry, toxicology, controlled human exposure studies, epidemiology, biostatistics, exposure assessment/modeling, risk assessment/modeling, and visibility impairment.¹ This nomination process eventually resulted in the Administrator appointing an additional 15 scientific experts to serve on the PM review panel.

¹ 86 Fed. Reg. 33,703 (June 25, 2021)

12. Based on the science, exposure/risk, and policy assessment documents, the advice of CASAC, and public comments, the Administrator will decide whether it is appropriate to propose a revision to the NAAQS in question. Any such proposal is governed by special rulemaking procedures set forth in section 307(d) of the Act, 42 U.S.C. § 7607(d).² EPA's notice of proposed decision, for example, must be accompanied by a detailed statement of its basis and purpose. In the case of the NAAQS, section 307(d)(3) specifically requires that the proposal "set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments" made by the CASAC and explain any important departures from CASAC's advice.

13. As in other proceedings under section 307(d), EPA must provide at least 30 days for public comment on the proposal. 42 U.S.C. § 7607(h). EPA must also provide an opportunity for oral presentation of comments on NAAQS proposals, keep a transcript of any such proceeding, and hold the record of the proceeding open for an additional 30 days to provide an opportunity for submission of rebuttal and supplementary information. 42 U.S.C. § 7607(d)(5).

14. After evaluating all written and oral comments on the proposal, EPA must determine whether any revisions are warranted and draft the final rulemaking decision and supporting technical documents. The final decision must be accompanied by a detailed statement of basis and purpose, an explanation of the reasons for any major changes from the proposal, and a response to each of the significant comments submitted in written or oral presentations during the comment period. 42 U.S.C. § 7607(d)(6).

² EPA does not believe that a decision to retain an existing NAAQS necessarily must be made through a full rulemaking process. However, EPA intends to use the notice and comment rulemaking process established in the Clean Air Act for the Ozone NAAQS reconsideration, even in the event that EPA's final decision is to retain the current NAAQS.

Ozone NAAQS

15. Currently there are NAAQS for six common air pollutants, including NAAQS for photochemical oxidants including ozone (Ozone NAAQS).

16. The current Ozone NAAQS were last revised in 2015 through an action titled “National Ambient Air Quality Standards for Ozone,” 80 Fed. Reg. 65,292 (Oct. 26, 2015).

17. EPA completed its last periodic review of the Ozone NAAQS in 2020. Based on its review of the air quality criteria and current standards, the agency decided to retain the current standards without revision and published notice of that decision in an action titled “Review of the Ozone National Ambient Air Quality Standards,” 85 Fed. Reg. 87,256 (Dec. 31, 2020) (2020 Ozone NAAQS Decision).

18. 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, 2021.³ An accompanying fact sheet provided a non-exclusive list of agency actions that agency heads will review in accordance with that order, including the 2020 Ozone NAAQS Decision.⁴

19. EPA has been reviewing the 2020 Ozone NAAQS Decision, consistent with the direction in the Executive Order.

20. Based on that review, EPA has decided to reconsider the 2020 Ozone NAAQS Decision, and it intends to complete this reconsideration by the end of 2023.

³ <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/>

⁴ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>

21. The goal of completing reconsideration by the end of 2023 reflects EPA's commitment to moving expeditiously on this reconsideration. Among other things, EPA anticipates that it will update one or more documents and convene an ozone review panel for this reconsideration, as the review of the Ozone NAAQS culminating in the 2020 Ozone NAAQS Decision was completed without the benefit of an ozone-specific panel supporting the CASAC, as had been done in prior reviews.

22. The CASAC for the last review noted the absence of an ozone review panel, stating: "interactive discussion between the CASAC and a pollutant-specific review panel, enables significantly more discussion and deliberation among experts with differing backgrounds and opinions, potentially resulting in a more comprehensive examination of some controversial topics."⁵

23. In light of EPA's plan to convene an ozone-specific review panel, update one or more documents for the Ozone NAAQS, seek CASAC's advice at a public meeting, and utilize full notice and comment rulemaking procedures for the Administrator's final decision whether to retain or revise the Ozone NAAQS, EPA expects that its reconsideration cannot be completed any more expeditiously than December 2023.

⁵ Letter from Louis Anthony Cox, Jr., Chair, Clean Air Scientific Advisory Committee, to Administrator Andrew R. Wheeler, Re: CASAC Review of the EPA's *Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards (External Review Draft – October 2019)*, Consensus Responses to Charge Questions at 1 (February 19, 2020). Available at: [https://yosemite.epa.gov/sab/sabproduct.nsf/264cb1227d55e02c85257402007446a4/4713D217BC07103485258515006359BA/\\$File/EPA-CASAC-20-003.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/264cb1227d55e02c85257402007446a4/4713D217BC07103485258515006359BA/$File/EPA-CASAC-20-003.pdf)

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of October, 2021.



Joseph Goffman
Principal Deputy Assistant Administrator and
Acting Assistant Administrator
Office of Air and Radiation
United States Environmental Protection Agency