

**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.<sup>1</sup> An accompanying

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<sup>1</sup> <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.<sup>2</sup> 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:

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<sup>2</sup> <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.”<sup>3</sup> *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.

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<sup>3</sup> 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.<sup>4</sup>

Respectfully submitted,

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<sup>4</sup> 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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al.*

**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