

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 State 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

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