

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK,  
*et al.*,

*Petitioners,*

v.

ENVIRONMENTAL PROTECTION  
AGENCY, *et al.*,

*Respondents.*

No. 21-1028  
and consolidated cases

**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)

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