ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASS'N, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	)	Docket No. 17-1172 (and consolidated cases)

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO GOVERN FURTHER PROCEEDINGS

Respondents United States Environmental Protection Agency and Andrew R. Wheeler, Acting Administrator, (collectively "EPA") hereby oppose Petitioners' "Second Motion to Govern Further Proceedings," ECF No. 1753095 (Sept. 28, 2018) ("Pet. Mot."). For the reasons stated herein, and in EPA's pending Motion to Govern Further Proceedings, ECF No. 1753166 (Sept. 28, 2018) ("EPA Mot."), the Court should instead dismiss this case as moot.

INTRODUCTION

EPA provided a detailed discussion of the background of this matter in its Motion to Govern, *see* EPA Mot. at 4-10, as well as an explanation of why this case is moot, *id.* at 11-15. Accordingly, we will not repeat those discussions here.[1] Instead, this response focuses on the additional points made in Petitioners' motion, with cross-references to EPA's prior briefing as appropriate for context.

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED AS MOOT

As EPA previously explained, this case is clearly moot because the Court cannot grant any effectual relief. EPA Mot. at 11-13. Although EPA continues to believe that this case became moot when EPA withdrew the challenged extension action, *see* 82 Fed. Reg. 37,318 (Aug. 10, 2017) ("Withdrawal Notice"), it is indisputably moot now that all final air quality designations for the 2015 ozone national ambient air quality standard ("NAAQS") have been made. *See* EPA Mot. at 11-13.[2] Petitioners do not directly argue to the contrary, but they do contend

[1] EPA regrets the inconvenience to the Court caused by the parallel tracks of separate motions to govern and responses and replies thereto. As EPA noted in its Motion to Govern, EPA asked Petitioners to agree to a more traditional and streamlined motions format to present these mootness issues to the Court, but they refused. EPA Mot. at 10, 17.

[2] *See also* 82 Fed. Reg. 54,232 (Nov. 26, 2017) (designations for 2,646 counties and certain areas in Indian Country); 83 Fed. Reg. 25,776 (June 4, 2018) (designations for all remaining areas other than eight counties in the San Antonio,

that this case fits the "capable of repetition yet evading review" exception to the mootness doctrine. Pet. Mot. at 6-11. Petitioners are wrong.

A. This Case is Not "Capable of Repetition."

With respect to the "capable of repetition" criterion, this Court has made clear that the relevant inquiry is not whether the same type of agency action may recur in the future, but rather, "whether the *legal wrong* complained of by the plaintiff is reasonably likely to recur." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009) (emphasis added); *see also, e.g., People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 422-23 (D.C. Cir. 2005) ("One function of the 'capable of repetition' doctrine is to satisfy the Constitution's requirement, set forth in Article III, that courts resolve only continuing controversies between the parties. That function cannot be fulfilled unless the alleged 'wrong' is put in terms of the legal questions it presents for decision.") (citation omitted).

Petitioners blithely claim that "EPA's extension raises a purely legal question: whether EPA may extend a deadline by relying on a justification that is outside of the narrow statutory grounds for an extension – insufficient information

---

Texas area); 83 Fed. Reg. 35,136 (July 25, 2018) (designations for the eight counties in the San Antonio, Texas area).

to make designations." Pet. Mot. at 8. However, this assertion is contradicted both by the challenged agency action and by Petitioners' stated challenges to it.

Contrary to Petitioners' assertion, EPA *expressly* premised the challenged extension on the statutory "insufficient information" criterion. *See* 82 Fed. Reg. 29,246, 29,247 (June 28, 2017) ("For the reasons explained in this notice, the EPA Administrator has determined that there is insufficient information to complete the designations by October 1, 2017.") ("Extension Notice"). The Extension Notice then went on to list EPA's supporting reasons for this "insufficient information" determination, for example: (1) "understanding the role of background ozone levels"; (2) "appropriately accounting for international transport"; (3) the "possible . . . outcome" of the "Ozone Cooperative Compliance Task Force" established "pursuant to language in the recently-enacted Fiscal Year 2017 omnibus bill"; (4) "full consideration of exceptional events impacting designations"; and (5) the Agency's then-ongoing "review[] of the 2015 ozone NAAQS rule." *Id.* at 29,247. Petitioners' merits challenge argued that the reasons cited by EPA were inadequate to demonstrate "insufficient information," *see* ECF No. 1683752, at 13-17 (July 12, 2017), or were otherwise "arbitrary and capricious." *Id.* at 17-21. However, this is at most a dispute about the sufficiency of the Agency's record. Petitioners cannot contest that EPA expressly based the Extension Notice on the statutory

criterion and believed at the time it issued the Extension Notice that the cited reasons provided appropriate support for that determination.

Therefore, properly understood, this case does not present the broad legal question suggested by Petitioners in their present motion, *i.e.*, whether EPA can extend the deadline for making air quality designations on grounds other than "insufficient information." Rather, it involves the far narrower question of whether the multiple grounds cited by EPA in this particular extension action provided adequate and appropriate record support for the Agency's (long-since withdrawn) "insufficient information" determination. This is the type of "highly fact-specific" inquiry that falls outside the "capable of repetition" exception to the mootness doctrine. *See People for the Ethical Treatment of Animals*, 396 F.3d at 424-25; *see also, e.g., Armstrong v. FAA*, 515 F.3d 1294, 1296 (D.C. Cir. 2008) ("*the issue presented* – whether it was arbitrary and capricious for the Administrator to make an emergency determination *under the specific factual circumstances* of this case – will never arise again") (emphases added).

B. A Future Case Will Not "Evade Review."

Even if this dispute were capable of repetition, there is still no reason to find that a future case would "evade review." In fact, as EPA previously explained, the course of this litigation proves the point. *See* EPA Mot. at 14. Petitioners sought summary vacatur or a stay of this litigation in July 2017, which would have

provided the Court with ample time to rule on the merits (or on EPA's cross-motion to dismiss on mootness grounds) had it deemed such action appropriate. *Id.* Instead, however, the Court deemed it more appropriate to grant Petitioners' alternative and repeated requests to hold this case in abeyance until the final 2015 ozone NAAQS designations were issued. *See* EPA Mot. at 5-9 (recounting this history).

Having successfully urged the Court to hold this case in abeyance for many months, Petitioners cannot now be heard to complain that the Court's grant of that relief caused their merits challenge to "evade" review. *See Armstrong*, 515 F.3d at 1296 ("A litigant cannot credibly claim his case 'evades review' when he himself has delayed its disposition.") (citation omitted). Nor can such a conclusion arise from the Court's decision *not to grant* Petitioners' earlier motion for summary vacatur or a stay. Simply put, a party's failure to obtain a decision on the merits and a case "evading" merits review are two different things. There is no reason to believe that in a future hypothetical extension challenge, the Court would lack ample time, before the case became moot, to consider and grant a more compelling request for merits relief than the one Petitioners presented here.

There also is no merit to Petitioners' suggestion that the "evading review" criterion is satisfied, *per se*, when the challenge involves an agency action of less than two years in duration. Pet. Mot. at 8 (citing *Del Monte*, 570 F.3d at 322). In

the cited portion of *Del Monte*, and the cases underlying that decision, the Court was referring generally to the typical time frame for cases that can involve up to three levels of judicial review: trial court proceedings, appellate review by this Court, and potential Supreme Court review. *See Public Utils. Comm'n v. FERC*, 236 F.3d 708, 714 (D.C. Cir. 2001); *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996); *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 369 (D.C. Cir. 1992); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1329 (D.C. Cir. 1985).

Whatever value this general rule of thumb may have in other contexts, it is not pertinent to cases, like this one, brought under the Clean Air Act's special statutory judicial review provision, 42 U.S.C. § 7607(b)(1). That provision allows parties to file a petition for review directly in this Court of "nationally applicable" final action immediately after publication in the Federal Register. These statutory judicial review proceedings are based entirely on an administrative record and therefore do not involve discovery, trial, or any of the other procedural steps that are typical of district court litigation. Further, where warranted, this Court's rules allow parties to seek summary vacatur and/or a stay pending review, just as Petitioners attempted to do here.

For all these reasons, even if it is assumed, *arguendo*, that the "legal wrong" complained of by Petitioners here were "capable of repetition" in some future

action, there is absolutely no reason to suppose that hypothetical future action would "evade review."

C. Petitioners Are Not Entitled to an Advisory Opinion in a Moot Case.

Petitioners state "should the Court decide the case is moot, Petitioners request that the Court vacate and declare the Designations Delay void *ab initio*, again based on the materials already before the Court." Pet. Mot. at 3; *see also id.* at 12 (repeating this request). Petitioners cite no pertinent authority to support this brazen request for the Court to decide the merits of a moot case, and none exists.[3]

To the contrary, this Court has unequivocally stressed that it has "no constitutional power to decide the merits in a mooted case." *Sands v. NLRB*, 825 F.3d 778, 785 (D.C. Cir. 2016) (citation omitted). As EPA previously pointed out, both the Supreme Court and this Court have clearly, repeatedly and consistently held that the case or controversy requirement in Article III of the Constitution forbids such action, and that any merits decision in a moot case would constitute an impermissible advisory opinion. *See* EPA Mot. at 14-15 (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 883 (D.C. Cir. 2014); *Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011)).

[3] Petitioners curiously cite *SW General, Inc. v. NLRB*, 796 F.3d 67, 71 (D.C. Cir. 2015), s*ee* Pet. Mot. at 12, but that case did not address mootness issues at all.

It is surprising that Petitioners would even make this argument, bereft of any discussion of pertinent case law, when this Court rejected a functionally identical argument by many of the same Petitioners less than two months ago in another case involving a moot challenge to a withdrawn EPA action under the Clean Air Act. Order, *Environmental Defense Fund v. EPA*, No. 18-1190, ECF No. 1746922 (D.C. Cir. Aug. 22, 2018) (per curiam) (because case was moot, "a decision from this court would constitute an impermissible advisory opinion as to the legality of the [challenged action]") (citing *Chamber of Commerce*).[4] Petitioners do not even mention *Environmental Defense Fund* in their motion, let alone posit any reason why the Court should reach a different conclusion here than it did there.

For all the foregoing reasons, this case should be dismissed as moot.

II. PETITIONERS' EQUITABLE ARGUMENTS ARE IRRELEVANT AND, IN ANY EVENT, MERITLESS

The overriding theme of Petitioners' motion to govern is that the pace of designations in this case is reflective of a larger pattern of supposed EPA "delay" under the present Administration, and that this litigation was necessary to assure completion of the 2015 ozone NAAQS designations. *See, e.g.*, Pet. Mot. at 1-2, 9-

[4] Environmental Petitioners Sierra Club and Environmental Defense Fund, and State Petitioners California, Delaware, District of Columbia, Illinois, Maine, Massachusetts, Minnesota, New Mexico, New York, Pennsylvania, Rhode Island, Oregon, and Vermont are all petitioners in both this consolidated case and in the cited consolidated case *Environmental Defense Fund v. EPA*, No. 18-1190.

11. For all the reasons discussed above, these equitable arguments are irrelevant. Where, as here, a case has indisputably become moot, the Constitution precludes this Court from granting further relief, regardless of perceived equities. Even if this were not the case, however, Petitioners' characterization of this action is unjustified and misleading.

There is, of course, no doubt that EPA missed the October 1, 2017 deadline for completion of the 2015 ozone NAAQS designations. However, EPA issued the designations for 2,646 counties and certain areas in Indian Country very shortly thereafter, completed all designations outside the San Antonio area (which had unique issues) within about six months, and finished the San Antonio designations just a few months later. *See generally* EPA Mot. at 3-4, 7-10. Ultimately, all the designations were completed and published in the Federal Register within about 10 months of the October 1, 2017 deadline. While any delay is regrettable, the timing of EPA's action here was not unreasonable given the statutory and historical context and technical complexity of the task.

To begin with, the very existence of the extension provision in 42 U.S.C. § 7407(d)(1)(B)(i) is evidence that Congress anticipated that NAAQS designations could sometimes take up to one year longer than the default statutory deadline. Even with the issuance (and subsequent withdrawal) of the extension, the overall

pace of EPA's designations here was not out of step with the Agency's historical practice and experience under other administrations.

For example, after the ozone NAAQS was last updated in 2008, *see* 73 Fed. Reg. 16,436 (Mar. 27, 2008), EPA under the Obama Administration also found it necessary to extend the statutory deadline for one year pursuant to 42 U.S.C. § 7407(d)(1)(B)(i). *See* 75 Fed. Reg. 2936 (Jan. 19, 2010). Even then, the Agency needed more time. In the end, the 2008 ozone NAAQS designations were not published in the Federal Register until over four years after the NAAQS was updated, well after the one-year extension had run. *See* 77 Fed. Reg. 30,088 (May 21, 2012). That schedule, from initial promulgation of the NAAQS in March 2008 to publication of final designations in May 2012, was about a year and a half *slower* than the comparable pace of designations here (October 2015 to July 2018). This comparison is not meant as a criticism of EPA's prior actions, but rather, to observe that ozone designations are a complex and challenging undertaking for *any* administration, and the procedure and timing involved here is hardly any kind of outlier when viewed in realistic context.

It also bears emphasis that the timing of EPA's actions here was closely examined by the United States District Court for the Northern District of California

in the related citizen suit litigation, and largely found to be reasonable.[5] Contrary to Petitioners' suggestion, *see* Pet. Mot. at 6, n.5, the district court mostly adopted the schedule proposed by EPA, subject only to a minor (slightly less than one month) adjustment to EPA's proposed deadline for the San Antonio area designations. *In re Ozone Designation Litig.*, 286 F.Supp. 3d 1082, 1088-90 (N.D. Cal. 2018). The district court rejected the state plaintiffs' request for a shorter deadline for the non-San Antonio designations, *id.* at 1087-88, and also rejected the environmental and state plaintiffs' request to make the designations effective immediately upon promulgation. *Id.* at 1090-91.

Finally, there is no merit to Petitioners' repeated assertions that maintenance of this action after the Extension Notice was withdrawn was necessary to assure completion of the 2015 ozone NAAQS designations. As EPA previously noted, *see* EPA Mot. at 3, when EPA withdrew the Extension Notice, it made clear that "unless and until the Administrator takes additional final action, the 2-year deadline for promulgating designations provided in the Clean Air Act (CAA) applies." *See* 82 Fed. Reg. 37,318 (Aug. 10, 2017) ("Withdrawal Notice"). EPA further stated that "[t]he agency believes that there may be areas of the United States for which designations could be promulgated in the next few months." *Id.* at

[5] As noted in our prior filing, EPA kept this Court fully apprised of developments in the district court case. *See* EPA Mot. at 4, n.3, and 8-9, nn.4&5.

37,319. As we previously explained, the Agency's subsequent issuance of the final designations, in three stages, was entirely consistent with the forecast in the Withdrawal Notice, EPA Mot. at 3, and there is no reason to believe that EPA would not have taken the same action, on at least roughly the same schedule, with or without any judicial involvement.

More importantly, however, once EPA issued the Withdrawal Notice, the statutory deadline for issuance of the final 2015 ozone NAAQS designations reverted to October 1, 2017, and Petitioners' legal rights and remedies to enforce that deadline were the same as if the Extension Notice had never been issued. Therefore, to the extent they felt the need for judicial oversight to keep EPA on schedule, Petitioners' appropriate remedy was in district court under 42 U.S.C. § 7604, the Clean Air Act citizen suit provision, and continued maintenance of the challenge to the Extension Notice in this Court was wholly unnecessary.

Petitioners in fact pursued their citizen suit remedy, and as the district court expressly noted, in that action EPA "[did] not dispute that the Administrator violated [42 U.S.C.] section 7407(d)(1)(B)(i) by failing to promulgate by October 1, 2017 initial area air quality designations under the 2015 ozone NAAQS for all areas of the country." 286 F. Supp. 3d at 1085. Since EPA had issued designations for most areas of the country in November 2017, *see* 82 Fed. Reg. 54,232 (Nov. 16, 2017), the only disputed issue before the district court was the

appropriate remaining deadlines to include in a remedial order, and as discussed above, the court largely found EPA's proposed schedule to be reasonable, with one minor exception. Nonetheless, although the district court set enforceable deadlines in an order issued on March 12, 2018, Petitioners illogically continued to insist in numerous filings with this Court after that date (and, in a sense, continue to insist today) that relief was also needed from this Court to keep EPA on schedule.

For all these reasons, Petitioners' equitable arguments are both irrelevant and misleading. Although EPA admittedly missed the October 1, 2017 deadline, EPA acted reasonably in completing these designations as quickly as possible thereafter, and it is debatable whether EPA's schedule for issuing the designations for the 2015 ozone NAAQS was materially affected by *any* litigation brought by Petitioners. Certainly, however, once EPA issued the Withdrawal Notice, there was no need for any further action by *this* Court, given that Petitioners had (and in fact pursued) a more appropriate remedy in district court, and that court set enforceable deadlines in a March 2018 order.

CONCLUSION

For all the foregoing reasons, as well as those set forth in EPA's motion to govern further proceedings and to dismiss, this case should be dismissed as moot. Further, for the reasons previously stated, should the Court grant EPA's motion to dismiss, EPA further suggests that the Court consider an award of attorney fees in

favor of EPA pursuant to 42 U.S.C. § 7607(f), in connection with the motions to govern further proceedings. *See* EPA Mot. at 16-18.[6]

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

/s/ Jon M. Lipshultz
Jon M. Lipshultz
Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
Tel: (202) 514-2191
Jon.lipshultz@usdoj.gov

Counsel for Respondents

October 9, 2018

[6] EPA again reserves its rights to seek fees, and to oppose other parties' requests for fees, with respect to other proceedings in this case. *See* EPA Mot. at 18, n.7.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2018, I caused a copy of the foregoing response to be served by the Court's CM/ECF system on all counsel of record in this matter.

/s/ Jon M. Lipshultz
Jon M. Lipshultz

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS AND WORD COUNT

I hereby certify, on this 9th day of October, 2018, that this response complies with the type-volume and word count requirements of Fed. R. App. 27 because it has been prepared in 14-point Times New Roman proportionally-spaced font, and contains 3,252 words, as counted by Microsoft Word software.

/s/ Jon M. Lipshultz
Jon M. Lipshultz