

No. 18-1302

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF MARYLAND,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION and DANIEL K. ELWELL,
Acting Administrator of the Federal Aviation Administration,
Respondents.

On Petition for Review of an Action of the
Federal Aviation Administration

UNOPPOSED MOTION TO HOLD CASE IN ABEYANCE

Of Counsel:

LANE N. MCFADDEN
Attorney
Office of the Chief Counsel
Federal Aviation Administration

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
JUSTIN D. HEMINGER
Attorney
Environment and Natural
Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Respondent Federal Aviation Administration (FAA) moves to hold this case in abeyance while the FAA reconsiders the September 2018 letter that Petitioner State of Maryland challenges in this case.

Maryland does not oppose the requested relief.

In support of this motion, the FAA states as follows:

1. In June 2018, Maryland submitted an administrative petition to the FAA addressing airplane flight approach procedures at Baltimore/Washington International Thurgood Marshall Airport (BWI Airport). Maryland Br. 13–16.
2. On September 18, 2018, the FAA wrote a letter that responded to the June 2018 petition. Maryland Br. 16.
3. In its opening brief, Maryland acknowledges that its June 2018 petition “does not explicitly track FAA’s procedures for requesting a rulemaking from the agency, *see* 14 C.F.R. § 11.71, nor is it expressly labeled as a petition for rulemaking.” Maryland Br. 33. Nonetheless, Maryland contends that the FAA should have treated the June 2018 petition as such a request. *Id.*
4. Counsel for the FAA has informed counsel for Maryland that the FAA has decided to reconsider its September 2018 letter.

5. Given the FAA's plan to reconsider its September 2018 letter, an abeyance in this Court is warranted. *See Anchor Line Ltd. v. Federal Maritime Commission*, 299 F.2d 124, 125 (D.C. Cir. 1962) (observing that “when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency”); *Railway Labor Executives' Association v. United States*, 675 F.2d 1248, 1252 (D.C. Cir. 1982) (observing that the Court held a petition for review in abeyance pending the outcome of a reconsideration proceeding initiated by the Interstate Commerce Commission); *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (noting that the Court often issues abeyance orders “in light of other pending proceedings that may affect the outcome of the case before us”).

6. 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. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). The FAA's reconsideration may result in a revised letter that either obviates the need for judicial resolution of

some or all of the issues raised by Maryland or that moots the current petition for review.

7. An abeyance would preserve resources of the parties and the Court. Although Maryland has filed its opening brief, briefing is not concluded, and the Court has not yet scheduled oral argument.

Maryland does not oppose this abeyance.

For the foregoing reasons, the FAA respectfully requests that the Court hold the case in abeyance until the FAA concludes its reconsideration, direct the FAA to file status reports every 60 days, and direct the parties to submit motions to govern further proceedings within 30 days after the FAA concludes its reconsideration process.

Respectfully submitted,

/s/ Justin D. Heminger

JEFFREY BOSSERT CLARK

Assistant Attorney General

ERIC GRANT

Deputy Assistant Attorney General

JUSTIN D. HEMINGER

Attorney

Environment and Natural

Resources Division

U.S. Department of Justice

(202) 514-5442

justin.heminger@usdoj.gov

Of Counsel:

LANE N. MCFADDEN

Attorney

Office of the Chief Counsel

Federal Aviation Administration

July 9, 2019

DJ Number 90-13-1-15697

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 494 words, excluding the parts of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Justin D. Heminger
JUSTIN D. HEMINGER

CERTIFICATE OF SERVICE

I certify that on July 9, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Justin D. Heminger
JUSTIN D. HEMINGER