

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, MAJORITY STAFF DIRECTOR
RUTH VAN MARK, MINORITY STAFF DIRECTOR

July 25, 2011

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: EPA's Reconsideration of the Primary and Secondary National Ambient Air Quality Standards for Ozone

Dear Administrator Jackson:

On July 13, 2011, you sent a letter to Senator Carper clarifying the basis for your decision to undertake a reconsideration of the 2008 National Ambient Air Quality Standard for ozone. In your response, you state that you relied on the Clean Air Science Advisory Committee (CASAC) to review the work of your Agency's health scientists and to provide recommendations. You further state that the 2008 standard was immediately challenged in court "based on arguments that the 0.075 ppm designation was 'arbitrary and capricious' because it was not consistent with the recommendations of CASAC," and that the legal defensibility of the standard posed major challenges for the federal government.

Your comments as well as the June 30, 2011 testimony by your Assistant Administrator, Ms. Regina McCarthy, before the Senate Environment and Public Works Committee are consistent in suggesting that the key factor compelling your decision to reconsider the 2008 standard was the fact that the 75 parts per billion (ppb) standard fell outside the 60 to 70 ppb range recommended by CASAC. Even though final action on the next statutorily required five year-review of the standard is due only two years from now in 2013, you felt and continue to feel compelled to revise the 2008 standard based on the now outdated scientific record.

Your interpretation of the Clean Air Act on this central point and thus your decision to revise the 2008 standard has no statutory basis. The Clean Air Act is clear in providing the Administrator with the exclusive authority and responsibility to determine the ambient level that is requisite to protect public health. CASAC's role in the development of NAAQS is to provide expert advice to the Administrator on the public health and environmental effects of air pollutants. Establishing a standard that is "requisite" to protect public health with an adequate margin of safety, however, is a science-based policy decision left exclusively to the Administrator's judgment. If the Administrator takes the CASAC recommendations at face value, she will have failed to exercise her independent judgment as required under the Act.

Based on your recent letter to Senator Carper, Ms. McCarthy's testimony, and a review of the proposed reconsideration, we have concerns regarding whether you improperly relied on CASAC and failed to exercise your independent judgment in proposing to reconsider the 2008 standard.

You are also incorrect in suggesting that EPA's 2008 decision is inconsistent with the scientific record. A close examination of the record shows that EPA based its decision on the entire body of scientific evidence and information available at the time. While Administrator Johnson judged the current standard of 0.08 ppm not to be requisite to protect public health with an adequate margin of safety, he also found significant reasons not to set a standard lower than 0.075 ppm. Specifically, EPA noted that at exposure levels below 0.080 ppm, there is "only a very limited amount of evidence" of ozone-related lung function decrements and respiratory symptoms from controlled human exposure studies which he regarded as providing the most certain evidence of adverse health effects. EPA observed that the great majority of the evidence concerning effects below 0.080 ppm came from epidemiological studies. Here the Administrator correctly noted that the epidemiological studies "do not identify any bright-line threshold level for effects" and are not "direct evidence" of a causal link between exposure to ozone and a wide array of respiratory and cardiovascular effects. He stated that while many epidemiological studies reported positive and statistically significant associations, other studies reported non-statistically significant associations or no positive association at all. The Administrator concluded that evidence of a causal relationship between adverse health outcomes and ozone exposures becomes increasingly uncertain at lower levels of exposure. Administrator Johnson also carefully examined the results of the risk and exposure assessment. The Administrator concluded that given the degree of uncertainty associated with the risk estimates for each benchmark level examined, there was not an appreciable difference from a public health perspective in the estimates of exposures associated with air quality just meeting an 8-hour standard set at 0.070 ppm (the upper end of the CASAC range) versus an 8-hour standard of 0.075 ppm (his final recommended level). And in the absence of record evidence demonstrating that a standard stricter than 0.075 ppm would result in an appreciable difference in public health benefit, EPA cannot support its conclusion that the stricter standard addresses a significant risk and thus is requisite to protect the public health.

While you may disagree with the decision made by Administrator Johnson in the final 2008 standard, this does not mean the Administrator's decision is inconsistent with the scientific record. As the Agency correctly noted in the 2008 final ozone rule, the selection of any particular approach to providing an adequate margin of safety is "a policy choice left specifically to the Administrator's judgment (*Lead Industries Association v. EPA*, 647 F.2d at 1161-62)" that involves consideration of such factors as the nature and severity of the health effects involved, the size of the population(s) at risk, and the kind and degree of the uncertainties that must be addressed. Furthermore, the decision must neither overstate nor understate the strength and limitations of the evidence and information. Administrator Johnson made a decision based on a thorough review of the science in accordance with the requirements of the Clean Air Act. Differing opinions of the scientific record, while valid, should not be a sufficient basis to reconsider the rule, especially given the significant uncertainty it creates.

We also have concerns that the reconsideration itself does not adhere to the requirements of the Clean Air Act and thus may be illegal. Your January 19, 2010 proposal to reconsider the 2008 standard proposes to lower the ozone standard to the CASAC recommended range of 60 to 70 ppb. Remarkably, it does not seek comment on the 2008 standard of 75 ppb or anything between that standard and the CASAC range, even though the proposed rule is defined as a reconsideration of the 2008 standard. Failure to seek comment on 75 ppb as part of the reconsideration proposal not only suggests an improper reliance on CASAC but may itself be illegal. While the proposed rule is littered with statements that EPA is “reconsidering” the primary NAAQS (*e.g.*, 75 Fed. Reg. 2943), you make clear in the very first sentence of the proposed rule that the reconsideration has already occurred and been decided. 75 Fed. Reg. at 2940 (“The proposed decisions presented in this notice are based on a reconsideration of the 2008 O₃ NAAQS final rule...”). The omission of any consideration of maintaining the current standard demonstrates that the proposal is not in fact a reconsideration, but the proposal of an entirely new standard without following the requisite process provided under the Clean Air Act.

Most significantly for an Administration that stresses the importance of transparency, the reconsideration shows that you appear to have already determined, before receiving *any* public comment that you intend to lower the primary NAAQS from 75 ppb to a level to the CASAC range of 60 to 70 ppb. By imposing this constraint and failing to seek comment on the existing standard or any standard between 70 and 75 ppb, you have effectively bypassed the statutory requirement to receive and consider public input on revisions to the NAAQS as required under the Clean Air Act (42 U.S.C. § 7607(d)). The decision to lower the standard is a *fait accompli*. This contravenes the very purpose of notice-and-comment rulemaking, which is to ensure that public comment will be considered by an agency before it reaches its decision, and that an agency may alter its action in light of those comments.

Nothing in the Clean Air Act authorizes EPA to circumscribe the topics for public comment in this manner on a standard that has been issued under valid procedures and is currently in place, particularly where it has unilaterally decided to abandon an existing standard entirely on its own volition without following any of the required procedures under the Clean Air Act for revising a standard. EPA has not developed a new criteria document or based its decision on the latest scientific information as required under the Act. Indeed, by imposing such a limitation, the Agency may constrain the ability of the public to seek judicial review of its final rule. This cannot be a result that Congress would have considered acceptable when it imposed the CAA-specific public comment requirements.

In light of these statements, could you please answer the following questions:

- Do you believe you were in any way legally compelled to review and reconsider the judgment made by the previous Administrator Stephen Johnson in establishing the NAAQS for ozone in 2008 even though you purport to rely on no new science? If so, what is the basis for that belief?
- If you do not believe you were legally compelled to reconsider the standard, why did you choose to do so given that any such reconsideration was unlikely to be completed earlier than 3 years into the already compelled 5-year NAAQS review process?

- Do you believe that then-Administrator Johnson was compelled to set the standard within the range recommended by CASAC? If so, why? What language in the Clean Air Act indicates that the Administrator should *not* exercise his or her judgment in setting the standard?
- Do you believe the Administrator has the authority to establish a standard that is in conflict with the advice of CASAC? What meaning do you ascribe to the word “recommend” in 42 U.S.C. § 7409(d)(2)(B); which states that the CASAC “shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards . . .”? Wouldn’t you agree that recommends means to advise but not dictate the outcome?
- Why would the statute provide that the Administrator must give an “explanation of the reasons” for any differences in a proposed NAAQS, in “any important respect,” from the CASAC’s “pertinent findings, recommendations, and comments”) in 42 U.S.C. § 7607(d)(3) if you were required to set the NAAQS within the CASAC recommended range? How would such a result square with *Am. Farm. Bureau Fed’n v. U.S. Evtl. Prot. Agency*, 559 F.3d 512, 522 (D.C. Cir. 2009), which held that the Administrator is not compelled to follow CASAC’s advice?
- Do you believe CASAC may be overstepping its authority by making what appears to be both policy and scientific advice in recommending that the standard be set between 60 and 70 ppb? What factors do you believe the Administrator has both the authority and ability to consider that fall outside CASAC’s role?
- In your July 12, 2011 proposed rule to revise the secondary nitrogen dioxide (NO₂) and sulfur dioxide (SO₂) NAAQS, you decided not to adhere to CASAC’s recommendation to establish a new secondary standard for acidity. Similarly, in your February 11, 2011 proposed rule to revise the carbon monoxide (CO) primary standard, you decided against CASAC’s preference to lower the standard. Why did you feel that you have the flexibility in the context of the primary CO standard and the NO₂ and SO₂ secondary standard to deviate from CASAC’s recommendations when you feel compelled to adhere to CASAC in the context of the ozone reconsideration? Did you deviate from CASAC’s advice in the CO and the NO₂ and SO₂ NAAQS proposed rules based on scientific, policy or legal grounds? Doesn’t your action in regard to these rules confirm that EPA is not bound by CASAC? Don’t they also confirm that only the Administrator can make the complicated legal, policy and science judgment in determining what level is requisite to protect public health in setting a standard?
- Do you believe disagreement with the previous Administration’s decision is sufficient grounds to conduct a reconsideration of a standard 19 months after the rule was promulgated? Doesn’t that put any major controversial decision in jeopardy if the Administration changes? Is that an appropriate approach to governance?
- Why did your proposal to reconsider the 2008 standard omit retaining the existing standard of 75 ppb? Why do you believe the proposal can be defined as a

reconsideration if it does not include the existing standard as an option and request comment on that standard?

- By omitting the existing standard, aren't you in essence proposing a new standard without having adhered to the required procedures under the Clean Air Act, such as developing a new Criteria Document (or Integrated Science Assessment) and basing your decision on the latest scientific information?
- Why did you think it was appropriate to decide the new level of the standard (60 to 70 ppb) in your proposed reconsideration without first seeking public comment? Do you think deciding the appropriate range of the new standard prior to issuing your reconsideration proposal without first soliciting public comment adheres to the Administration's policies regarding transparency?
- Given that EPA has conceded that the reconsideration cannot be based on the "latest scientific knowledge" but only "on the scientific and technical record from the 2008 rulemaking" *See* 75 Fed Reg. 2938, 2944 (Jan. 19, 2010), isn't it true that resetting the standard now will be based on outdated information. If not, why not?
- How will this disruption be managed by states that are revising their implementation plans based on the 2008 NAAQS?
- In testimony, Ms. McCarthy stated that you have decided to move forward with the next scheduled review due to be completed in 2013. Why should states go through the difficult process of making designations and developing state plans only to know that they will have to redo the designations and state plans two to three years later? Isn't this unreasonable and destabilizing for states and regulated industries?

Finally, our understanding is that the 2008 to 2010 air quality data show significant continued improvement in air quality from existing regulations. Many areas that would be out of attainment with the 75 ppb standard based on earlier air quality data (2005 to 2007) will happily find that the new data will show they are in attainment. This data suggest that areas are continuing to make significant progress in reducing ozone under existing regulations. The significant new regulations now under development, such as the final Clean Air Transport Rule and the Utility Maximum Achievable Control Technology Rule will ensure that this progress accelerates without lowering the ozone standard further. In fact, many areas that EPA would declare as being in nonattainment based on the 2008 to 2010 data will likely find that they are in attainment based on likely 2011 to 2013 air quality data. And yet, by proposing to reconsider the standard now, EPA will be forcing hundreds of marginal areas to be needlessly designated as nonattainment. This will likely choke off economic development in many of these areas at a time when they need economic growth and job creation.

- Why has EPA delayed the release of this data until after the final transport rule was released? When was the data ready for release? If the existing 2008 standard is maintained, how many of these areas will be reclassified from nonattainment to attainment?

The Honorable Lisa P. Jackson

July 25, 2011

Page 6

- What are EPA's projections for continued air quality improvement based on existing and soon to be finalized regulations? How many existing nonattainment areas could attain the standard based largely on currently planned federal regulations?
- By moving forward with the reconsideration now, isn't EPA needlessly forcing potentially duplicative local control costs of hundreds of areas across the country that may be out of attainment only for a short time but would likely be brought back into attainment based on the existing and currently planned federal regulations?

In light of the Administration's commitment to complete its decision on the ozone NAAQS by the end of this month, we request that you answer these questions by July 29, 2011.

Sincerely,



James M. Inhofe
Ranking Member
Committee on Environment & Public Works