

Attorneys General of New York, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, and Rhode Island, the Corporation Counsel of the City of New York, and the California Air Resources Board

September 18, 2015

By electronic mail and first class mail

Howard Shelanski, Administrator
Office of Information and Regulatory Affairs
The White House Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Re: *Final National Ambient Air Quality Standards for Ozone*

Dear Administrator Shelanski:

We understand that the Environmental Protection Agency has submitted to the Office of Information and Regulatory Affairs (OIRA) a final rulemaking package on the National Ambient Air Quality Standards for Ozone. As you are aware, EPA is under a federal court order to issue a final rule by October 1, 2015. We urge you to support EPA's adoption of a primary 8-hour standard for ozone below 70 parts per billion to protect public health with an adequate margin of safety. And to protect public welfare, we urge you to support EPA's adoption of a cumulative, seasonal secondary standard at a level within the range recommended by the Clean Air Scientific Advisory Committee.

As EPA has determined, the scientific evidence of harm to public health from ozone pollution is well established. At certain concentration levels, ozone irritates the respiratory system, causing coughing, wheezing, chest tightness and headaches. People exposed to elevated levels of ozone suffer from lung tissue damage, and aggravation of asthma, bronchitis, heart disease, and emphysema. Children, older adults, people with asthma or other lung diseases, and people who are active outdoors are particularly susceptible to the harmful health effects of ozone. Ozone pollution also harms public welfare by, for example, damaging trees and reducing crop yields by interfering with the ability of plants to produce and store food and making them more susceptible to disease, insect pests, and other stressors. Ozone can also inhibit the ability of plants and trees to mitigate harms from climate change.

To protect against these adverse impacts and "to promote the public health and welfare and the productive capacity of its population," the Clean Air Act aims "to protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). To achieve this goal, the Act requires EPA to adopt primary standards for certain pollutants, such as ozone, at a level that protects public health with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). The Act also requires EPA to adopt secondary standards at a level that protects the public welfare from "any known or anticipated adverse effects." 42 U.S.C. § 7409(b)(2). The Act mandates that EPA review the air quality standards

every five years and revise the standards as appropriate. In its review, EPA must set the primary and secondary standards based on the scientific evidence, and may not consider implementation costs. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001).

The last time EPA revised the ozone standards, in 2008, our States sued the agency for failing to adopt primary and secondary standards that adequately protect public health and welfare as required by the Clean Air Act. We argued that EPA's primary 8-hour standard of 75 parts per billion (ppb) did not adequately protect public health. We also argued that EPA erred by adopting an identical secondary standard to protect public welfare. In 2009, EPA announced it would voluntarily reconsider the ozone standards, so the litigation was put on hold. EPA then proposed to strengthen the primary standard to a range of 60-70 ppb and adopt a separate secondary standard to protect forests and crops from cumulative ozone exposure, consistent with the recommendations of the Clean Air Scientific Advisory Committee (CASAC). However, on September 2, 2011, then-OIRA Administrator Sunstein informed EPA that the President did not support finalizing revised standards at that time, citing, *inter alia*, that the next mandatory five-year review of the standards was well underway. Thus, litigation resumed, and the D.C. Circuit held that there was adequate support in the record then for the 75 ppb primary standard, but agreed with our position that the secondary standard was unlawful. *Mississippi v. EPA*, 744 F.3d 1334 (D.C. Cir. 2013). Therefore, the final rulemaking package currently being reviewed by OIRA is both EPA's response to the court's decision and its satisfaction of its statutory obligation to periodically review and update the standards to ensure they adequately protect public health and welfare.

In 2014, EPA issued a proposed rule in which it concluded that the current primary standard of 75 ppb does not adequately protect public health, and proposed to revise the standard within the range of 65-70 ppb (EPA also requested comment on a standard down to 60 ppb). CASAC recommended a primary standard in the range of 60-70 ppb. CASAC further advised that in light of scientific evidence showing adverse effects at concentrations at or near 70 ppb, including decreases in lung function, increases in respiratory symptoms and increases in airway inflammation, setting the standard at this level would offer little margin of safety, particularly for sensitive subpopulations. Therefore, several of our States in commenting on the proposal urged EPA to adopt a primary standard lower than 70 ppb to protect public health with an adequate margin of safety. As CASAC concluded, the extensive and overwhelming public health evidence contained in the record fully support setting the primary standard at a level below 70 ppb.

Regarding the secondary standard, which EPA proposed to set identical to the primary standard (based on an 8-hour average and in range of 65-70 ppb), the D.C. Circuit explained that "it is insufficient for EPA merely to compare the level of protection afforded by the primary standard to possible secondary standards and find the two roughly equivalent." *Mississippi v. EPA*, 744 F.3d at 1360-61 (quoting *American Farm Bureau v. EPA*, 559 F.3d 512 (D.C. Cir. 2009)). Rather, "EPA must expressly 'determine what level of ... protection is requisite to protect the public welfare,' along with an explanation for its finding. *Id.* Because an 8-hour standard fails to adequately account for the cumulative exposure plants and trees experience over the course of the growing

season, CASAC recommended that EPA adopt a separate standard to protect public welfare. Similarly, in comments on the proposal, several of our States urged adoption of a cumulative, seasonal secondary standard (W126-exposure index over three-month period) in the range recommended by CASAC (7-15 ppm-hrs) to protect the public welfare from known and anticipated adverse effects of ozone pollution, including visible foliar injury, reduced vegetation growth, reduced and poor crop yield, and impacts on terrestrial ecosystems.

We recognize the concerns raised by some western states that higher background levels of ozone in that region may make it more difficult to attain more protective standards. However, the solution to that problem is not—as some have argued—for EPA to decline to strengthen the ozone standards nationally. The language of the Clean Air Act in Section 109(b) is clear: EPA may not “consider costs in setting the standards,” *Whitman*, 531 U.S. at 465, and as explained above, the overwhelming scientific evidence shows that the current standards are inadequate to protect public health and welfare. If EPA concludes that certain regions may be unable to attain more protective standards due to elevated background levels, the agency can apply its Exceptional Events policy to permit states to exclude data associated with event-influenced exceedances or violations of the standard.¹ See 79 Fed. Reg. at 75,383-84.

Ozone pollution remains a serious and persistent problem for our nation, posing a particular risk to the health of children, the elderly and the sick, as well as individuals who spend time outdoors. We therefore urge you to support EPA in promulgating ozone standards by October 1, 2015 that fully meet the requirements of the Clean Air Act. Thank you for your attention to this critical matter.

Sincerely,

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¹ EPA’s proposed rule states that EPA intends to develop guidance and propose revisions to the Exceptional Events Rule in a future notice and comment rulemaking. 79 Fed. Reg. at 75,383.

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cc: Gina McCarthy, EPA Administrator
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