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March 17, 2015

Ms. Gina McCarthy
Administrator
U.S. Environment Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

**Re: Proposed National Ambient Air Quality Standards for Ozone – 79 Fed. Reg. 75234
(December 17, 2015), Docket ID No. EPA-HQ-OAR-2008-0699**

Dear Administrator McCarthy:

The States of Alabama, Indiana, Mississippi, North Dakota, West Virginia and Wyoming (States) have a shared desire to work constructively with EPA on issues related to the implementation of the federal Clean Air Act (CAA). As you know, the CAA establishes a partnership between EPA and the States for addressing sources of air pollution within their jurisdiction. The National Ambient Air Quality Standards (NAAQS) are a key component of our partnership.

The States are proven leaders in environmental and energy policy and have a strong interest in preserving and growing their respective economies in an environmentally sustainable and energy-efficient manner. From these perspectives, we have serious concerns with the reduced ozone NAAQS scenarios EPA has proposed. Specifically, the States are concerned that EPA has not fully considered western background issues, has not received or considered the statutorily required range of critical information from the Clean Air Act Science Advisory Committee (CASAC), and has not assembled adequate and objectively transparent science to support lowering the ozone NAAQS.

For the reasons explained in these comments, the States respectfully ask EPA to fundamentally reconsider the Proposed Rule.¹ Until such time as EPA addresses the States' concerns, EPA should maintain the current NAAQS for ozone of 75 parts per billion (ppb) and commit to enhanced efforts on working with the States in effectively implementing that standard. Indeed, the States are still reviewing EPA's proposed State Implementation Plan (SIP) requirements for the current standard that EPA published on March 6, 2015. If EPA finalizes the Proposed Rule under the existing schedule, the States will be required to initiate implementation

¹ While some of the States are submitting separate comments on the Proposed Rule, they have also joined in these comments.

of the existing standard under the shadow of a substantially more stringent standard that, in many areas, is simply not attainable.

I. Introduction

The States appreciate EPA's acknowledgement that the data compiled in preparation for this proposed rulemaking clearly demonstrate that ambient ozone levels have decreased substantially as a result of past and ongoing actions by EPA and States. This result is strong evidence of the effective Federal/State partnership created by the CAA and a guide as to how it should continue to function.

As a starting point, all agree that the NAAQS must be requisite to protect the health of our citizens. The Supreme Court of the United States has explained, however, that "requisite to protect" means "not lower or higher than is necessary." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 476 (2001). Therefore, in assuring that the NAAQS is neither higher nor lower than the "necessary" levels to protect the public health, EPA must assure that the NAAQS is based on sound and transparent science. In addition, CAA § 109 broadens the concept of requisite to include various contextual factors such as unique regional conditions and socioeconomic impacts and the health impacts associated with diminished economic opportunity. This includes taking into account that the Proposed Rule directly raises the very significant issue of potential widespread unattainability of the proposed revised NAAQS due to background levels that are not subject to control by either the States or the Federal government through their statutory and regulatory authority.

II. EPA Has Not Adequately Considered Western Background Ozone

In the Proposed Rule, EPA identifies several types of background ozone sources that can increase ambient ozone concentrations and contribute to exceedances of the ozone NAAQS. These background sources include international transport, stratospheric ozone intrusions, and ozone originating from natural sources such as wildfires (79 Fed. Reg. at 75342). Also important to background concentrations are lightning, biogenic sources such as pine trees, and elevation. EPA acknowledges that it can account for background concentrations when setting NAAQS. (79 Fed. Reg. at 75238, citing *American Trucking Associations, Inc. v. EPA*, 283 F.3d 355, 378 (D.C. Cir., 2002)) but declines to do so at the standard-setting stage. Because of the significant reductions already achieved through successful implementation of the CAA and the resultant and ever-diminishing gap between naturally occurring ozone levels and the existing standard, such delay in consideration is a serious error.

The States call attention to EPA's acknowledgement that "there can be episodic events with substantial background contributions where O₃ concentrations approach or exceed the level of the *current* NAAQS (i.e., 75 ppb)" (79 Fed. Reg. at 75242; emphasis added). Unfortunately, the Proposed Rule seeks to impose new regulatory standards at or below background ozone levels for many western air quality control regions, meaning that no amount of technological innovation (or costs expended) will allow those regions to reach attainment status. Background ozone, whether attributable either to natural phenomena or to emissions from outside of the U.S., is plainly beyond a States' (or EPA's) control, and Congress simply did not intend to require

states to do the impossible.² The legislative history of the CAA's NAAGS provisions makes this clear:

Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should [b]e set at zero or background levels. Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 127 (1977).

The States are concerned that EPA is overlooking background ozone concentrations at the standard-setting stage based on a promise to later build flexibility into the implementation and enforcement stage. In fact, EPA has made an express decision not to break out background ozone when considering potential health effects:

EPA has updated several aspects of our methodology for estimating the change in health risk and exposure that would result from a revision to the O₃ NAAQS. First, risk estimates are now based on total O₃ concentrations, as opposed to previous reviews which only considered risk above background levels.

EPA Policy Assessment, Second External Review Draft, January 2014, at 2-11.

Such approach, however, is not consistent with the CAA, which places the burden on "each state" to develop a plan specifying how the NAAQS "*will*" be attained and maintained" (§ 107(a); emphasis added). *See also* CAA. §§ 110(a)(2) (infrastructure SIPs), 172(c) (general requirements for nonattainment area SIPs), 182 (specific requirements applicable to SIPs for ozone nonattainment areas). A NAAQS that is impossible for many areas to attain sets an unachievable implementation mandate for the States.

Instead of addressing these legitimate concerns during the standard setting stage, EPA identifies three programs that it claims will provide later regulatory relief for the States in situations in which ozone levels "approach or exceed the concentration levels being proposed in this notice (i.e., 60-70 ppb) in large part due to background sources." 79 Fed. Reg. at 75382. Specifically, EPA discusses use of (a) exceptional event exclusions, (b) treatment as rural transport areas, and (c) international transport provisions. 79 Fed. Reg. at 75383-85. These provisions do not adequately substitute for EPA's responsibility to take background ozone levels properly into account in revising the NAAQS. While each of these provisions could, in theory, provide limited relief for a limited set of exceedances, each has been a part of the CAA for a decade or more without being used effectively. EPA must address this fundamental issue before proceeding any further with the proposed ozone NAAQS rule.

² EPA should not set NAAQS at background levels on the mistaken belief that the decision in *API v. Costle*, 665 F.2d 1176, 1184-86 (D.C. Cir. 1981), allows that result. To the contrary, *API* simply did not address the issue of whether a NAAQS that was unattainable not just in a single locale such as Houston, but throughout much of the nation due to factors beyond the control of the states or any U.S. regulated entities would be consistent with the CAA.

The States appreciate EPA's foundational work with the western states on these issues thus far. EPA has participated in several previous Western States Air Resources Council (WESTAR) events on this precise topic (i.e., "WESTAR Conference on Western Ozone Transport," October 11, 2012) and a major WESTAR conference on the topic will be taking place shortly after the current comment deadline for the Proposed Rule (i.e., Transboundary Ozone Pollution Conference," March 31-April 2, 2015). EPA should allow these collaborative efforts to bear future fruit by improving the very limited understanding of background ozone in the west and then assure that their content is meaningfully considered as part of the pending rulemaking.

Such improved understanding and consideration is especially important for rural areas in the west. EPA has proposed increasing state monitor requirements in remote rural areas, including national parks and other federal land areas. 74 Fed. Reg. 34525, 34530-31. The isolated nature of these areas combined with background concerns means this strategy will seriously and disproportionately impact the west by increasing the number of areas susceptible to a nonattainment designation that can never be overcome due to high background levels and no anthropogenic sources to control or offset. As a group of well-respected scientists noted:

If the NAAQS is lowered in the 60-70 ppbv range, areas of the intermountain West will have little or no ability to reach compliance through North American regulatory controls.

Zhang et al, Improved Estimate of the Policy-Relevant Background Ozone in the United States, 45 *Atmospheric Environment* 2011, at 6773-74.

III. EPA Should Not Proceed Until CASAC Fulfills Its CAA Obligations

EPA should not pursue any potential revisions to the Ozone NAAQS until it receives the full suite of critical advice required from the Clean Air Science Advisory Committee (CASAC). Specifically, CAA § 109(d)(2)(C)(iv) contains a clear requirement directing that CASAC "shall" "advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity" and "advise the Administrator of any adverse public health, welfare, **social, economic, or energy effects** which may result from various strategies for attainment and maintenance of such national ambient air quality standards." CAA § 109(d)(2)(C). Congress clearly wanted CASAC to play a broader role than simply advising EPA on the level of the NAAQS, which is all CASAC has done for the current Proposed Rule. CASAC's offer to provide such analyses at a later stage of the implementation process is inadequate. See CASAC Review of the EPA's *Second Draft Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards*, Letter to Gina McCarthy, June 26, 2014, at v.

Because CASAC did not fulfill its statutorily required role to advise EPA, EPA's proposals to lower the NAAQS (and attendant RIA) are not sufficiently supported for the following reasons:

- **There is an absolute need for a valid source of information** about background concentrations (attributable to both natural and non-U.S. anthropogenic sources) and the degree to which they affect the ability of certain areas to achieve the ozone NAAQS.

- **In considering the contribution from anthropogenic sources, CASAC should distinguish between** (i) anthropogenic sources that are within the U.S. and therefore subject to control under the CAA and (ii) anthropogenic sources from outside the U.S., which are not.
- **Without that information,** a major unresolved issue is whether the tools EPA says will provide “regulatory relief” for exceedances due to background ozone (exceptional events, rural transportation, and international transportation) are likely to, in fact, provide such relief. *See* 79 Fed. Reg. at 75382-85.

IV. Conclusion

For the reasons outlined above and based upon other comments submitted by the States, the States respectfully request that EPA: 1) withdraw the Proposed Rule and 2) initiate a means for cooperation and consultation directly with the States. If EPA is unwilling to immediately withdraw the Proposed Rule, it should, at a minimum, grant an extension of the public comment period for an additional ninety (90) days. This additional time is critical to allow for meaningful dialogue on the issues noted above.

Sincerely,



L. David Glatt, Chief, Environmental Health Section
North Dakota Dept. of Health



Lance LeFleur, Director
Alabama Dept. of Environmental Management



Thomas W. Easterly, Commissioner
Indiana Dept. of Environmental Management

A handwritten signature in blue ink that reads "Gary C. Rikard". The signature is written in a cursive style with a large, looped initial "G".

Gary Rikard, Executive Director
Mississippi Dept. of Environmental Quality

A handwritten signature in blue ink that reads "Randy Huffman". The signature is written in a cursive style with a large, looped initial "R".

Randy Huffman, Secretary
West Virginia Dept. of Environmental Protection

A handwritten signature in blue ink that reads "Todd Parfitt". The signature is written in a cursive style with a large, looped initial "T".

Todd Parfitt, Director
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