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March 17, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Comments of the States of Nebraska, Oklahoma, West Virginia, Alabama, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Montana, North Dakota, Ohio, South Carolina, and Wisconsin Concerning The Proposed Revision Of The Primary And Secondary National Ambient Air Quality Standard For Ozone (EPA-HQ-OAR-2008-0699)

Administrator McCarthy,

As the chief legal officers of our States, we write to express concern with the proposed rule issued by the United States Environmental Protection Agency ("EPA") which seeks to set the National Ambient Air Quality Standard for Ozone at a level which is unachievable. 79 Fed. Reg. 75234 (December 17, 2014) ("Proposed Rule").

EPA is conducting a review of its primary health-based and secondary welfare-based National Ambient Air Quality Standards ("NAAQS") for ground-level ozone ("O_3"). Presently, the 8-hour O_3 NAAQS is 0.075 parts per million ("ppm") based on a 3-year average of the annual fourth-highest daily maximum 8-hour average O_3 concentration. *See* 40 C.F.R. § 50.15. The Proposed Rule proposes to reduce both the primary and secondary O_3 NAAQS to somewhere between 0.065-0.070 ppm and seeks additional comment on 0.060 ppm. 79 Fed. Reg. at 75234.

As explained below, numerous aspects of the Proposed Rule render it unlawful and unachievable. EPA should withdraw the Proposed Rule and revisit the O_3 NAAQS to determine a level which bears a rational connection to the underlying science, accounts for the benefits to be achieved by other recently-promulgated regulations, and does not force states to regulate reductions in background levels.

Background

Section 109(b) of the Clean Air Act ("CAA") directs the Administrator to promulgate NAAQS to limit the level of listed air pollutants, including O_3, in the ambient air. Primary NAAQS are limited to that required to protect the "public health" allowing for an "adequate of margin of safety" while secondary NAAQS are limited to a level which will protect the "public welfare" from "any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. § 7409(b). Once the NAAQS are established, the States are responsible for implementation and enforcement. *See* 42 U.S.C. § 110(a)(1).

The "requisite" level for primary NAAQS is that which is "not lower or higher than necessary – to protect the public health with an adequate margin of safety…." *Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 475-76 (2001). NAAQS are not required to be set at background levels, or eliminate all risk. *See Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1156 n.51 (D.C. Cir. 1980).

NAAQS levels for any particular listed pollutant are based on "air quality criteria" prescribed to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air." *Id.* at § 7408(a)(2). The air quality criteria and NAAQS are to be reviewed every five years and revised "as may be appropriate in accordance with" §§ 108 and 109(b). *Id.* at § 109(d)(1). In conducting the five-year NAAQS review process, the Clean Air Scientific Advisory Committee ("CASAC") advises EPA of any adverse public health, welfare, social, economic, or energy effects which may result from various attainment strategies, noting where additional knowledge and research are necessary, analyzing the impacts of natural and anthropogenic contributions of air pollutants, and making recommendations for any revisions. *Id.* at § 109(d)(2). While the Supreme Court has held that EPA may not consider implementation costs when setting NAAQS, an explanation is to be set forth in any proposed NAAQS revisions to the extent EPA's findings "differ[] in any important respect from any of [CASAC's] recommendations." *Whitman*, 531 U.S. at 486; 42 U.S.C. § 307(d)(3).

EPA originally promulgated NAAQS for O_3 in 1971. 36 Fed. Reg. 8186 (April 30, 1971). A second round of O_3 NAAQS were promulgated in 1979. 44 Fed. Reg. 8202 (February 8, 1979). The second round was eventually replaced in 1997 when EPA set the O_3 NAAQS at 0.08 ppm. 62 Fed. Reg. 38856 (July 18, 1997). The 1997 version of the O_3 NAAQS was challenged in, and upheld by, the D.C. Circuit in *American Trucking*. 175 F.3d 1027, 1033 (D.C. Cir. 1999), *rev'd sub nom Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001); *Am Trucking Ass'ns v. EPA*, 283 F.3d 355 (D.C. Cir. 2002).

EPA lowered the level of both the primary and secondary O_3 NAAQS to 0.075 ppm in 2008. 73 Fed. Reg. 16436 (March 27, 2008). In September 2008, EPA began the current effort to further lower the primary and secondary O_3 NAAQS. 73 Fed. Reg. 56581 (September 29, 2008).

The Proposed Rule Will Cause Substantial Harm to the States

If EPA finalizes the proposed rule and revises the ozone NAAQS, many of the States will be forced to expend substantial public resources to comply. The States play a central role in the regulation of NAAQS, and with the promulgation of new NAAQS comes new challenges for the States. The Clean Air Act imposes on the States the duty to develop and submit state implementation plans ("SIPs") within three years following the promulgation of a primary or secondary NAAQS. *See* 42 U.S.C. § 110(a)(1). The SIP governs how the State will implement, maintain, and enforce the new NAAQS in each air quality control region within its borders. *Id*.

The Proposed Rule revises the ozone NAAQS downward before the current 2008 standards have been fully implemented and assessed by the States. On March 6, 2015, EPA published a final rule for implementation of the 2008 O_3 NAAQS. 80 Fed. Reg. 12,264. This means the States are only now receiving the implementation tools needed to effectively and properly implement the 2008 NAAQS revision. Nonetheless, EPA proposes to move the marker further out, making attainment and maintenance all the more difficult to achieve.

In addition, as numerous stakeholders have more fully explained, the Proposed Rule will have a dramatic negative effect on the economic growth in the States, saddling increasingly heavy compliance costs on job creators—particularly in the manufacturing and industrial sectors. Thus, if promulgated, the Proposed Rule will hamper the creation and preservation of good-paying jobs in the States and quicken the movement of such jobs overseas. As a result, the States will be left to deal with increasing unemployment and more Americans leaving the workforce altogether. The increasing pressure on the already-strained social safety net, combined in many States with a decrease in tax revenue from the depression in economic activity, makes this Proposed Rule a disaster for the States and their citizens.

The Proposed Rule is Illegal

The lower standards in the Proposed Rule are not supported by the scientific evidence, and thus the Proposed Rule is arbitrary and capricious. Under the APA, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. . . ." *Motor Vehicle Mfr's Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Specifically, a rule is arbitrary and capricious where the agency "offered an explanation for its decision that runs counter to the evidence before the agency." *Id.*

As noted, the Clean Air Act requires EPA to set primary NAAQS at a level "requisite to protect the public health" with "an adequate margin of safety," and secondary standards at a level "requisite to protect the public welfare from any known or anticipated adverse effects. . . ." 42 U.S.C. § 7409(b). EPA has not demonstrated that lower levels in the Proposed Rule are "requisite to protect the public health," given the already stringent requirements the agency set in

2008. *Id.* EPA itself has acknowledged that there are no human clinical studies demonstrating a "combination of statistically significant increases in respiratory symptoms and decrements of lung function" at levels below 0.072 ppm, and the agency observed that the best evidence regarding ozone's effects in healthy subjects is based on ozone exposures at 0.080 ppm and above. 79 Fed. Reg. at 75,304.

Accordingly, a decision by EPA to set lower standards would not be based upon a "'rational connection between the facts found and the choice made.'" *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994) (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974)); *see also A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) ("an agency must cogently explain why it has exercised its discretion in a given manner," and that explanation must be "sufficient to enable us to conclude that the agency's action was the product of reasoned decisionmaking" (quoting *State Farm*, 463 U.S. at 48, 52 (alterations omitted))). To the contrary, that decision would "run[] counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

The standards in the Proposed Rule are not achievable because they fail to adequately consider background concentrations. When drafting the NAAQS provisions of the CAA, Congress noted that the standards should not be set at a level which would be unachievable. *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 127 (1977). While Congress could have permitted EPA to set NAAQS at a level low enough that all risk to health and welfare would be eliminated, Congress rejected this approach because such a "no-risk philosophy ignores all economic and social consequences and is impractical." *Id.* Instead, Congress directed that NAAQS are to be set only at the "requisite" level, which the Supreme Court has interpreted as "not lower or higher than necessary – to protect the public health with an adequate margin of safety. . . ." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 475-76 (2001).

In the 2008 rulemaking that resulted in the downward adjustment of the O_3 NAAQS from 0.08 ppm to 0.075 ppm, EPA explained that "a 0.07 standard would be closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of O_3 precursors, and thus more likely to be inappropriately targeted in some areas on such sources." 62 Fed. Reg. at 38,868. In that same rulemaking, the CASAC argued that the standard should not set below 0.08 ppm. *See Whitman v. Am. Trucking Ass'ns*, 175 F.3d 1027, 1035 (D.C. Cir. 1999), *rev'd sub nom Whitman*, 531 U.S. 457. The D.C. Circuit recognized that it "may well be a sound reading of the statute" to say that "given the national character of the NAAQS, it is inappropriate to set a standard below a level that can be achieved throughout the country without action affirmatively extracting chemicals from nature." 175 F.3d at 1036.

In the present rulemaking, however, EPA proposes a range from 0.065 through 0.070 ppm. 79 Fed. Reg. 75234. These proposals are too close to background levels to make any such reductions achievable. For example, the State of Nebraska reports peak background levels of up to 0.068 ppm. Any further reduction to the current O_3 NAAQS level of 0.075 would essentially require Nebraska to eliminate all risk presented by anthropogenic emissions, if not affirmatively extract naturally occurring precursors. Such a requirement is contrary to reasoned decision-making and is thus arbitrary and capricious. *State Farm*, 463 U.S. at 43, 52.

The Proposed Rule is also unlawful because it fails to adequately consider the multiple other programs undertaken by EPA to address the problem that this proposal intends to address. The Supreme Court has long said that a rule is arbitrary and capricious where the agency that promulgated it "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Here—before forcing the States and the job creating industries to expend significant resources in additional pollution control technology—EPA should have examined the air quality impact of several existing or impending regulatory programs. Among these, EPA failed to adequately consider the Mercury and Air Toxics Standards, the Regional Haze Program, the Cross-State Air Pollution Rule, and the Motor Vehicle Emission and Fuel Standards, among others. Although these other programs may also suffer from a variety legal and other problems, EPA was still required to assess the impact of these programs on the ozone problem targeted by the Proposed Rule. By failing to do so, EPA "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Moreover, EPA acknowledged its "Overview" of the proposed rule, that its own "projections show the vast majority of U.S. counties with monitors would meet the proposed standards by 2025 just with the rules and programs now in place or underway." The proposed ozone standard can hardly be considered "requisite", i.e. not more or less than necessary, if the same result will occur regardless of its promulgation.

Respectfully,

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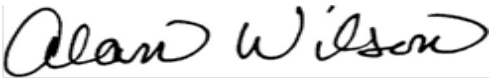

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