

May 26, 2014

Dr. H. Christopher Frey
Chairman, Clean Air Act Science Advisory Committee
Department of Civil, Construction, and
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North Carolina State University
Raleigh, NC 27695-7908

Subject: CASAC's Willful Failure to Comply with the Clean Air Act

Dear Dr. Frey:

I have now had the opportunity to review the May 12th draft letter to Administrator McCarthy from the CASAC Ozone Review Panel and the draft responses to charge questions on the Second Draft Policy Assessment. It is clear that a great deal of thought and effort has gone into these documents. I was puzzled and disappointed, however, to see no mention whatsoever of CASAC's legal obligation under Section 109(d)(2)(C)(iv) of the Clean Air Act to 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" the ozone NAAQS.

I understand that EPA has not asked CASAC or the Ozone Review Panel for an evaluation of these issues and that CASAC normally just responds to questions posed by EPA staff. As you have acknowledged, however, Congress has given CASAC a clear mandate to evaluate the adverse health, welfare, social, economic, and energy effects that will result from the actions that will be needed to attain a new ozone NAAQS. CASAC is required to provide advice on these issues regardless of whether it is requested by EPA.

Given that the Panel has not yet received any studies from EPA about these issues, it is not surprising that your letter does not attempt to evaluate them substantively at this point. It is surprising, however, that you have not asked EPA staff to address these issues in the Policy Assessment or made any attempt to develop a plan or process that would allow you to comply with Section 109(d)(2)(C)(iv) of the Clean Air Act. Your draft letter simply ignores these issues altogether.

You did acknowledge, in the public meeting on March 26, that CASAC has a statutory duty to advise the Administrator of the adverse health, welfare, social, economic, and energy

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effects that may result from strategies to attain and maintain the NAAQS. The only point of disagreement was whether CASAC must provide this advice when it answers EPA's charge questions and make recommendations regarding the adequacy of the NAAQS. At the March 26th public meeting, you relied on statements from an EPA lawyer, Steven Silverman, to take the position that this advice is somehow separate from the other obligations that CASAC has under Section 109 and does not need to be provided when CASAC makes recommendations about the NAAQS. I have a great deal of respect for Mr. Silverman, who is a very able lawyer, but in this matter, his argument simply does not stand up.

I went back and reviewed the transcript of the March 26 meeting, and Mr. Silverman argued his point by referring to a footnote in the Supreme Court's decision in *Whitman v. American Trucking Association*, 531 U.S. 457 (2001). This is the case in which the Court, among other things, held that EPA is not allowed to consider cost in determining where to set the NAAQS. In the body of the opinion, the Court says the following:

[Section] 109(d)(2)(C)(iv) requires the Clean Air Scientific Advisory Committee "to 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" the NAAQS.

531 U.S. at 470. The footnote referenced by Mr. Silverman is at the end of this sentence. It reads as follows:

Respondents contend that this advice is required to be included in the NAAQS rulemaking record – which, if true, would suggest that it was relevant to the standard-setting process. But the provision that respondents cite for their contention, 42 U.S.C. 7607(d)(3), requires only that "*pertinent* findings, recommendations, and comments by the Scientific Review Committee" be included. The Committee's advice concerning certain aspects of "adverse public health . . . effects" from various attainment strategies is unquestionably pertinent; but to say that Committee-generated cost data are pertinent is to beg the question."

531 U.S. at 470, note 2 (emphasis in original). Contrary to the position taken by Mr. Silverman, this footnote makes it clear that, as part of the standard-setting process, CASAC *must* evaluate and advise the Administrator about the attainment strategies that will be needed to attain the NAAQS. The court said explicitly that CASAC's "advice concerning certain aspects of 'adverse public health . . . effects' *from various attainment strategies* is unquestionably pertinent" to the standard-setting process and must therefore be included in the rulemaking record for EPA's decision regarding the

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NAAQS. Clearly, in order to provide advice about the adverse health effect of “various attainment strategies,” CASAC must first evaluate what those strategies will be. In making recommendations about the NAAQS, CASAC is required to advise the Administrator about the adverse health effects of these strategies. There is nothing in this footnote (or anywhere else) to suggest that CASAC may provide its advice on the other adverse effects of these strategies at a different time. The Court obviously assumed that CASAC would evaluate and advise the Administrator about all the adverse effects of the various attainment strategies at the same time. Otherwise, there would have been no reason for the Court to say that CASAC’s advice on adverse effects other than public health effects need not be included in the NAAQS rulemaking record. It certainly did *not* say, as Mr. Silverman suggested at the public hearing, that CASAC need not provide this advice at the same time as it provides advice on the adverse public health effects of the strategies that will be needed to attain and maintain the NAAQS.

The whole of Section 109(d) deals with EPA’s responsibility to review each of the national ambient air quality standards (NAAQS) on a 5-year cycle. With regard to this five-year review process, Subsection (d)(1) sets forth the requirements that apply to the Administrator, and Subsection (d)(2) sets forth the requirements that apply to CASAC. There is no way to read the statute that makes any of CASAC’s obligations any different from the others in terms of either timing or importance.

I urge you, as the Chairman of CASAC and the Ozone Review Panel, to develop a plan that will allow CASAC to meet its obligation to evaluate the strategies that will be needed to attain and maintain a new ozone NAAQS and to advise the Administrator of the adverse effects that will result from these strategies. Your comments on the current draft of the Policy Assessment are the appropriate place to lay out this plan.

It is true that Section 109(d), in its current form, has been in place since 1977. And it appears that CASAC has never complied with its statutory duty under 109(d)(2)(C)(iv) “to 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” the NAAQS. At this point, however, there is increasing and legitimate concern about the adverse effects that will be caused by a lower ozone NAAQS.

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It is premature to speculate about the legal or other consequences that may result if CASAC refuses to comply with Section 109(d)(2)(C)(iv). However, given the widespread concern about the potential adverse effects of a lower ozone NAAQS, it seems unlikely that this issue will go away.

Sincerely,

/s/ Jeffrey R. Holmstead of
Bracewell & Giuliani LLP

cc: Gina McCarthy, EPA Administrator
Janet McCabe, EPA
Steven Silverman, EPA
Dr. Holly Stallworth, EPA