

# **Comments on Reconsideration of the Ozone National Ambient Air Quality Standards**

Presented at the CASAC Teleconference  
February 18, 2011

by

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As a former member of numerous CASAC Panels from 1985 to 2006 and Chair from 1993 to 1996, I would like to share my perspectives on the "Reconsideration."

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# The 1985 – 1989 O<sub>3</sub> Review

- I was appointed to the CASAC O<sub>3</sub> Panel in 1985
- CASAC closure on the CD occurred in October 1986
- However, new studies warranted a 1988 CD Supplement
- CASAC closure on CD Supplement and SP occurred in May 1989
- However, a rapidly emerging 6-hr exposure data base delayed EPA's rulemaking
- A 1991 ALA suit compelled a court-ordered final rule by March 1, 1993
- In August 1992, EPA proposed to keep 1-hr NAAQS at 0.12 ppm
- In January 1993, Carol Browner became the new EPA Administrator
- March 1993, Carol Browner reaffirmed the 1-hr NAAQS at 0.12 ppm even as the evidence supporting a lower 6-8 hr NAAQS grew stronger

If ever there was a time that justified a reconsideration,  
it was then

# March 1, 1993 Final Rule

- The FR Notice also stated that new information not contained in the CD must be reviewed ASAP
- “a rigorous assessment of the new studies is necessary to assure a sound decision”
- Consequently, the Administrator adopted a substantially accelerated schedule for the next review during which I chaired CASAC

# The March FR Also Explained Why the Administrator Took this Action

- “implementation of the NAAQS can have profound economic and social as well as environmental consequences, and it is understandable that Congress would require them to be based on studies that had been rigorously assessed not only by the EPA but also by an independent advisory committee (i.e., CASAC). Under the statute, the process for performing this assessment is preparation or revision of a criteria document.”
- “EPA has taken the view that NAAQS decisions are to be based on scientific studies that have been assessed in air quality criteria.”
- “The Administrator concluded that the best course of action was to complete the current review based on the current criteria and at the same time to proceed as rapidly as possible with the next review of the criteria and standards for O<sub>3</sub>.”

# Present Situation

- Administrator Johnson published final rule on March 27, 2008
- He considered Staff recommendations (<0.08 to 0.064)
- He considered CASAC's recommendations, and
- He arrived at a policy decision to select 0.075 ppm
- The next O<sub>3</sub> review began in September 2009
- The New Administrator disagreed with Johnson nearly 2 years later (January 2010) and decided to "reconsider" his 2008 decision and announced this final rulemaking would be completed by August 31, 2010

# The Reconsideration

- In January 2010, the revisions were proposed
- In August the final rule was postponed until October
- In November the final rule was postponed until December
- In December the final rule was postponed until July 2011 and, as an afterthought, the old CASAC panel was called in to provide “scientific cover” to justify revising the O<sub>3</sub> NAAQS based on 7-year old science
- In the meantime, a new O<sub>3</sub> ISA is about to be released any day for review by a new CASAC panel (the ISA was due in November 2010)

# Conclusions

- The Reconsideration is unprecedented
- It by-passes the requirements of the CAA
- The new science needs to be assessed
- Recent papers on background O<sub>3</sub> could have significant impact on the policy relevant background and hence on the risk assessments
- In my opinion, EPA resources should be focused on the new review, and the reconsideration should be abandoned

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As a former member of numerous Clean Air Scientific Advisory Committee (CASAC) Panels from 1985 to 2006 and Chair from 1993 to 1996, I would like to share my perspectives on the "Reconsideration."

I was appointed to the CASAC Ozone Review Panel in 1985 as the Panel was preparing to review a draft of the ozone Criteria Document (CD). That Panel came to closure on the CD in 1986. Following closure, it came to the Panel's attention that a number of new scientific articles had been published or were in the process of being published that appeared to be of sufficient importance to warrant the preparation of a supplement to the 1986 CD so the information could also be incorporated into the Staff Paper (SP). At a public meeting in December, 1988, CASAC came to closure on both the CD supplement and the SP. In a May 1, 1989 closure letter, the Chair wrote:

While reaching closure at this time, the Committee did note an emerging data base on the acute health effects resulting from 6-plus hours of ozone exposure, providing evidence of the possible need for a standard with a 6-8 hour averaging time. However, it was the Committee's view that it would be some time before enough of this developing information would be published in scientific journals to receive full peer review and, thus, be suitable for inclusion in a criteria document. CASAC concluded such information can be better considered in the next review of the ozone standards.<sup>1</sup>

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<sup>1</sup> McClellan R.O., Closure Letter for the O<sub>3</sub> Criteria Document Supplement and Staff Paper written to Administrator William Reilly, May 1, 1989.

However, nearly two more years passed without EPA taking any action so on October 21, 1991 ALA and other plaintiffs filed suit to compel EPA to complete its review of the criteria and standards for ozone. The U.S. District Court in New York subsequently ordered the Administrator to sign a Federal Register notice announcing the proposed decision on whether to revise the standards by August 1, 1992 and its final decision on March 1, 1993.<sup>2</sup>

On August 10, 1992, the EPA published its intent to not revise the standards at this time.<sup>3</sup> In January, 1993, Carol Browner became the new EPA Administrator and was faced with the March 1 deadline. On March 9, 1993, she published the final rule reaffirming the 1-hour NAAQS of 0.12 ppm for both the primary and secondary standards.<sup>4</sup> If ever the circumstances warranted a reconsideration of a NAAQS, it would appear that this was the time. However, the new Administrator followed the rule of law.

The same notice stated: "a rigorous assessment of the new studies is necessary to assure a sound decision."<sup>5</sup> To facilitate the process, the Administrator adopted a substantially accelerated schedule for the next review, during which I chaired CASAC. The Federal Register notice went on to explain the reasons the Administrator took this path:

As discussed in the August 10, 1992 proposal notice, implementation of the NAAQS can have profound economic and social as well as environmental consequences, and it is understandable that Congress would require them to be based on studies that had been rigorously assessed not only by the EPA but also by an independent advisory committee (i.e., CASAC). Under the statute, the process for performing this assessment is preparation or revision of a criteria document.<sup>6</sup>

It further stated:

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<sup>2</sup> U.S. EPA, "Review of the National Ambient Air Quality Standards for Ozone Assessment of Scientific and Technical Information, OAQPS Staff Paper, EPA-452/R-96-007, June 1996.

<sup>3</sup> 57 FR 35542, August 10, 1992.

<sup>4</sup> 58 FR 13008, March 9, 1993.

<sup>5</sup> *Id.* at 13016/1.

<sup>6</sup> *Id.* at 13013/3.

EPA has taken the view that NAAQS decisions are to be based on scientific studies that have been assessed in air quality criteria.<sup>7</sup>

Finally,

The Administrator concluded that the best course of action was to complete the current review based on the current criteria and at the same time to proceed as rapidly as possible with the next review of the criteria and standards for O<sub>3</sub>.<sup>8</sup>

Thus the expedited review began immediately. The first external draft of the CD was released and reviewed by CASAC in July, 1994 and CASAC came to closure on both the CD and the primary portion of the SP by November 1995.<sup>9,10</sup> Closure on the secondary portion of the SP was delayed until April 1996.<sup>11</sup> The final rule for 8-hour primary and secondary O<sub>3</sub> NAAQS of 0.08 ppm was announced in the Federal Register on July 18, 1997.<sup>12</sup> In the subsequent O<sub>3</sub> NAAQS review, Administrator Johnson lowered the 8-hour primary and secondary NAAQS to 0.075 ppm on March 27, 2008.

Consequently, by following the NAAQS review procedure laid out in the Clean Air Act (CAA) which specifies the development of a CD which contains the latest science and requires CASAC's review and allows for public comment in an open and transparent process, the mission of replacing the 1-hour NAAQS with a multi-hour NAAQS was accomplished in three years. Since an external draft of the new Integrated Science Assessment (ISA) was scheduled to be released in November 2010, a proper NAAQS review following the procedures specified in the CAA could be completed by late 2013 in an expedited review.

The only similarity between the situation in 1993 and the situation in 2011 is that the Administrator (and some members of CASAC) felt that the existing ozone NAAQS needed to be

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<sup>7</sup> *Id.* at 13013/3.

<sup>8</sup> *Id.* at 13013/2.

<sup>9</sup> Wolff, G.T., "CASAC Closure on the Air Quality Criteria for Ozone and Related Photochemical Oxidants," EPA-SAB-CASAC-LTR-96-001, November 28, 1995.

<sup>10</sup> Wolff, G.T., "CASAC Closure on the Primary Standard Portion of the Staff Paper for Ozone," EPA-SAB-CASAC-LTR-96-002, November 30, 1995.

<sup>11</sup> Wolff, G. T., "Closure by the Clean Air Scientific Advisory Committee (CASAC) on the Secondary Standard Portion of the Staff Paper for Ozone," EPA-SAB-CASAC-LTR-96-006, April 4, 1996.

<sup>12</sup> 62 FR 38856, July 18, 1997.

revised. Administrator Browner chose to promulgate the proposed standard and focus on the expedited review and follow the procedures prescribed in the CAA as the way forward. In contrast Administrator Jackson is "reconsidering" a regulation that was finalized three years ago by an Administrator who followed proper procedures in exercising his judgment in a policy matter.

This "reconsideration" is unprecedented. It ignores the requirements set forth in the CAA and will result in the Administrator making a policy decision that can only consider science contained in the 2006 CD which, with a few exceptions, summarizes the state-of-the-art science that is 7 years old! Since the 2006 CD was completed, a number of studies have been published which do not support the epidemiology that EPA relied on in the development of their 2007 risk analysis.<sup>13</sup> In addition, there have been a number of papers published which indicate the background ozone is significantly higher than the values used by EPA.<sup>14</sup> These papers need to be assessed by EPA and subjected to CASAC and public review because they have the potential to significantly lower the 2007 risk estimates.

In the "reconsideration" Notice of Proposed Rulemaking,<sup>15</sup> the deadline for the final rulemaking was set for August 31, 2010.<sup>16</sup> As this deadline approached, the decision was delayed until on or about the end of October.<sup>17</sup> On November 1, it was announced that the decision was delayed until December 31, 2010.<sup>18</sup> On December 11, 2010 EPA filed a statement saying the decision was being delayed until the end of July 2011 so that EPA could review the input that CASAC provides.<sup>19</sup> In other words, as an afterthought, the Administrator was calling in the old CASAC

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<sup>13</sup> Comments of The Alliance of Automobile Manufacturers on EPA's Proposal for Reconsideration of the Primary and Secondary National Ambient Air Quality Standards for Ozone, March 22, 2010, "Alliance Comments," Docket ID No. EPA-HQ-OAR-2005-0172-2133.1.

<sup>14</sup> Lefohn, A. S. and Oltmans, S.J., "Policy-Relevant Background Ozone Comments Using Empirical Data," Comments for Consideration by the US EPA for its Deliberations on the Re-Evaluation of the Ozone Standards, March 18, 2010, Docket ID No. EPA-HQ-OAR-2005-0172-11573.1.

<sup>15</sup> 75 FR 2938, January 19, 2010.

<sup>16</sup> EPA's Notice that It Is Reconsidering the Rule Challenged in These Cases at 2, *Mississippi v. EPA*, No. 08-1200 (D.C. Cir. Sept. 16, 2009).

<sup>17</sup> EPA's Status Report at 2, *Mississippi v. EPA*, No. 08-1200 (D.C. Cir. Aug. 20, 2010).

<sup>18</sup> EPA's Partially Unopposed Motion To Govern Requesting that These Cases Continue To Be Held in Abeyance at 1, *Mississippi v. EPA*, No. 08-1200 (D.C. Cir. Nov. 1, 2010).

<sup>19</sup> EPA's Revised Motion Requesting a Continued Abeyance and Response to the State Petitioners' Cross-motion at 2, *Mississippi v. EPA*, No. 08-1200 (D.C. Cir. Dec. 8, 2010).

Panel to give her scientific cover for not following the procedures specified in the CAA. In the meantime, the new CASAC Panel continues to wait for the first draft of the new ISA which has been delayed (because the Agency is preoccupied with the reconsideration?).

In my opinion, I think EPA would better serve the public interest by abandoning the reconsideration and focusing on the current O<sub>3</sub> NAAQS review to ensure that the assessment of the new air quality criteria is the best it can be. The reconsideration process that is being followed will be a magnet for litigation.

#### Acknowledgement

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