

March 13, 2014

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Chairman, Clean Air Act Science Advisory
Committee
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Re: Your January Presentation on CASAC

Dear Dr. Frey:

I recently had the chance to view and listen to the webinar presentation on CASAC that you did on January 8th for the Air and Waste Management Association. I very much enjoyed it. And even though I served for several years as the EPA Assistant Administrator for Air and Radiation and have been a keen observer of CASAC for many years, I also learned a fair bit. You did an excellent job of describing the role of CASAC and the CASAC panels and how the members of these groups are selected and interact with each other.

I am concerned, however, about one misstatement you made regarding the statutory duties that CASAC has under the Clean Air Act. Near the beginning of your presentation, you had a slide that listed the five specific responsibilities that Congress gave to CASAC as part of EPA's 5-year review of an existing NAAQS under Section 109(d)(2) of the Clean Air Act:

- (1) Review the air quality criteria and the primary and secondary NAAQS for the pollutant under review and recommend any new NAAQS or revisions to existing NAAQS as may be appropriate;
- (2) Advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised NAAQS;
- (3) Describe the research efforts necessary to provide the required information;
- (4) Advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity; and

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- (5) 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.

In your presentation, you said that the fifth task is different from the first four because the first four are part of the five-year review process, but the fifth is not. According to my notes, you said that the fifth task – advising the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from efforts to attain or maintain the NAAQS – is a “separate activity” and is “not really part of the review cycle for any existing NAAQS.”

This interpretation of the Clean Air Act is simply incorrect. There is no way to read the statute that makes the fifth task any different from the other four in terms of either timing or importance. As you may know, the last four tasks on your list are set forth as co-equal subsections (i), (ii), (iii), and (iv), and are preceded by language that simply says “The Committee [CASAC] shall” do each of the following four things. CASAC’s obligation to perform the tasks listed in subsection (iv) is no different than its obligation under the other three subsections.

I realize that CASAC traditionally focuses on the specific charge questions that are presented by EPA staff. It is certainly important for CASAC to respond to these questions, but Congress made it clear that CASAC has a broader role than simply speaking to the issues that EPA may want it to address. By statute, CASAC is supposed to evaluate “any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance” of the NAAQS under review, regardless of whether EPA staff poses questions about these issues.

As you noted in your presentation, the Supreme Court has said that EPA is not permitted to consider costs when it determines the level and form of any NAAQS. But this has no bearing on CASAC’s statutory obligations. Congress clearly intended CASAC to play a broader role than simply advising the Administrator about the level and form of the NAAQS.

As you know, EPA itself does a cost-benefit analysis for any new NAAQS or any revision of an existing NAAQS – even though the Administrator does not consider the cost side of this analysis in setting the NAAQS. EPA’s cost analysis provides important information to the public, even though it is not used in setting the NAAQS.

Likewise, CASAC clearly has a statutory obligation to advise the Administrator –and through her, other policymakers and the public – of “any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment

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and maintenance of” the NAAQS. All CASAC’s statutory responsibilities are listed under the section of the Clean Air Act dealing with the 5-year NAAQS review process, and CASAC has an obligation to examine potential adverse health, welfare, social, economic and energy effects of the NAAQS as part of this process. It seems quite clear that Congress wanted CASAC to provide policymakers with information about the tradeoffs that we all face as our society spends resources on “strategies for attainment and maintenance of the NAAQS.”

In my own view, based on almost 25 years of working on Clean Air Act issues, the question of tradeoffs is especially relevant to the ozone NAAQS. Given the status of the ozone NAAQS review, it might be appropriate for CASAC to request that EPA staff add an additional chapter to the Policy Assessment that specifically discusses the potential adverse health, welfare, social, economic and energy effects of actions that will be needed to attain the ozone NAAQS and potential revisions that are under consideration. This would certainly provide a valuable starting point for CASAC’s evaluation of these issues.

As you know, EPA and state environmental agencies have been focused on reducing concentrations of ozone for more than 40 years (although the term ozone was not used in the early years). As a country, we have probably spent more money to address ozone than to address any other air pollutant – and it is certainly true that ozone concentrations have been reduced substantially in most parts of the U.S.

Even though there has been considerable progress in reducing ozone formation, there are many areas of the country that have not attained the current ozone NAAQS of 75 ppb. In fact, there are several major urban areas that, although they have made dramatic improvements in air quality, are still a long way from meeting this standard. These areas have not been negligent in their efforts to regulate sources of air pollution. In fact, many of them – in California, Texas, and the mid-Atlantic region in particular – have been extremely aggressive in regulating virtually every imaginable source of ozone precursors. In my discussions with regulatory officials, they say that there is little more that they can do.

To be sure, ozone concentrations in these areas will continue to decrease gradually as lower-emitting cars, trucks, and non-road engines replace older vehicles and engines. But these decreases will fall far short of what will be needed in many areas to attain even the current ozone standard. Thus, there are at least two important questions facing regulators and policymakers:

- 1) What more can be done to reduce ozone formation – especially in areas that have already been regulating aggressively for many years?

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- 2) If there are additional things that can be done to meet the current or lower standards for ozone under consideration, what are the impacts (including any adverse public health, welfare, social, economic, or energy impacts) of doing them?

Congress clearly intended for CASAC to play a role in answering these important questions, and I hope that CASAC will do so as part of this review cycle.

Very truly yours,

Bracewell & Giuliani LLP

/s/ Jeffrey R. Holmstead

cc: Dr. Holly Stallworth, EPA