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BY EMAIL TRANSMISSION

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RE: Ozone Review Panel: Public Teleconference and Discussions Concerning the Final Rule
for the National Ambient Air Quality Standard (NAAQS) for Ozone

Dear Dr. Henderson:

Environmental Defense Fund appreciates the opportunity to submit these comments to the Ozone Review Panel of the Clean Air Scientific Advisory Committee (CASAC) regarding the recently promulgated Final Rule for the ozone NAAQS. Environmental Defense Fund is a national non-partisan science-based environmental organization.

The Clean Air Act is one of the nation's single most effective environmental statutes. Since its adoption in 1970, it has been a triumph of bipartisanship and healthier air. The key to the success of the Clean Air Act is the decision that public health and welfare standards are to be based on science, while economics play an integral role in the design of strategies necessary to achieve the standards. Economics play an important part in this process, but Congress wisely recognized that the cost of controls does not determine what makes healthy air.

However, in announcing the revised national ambient air quality standard for ozone, EPA Administrator Johnson claimed that the Clean Air Act needed an "overhaul" and that economic costs should be allowed to be considered when EPA defines what is in fact healthy air. This claim is seriously misplaced and would radically shunt aside the successful history and continued importance of the Clean Air Act's two-step process which requires a science-based approach to setting national ambient air quality standards.

THE CLEAN AIR ACT'S TWO-STEP PROCESS

Congress in 1970 established an effective process in the fight against air pollution. Congress commanded that the national ambient air quality standards be based on public health and welfare considerations alone. Then, economics are thoroughly considered in devising the air pollution control strategies to achieve the health standards. So the law is sharply focused in ensuring the nation's health-standards are established solely on the basis of public health, and this same law is broadly encompassing in considering economics when federal, state and local officials determine how to cost-effectively achieve the health standards.

PUBLIC HEALTH

Some in industry have long protested this carefully calibrated dual system. Some have argued that this two-step inquiry should be conflated rather than distinct, that the nation's health standards should be based on economics and then economics should likewise infuse the policies to achieve the standards. This argument has been thoroughly presented – and resoundingly rejected – over the past 38 years.

This question was answered by a unanimous Senate in 1970. The language crafted by Congress in 1970 is straight forward; its meaning is plain. The Administrator is instructed to establish standards that “are requisite to protect the public health” with “an adequate margin of safety.”¹ The statute thus provides for the health-based standards to be based exclusively on public health and to be precautionary in safeguarding against adverse health effects.

This question has also been consistently answered by the decisions of prior EPA Administrators and numerous judicial decisions of the federal court of appeals in Washington, D.C.²

Ultimately, this question was emphatically answered by a unanimous Supreme Court. Justice Antonin Scalia, writing for the high Court, explained that the text of the Clean Air Act is clear notwithstanding the copious arguments of industry lawyers: “Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards.”³

Justice Scalia then set forth the inquiry the Administrator must make in establishing the nation's health-based air quality standards on the basis of science:

The EPA, ‘based on’ the information about health effects contained in the technical ‘criteria’ documents compiled under §108(a)(2), 42 U.S.C. §7408(a)(2), is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an ‘adequate’ margin of safety, and set the standard

¹ Clean Air Act §109(b)(1), 42 U.S.C. §7409(b)(1).

² See *Lead Industries Assn., Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980); *American Lung Assn. v. EPA*, 134 F.3d 388 (1998); *NRDC v. Administrator, EPA*, 902 F.2d 962 (D.C. Cir. 1990), vacated in part on other grounds, *NRDC v. EPA*, 921 F.2d 326 (D.C. Cir. 1991); *American Petroleum Institute v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981).

³ *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 465 (2001).

at that level. Nowhere are the costs of achieving such a standard made part of that initial calculation.⁴

Accordingly, in setting the health-based air quality standard for ozone, the Administrator must be steadfast—and unwavering—in basing his decision exclusively on what is requisite to protect the public health with an adequate margin of safety.

ECONOMICS

After the standards are established, the Clean Air Act provides a prominent role for consideration of costs in national, state and local decisions about the pollution control strategies deployed to achieve the health standards. EPA is not only empowered to consider costs in setting emission limits for cars, SUVs, trucks, buses, construction equipment, lawnmowers, aircraft, fuels, power plants, and industrial facilities but it is expressly *required* by law to do so.⁵

States and local governments, in turn, are distinctly responsible for designing the air quality management plans for their communities and entrusted with determining how the clean up burden is allocated. Justice Scalia succinctly explained that “[i]t is to the States that the Act assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources.”⁶

THE RESULTS

In practice, the two-step process forged in 1970 has been integral to the enduring success of the Clean Air Act. By any measure, the achievements under the national ambient air quality standards have been profound.

Emissions Reductions and Economic Growth

Under this two-step process, America has dramatically reduced the emissions that contribute to the national ambient air quality standards while the economy has grown.

- ❖ Lead emissions have been slashed some 98 percent since 1970.
- ❖ Volatile organic compounds, which form ground-level ozone and are often comprised of toxic contaminants, have been reduced by over 50 percent since 1970.
- ❖ Sulfur dioxide, which transforms into deleterious particulate pollution, has also been cut in half since 1970.
- ❖ Nitrogen oxides, which are implicated in the formation of ground-level ozone and particulate pollution, have been lowered nearly one quarter since 1970.

⁴ *Id.* (emphasis added).

⁵ 42 U.S.C. §§7521(a), 7547(a), 7545, 7541, and 7411(a).

⁶ *Whitman v. American Trucking Assns., Inc.*, 531 U.S. at 470.

During the period that these remarkable emissions reductions have occurred, gross domestic product has risen some 174 percent.⁷

Summary of pollution levels and economic growth since 1970 Clean Air Act

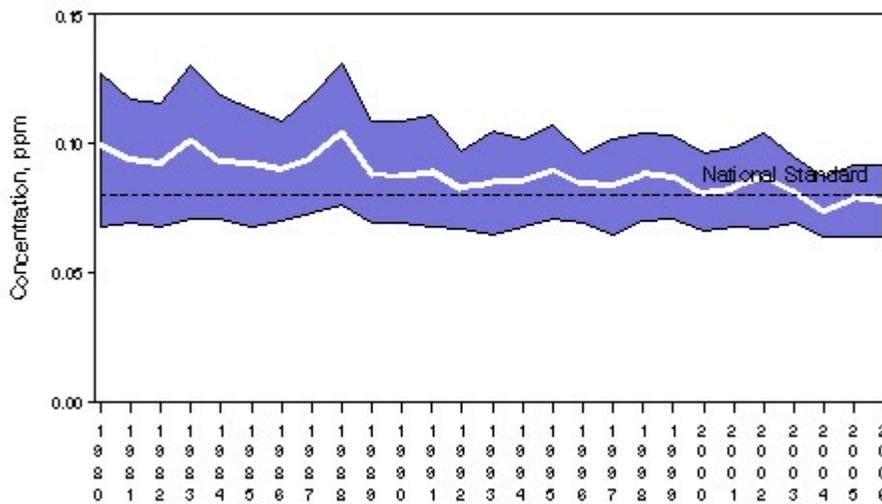
Indicator	Pollution cuts since 1970	Percent change
Oxides of nitrogen (NO _x)	6.4 million tons annually	23.8% decrease
Volatile organic compounds (VOC)	18.3 million tons annually	54.3% decrease
Particulate matter (PM)	9.1 million tons annually	74.6% decrease
Sulfur dioxide (SO ₂)	15.4 million tons annually	49.4% decrease
Lead	0.22 million tons annually	98.5% decrease
Carbon monoxide (CO)	104 million tons annually	52.5% decrease
Gross Domestic Product		174% increase

Restoring Healthy Air in Communities and Neighborhoods

Similarly, communities with pollution concentrations above the national ambient air quality standards have reduced pollution, saved lives, prevented respiratory diseases and made enormous strides in restoring healthy air.

Since 1980, peak ozone concentrations monitored at some 275 sites across the country have declined by more than 20 percent.⁸ These pollution reductions have prevented hospital admissions and school absences for respiratory illnesses, and have saved lives.

Ozone Air Quality, 1980 — 2006
 (Based on Annual 4th Maximum 8—Hour Average)
 National Trend based on 275 Sites



1980 to 2006 : 21% decrease in National Average

Telling the Public Whether the Air is Safe to Breathe

⁷ Department of Commerce, Gross Domestic Product (2005).

⁸ U.S. EPA, The Ozone Report, *Measuring Progress through 2003*, (Nov. 17, 2005).

The two-step system of air quality management adopted in 1970 ensures that the nation's health standards will be based, exclusively, on health science. This system of air quality management puts the nation's very best scientists at the forefront while provisionally relegating the economists, lobbyists and lawyers to the backburner. Most importantly, however, this system of air quality management provides American families with a transparent and unmitigated science-grounded benchmark for determining whether the air in their neighborhood or community is safe to breathe. And it leaves ample room for the economists and the lawyers and the lobbyists to argue subsequently, in a variety of forums, to what extent society should invest in restoring healthy air.

In sum, the Clean Air Act has been vigorously tested over the past 37 years and it has delivered robust results. The Act is not some relic as Administrator Johnson claims, but a flexible and adaptable tool that has and will continue to improve air quality in this country. Central to its success is the two-part inquiry in which the consideration of costs is not commingled with the establishment of the national ambient air quality standards on the basis of science. As Justice Scalia explained for a unanimous Supreme Court, conflating costs with public health in setting the standards may altogether eliminate protection against adverse health effects: the consideration of costs "is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects."⁹

EPA'S FINAL OZONE DECISION

The Administrator, in setting a final primary ozone standard of 0.075 ppm, failed to follow both the available scientific evidence and the unanimous recommendation of the CASAC. Further, by deviating at the final moment from his decision to propose a separate, cumulative seasonal standard for ozone to protect the public welfare, the Administrator again failed to follow the science and the advice of the CASAC. Environmental Defense Fund is deeply disappointed that the Administrator did not meaningfully address the well-reasoned and intensive scientific recommendations of the CASAC on either the health or welfare standards or follow the legal mandate entrusted to him under Section 109 of the Clean Air Act in setting the NAAQS.

The CASAC unanimously and unambiguously advised EPA Administrator Stephen Johnson: "(1) There is no scientific justification for retaining the current primary 8-hr NAAQS of 0.08 parts per million (ppm), and (2) The primary 8-hr NAAQS needs to be substantially reduced to protect human health, particularly in sensitive subpopulations."¹⁰ The Committee also unanimously agreed upon a recommended range: "Therefore, *the CASAC unanimously recommends a range of 0.060 to 0.070 ppm for the primary ozone NAAQS.*"¹¹ These recommendations leave no room for misinterpretation.

The CASAC and the National Park Service also clearly explained why a separate standard was needed to protect public welfare, a cumulative seasonal standard that more accurately reflects the

⁹ *Whitman v. American Trucking Assns., Inc.*, 531 U.S. at 469.

¹⁰ Dr. Rogene Henderson, Chair, CASAC, to Stephen Johnson, EPA Administrator, "Clean Air Scientific Advisory Committee's (CASAC) Peer Review of the Agency's 2nd Draft Ozone Staff Paper," (Oct. 24, 2006).

¹¹ *Id.* at 2 (italics in original).

impacts of ozone on vegetation and natural ecosystems. The administrative record shows that Administrator Johnson agreed with this recommendation, at least in part. The last-minute reversal, shunting aside the seasonal welfare-based standard, does not provide any meaningful discussion of the rationale for that course of action.

Additionally, the imperative to appropriately address welfare effects derives at least in part from an extensive report from the National Academy of Science on Air Quality Management in the United States.¹² That report includes the conclusion that “[t]he current practice of using the primary standard to serve as the setting secondary standard for most criteria pollutants does not appear to be sufficiently protective of sensitive crops and unmanaged ecosystems.”¹³ The report’s Recommendation Five, designed to “Enhance protection of ecosystems and other aspects of public welfare” includes the need to “[p]romulgate secondary standards where needed that take the appropriate form.”¹⁴

CONCLUSION

The Clean Air Act is a thoroughly tested and vibrant tool for improving air quality that will continue to achieve enormous health and welfare benefits for decades to come. The essential structure of the Clean Air Act must be maintained to ensure that health and welfare standards are set based on the best available science. Economics rightly plays an important role in the design of control strategies necessary to achieve the standards.

Administrator Johnson’s misguided call to undo the grand bipartisan achievement embodied in the Clean Air Act is highly disappointing and presents a clear danger to public health and the environment. This action is particularly troubling when combined with EPA’s failure to follow the science in setting the final ozone health and welfare standards.

Thank you for the opportunity to share these comments with you as you review EPA’s final rule on ozone.

Sincerely,

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¹² NATIONAL RESEARCH COUNCIL, AIR QUALITY MANAGEMENT IN THE UNITED STATES (2004).

¹³ *Id.* at 259.

¹⁴ *Id.* at 15 (emphasis omitted).

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