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ADMINISTRATOR
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March 6, 2008

MEMORANDUM FOR ADMINISTRATOR STEVE JOHNSON

FROM: Susan E. Dudley

SUBJECT: Secondary Ozone NAAQS

I am writing with concerns about EPA's preliminary draft final regulation setting national ambient air quality standards (NAAQS) for ozone, submitted for review under Executive Order 12866 on February 22, 2008. Under the draft, EPA would establish, for the first time, a secondary standard for ozone (based on "public welfare") that is different from the primary standard that the draft would establish (based on "public health"). Yet, in the course of interagency review, concerns have been raised that the analysis that accompanies this draft is not adequate to support such a decision. First, the draft would establish a secondary standard without taking into consideration the factors that Congress, in the Clean Air Act, expressly specified as coming within the Act's broad definition of "welfare." Second, the draft does not provide any evidence that a separate secondary standard would be more protective than one set equal to the draft primary standard. This approach is inconsistent with Executive Order 12866, which requires agencies to adhere to certain principles, when not precluded by law.

As you know, in the Clean Air Act, Congress requires EPA to set a secondary standard at a level "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air." [Sec. 109(b)(2)] The Act defines "welfare" very broadly, by setting forth a non-exhaustive list of criteria which include "effects on economic values and on personal comfort and well-being." Specifically, the Act defines "welfare" as follows:

> Welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." [Sec. 302(h)]

Executive Order 12866 directs that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need..." [Sec. 1(a)]

The language of Section 109(b)(2) clearly allows for the balanced consideration of a broad measure of public welfare. Yet, the draft under review would interpret the statute in a way that sets a separate W126 standard of 21 parts-per-million hours (ppm-h) based exclusively on adverse effects of ozone exposure on sensitive vegetation, with a narrow focus on forested lands in specifically-designated areas. EPA has not considered or evaluated the effects of adopting a W126 standard on economic values, personal comfort and well-being, as specifically enumerated in the Act.[1]

Adopting a W126 standard would also deviate from EPA's past practice, which has been to set a secondary ozone NAAQS equal to the primary NAAQS. The preamble to the 1997 final regulation explained the rationale for deciding not to establish a separate secondary standard, despite a similar scientific basis as today, as follows:

> The decision not to set a seasonal secondary standard at this time is based in large part on the Administrator's recognition that the exposure, risk, and monetized valuation analyses presented in the proposal contain substantial uncertainties, resulting in only rough estimates of the increased public welfare protection likely to be afforded by each of the proposed alternative standards... In light of these uncertainties, the Administrator has decided it is not appropriate at this time to establish a new separate seasonal secondary standard given the potentially small incremental degree of public welfare protection that such a standard may afford."[2]

Nothing in the draft or its accompanying analysis supports a different conclusion today. As EPA observed last summer in the preamble to the proposed rule, a secondary (public welfare) standard that is set at a level identical to the primary (public health) standard would provide a significant degree of additional protection for vegetation as compared to the primary standard currently in effect.[3] By contrast, the incremental protection that would be associated with a W126 standard is far less certain. EPA has not attempted to make even a rough estimate of the increased public welfare protection associated with adopting a separate W126 standard beyond that achieved by adopting a revised secondary standard equal to the primary standard of 75 ppb. In fact, there is substantial uncertainty in the additional benefits of a separate secondary standard, both in terms of the degree of risk attributable to alternative standards and the degree of protection afforded by a W126 standard of 21. As a result, the draft rule under review does not contain a reasoned basis for concluding that a secondary standard set separate from the primary standard is "requisite to protect the public welfare."[4]

I know you are under a tight deadline for issuing a final rule, and my staff and I stand ready to work expeditiously with you to ensure the draft meets the requirements of E.O. 12866 by your deadline.

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[1] EPA's discussion does not include an inquiry into broader effects of a separate secondary standard. See American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1052-53 (D. C. Cir. 1999) ("Legally, then, EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109" and EPA "[should] determine whether . . . tropospheric ozone has a beneficent effect, and if so, then to assess ozone's net adverse health effect by whatever criteria it adopts."), *pet. for reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part and rev'd in part on other grounds sub nom.* Whitman v. American Trucking Ass'ns, 531 U.S. 457 ((2001)

[2] National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38856, 38877-78 (July 18, 1997) (codified at 40 C.F.R. part 50).

[3] In this respect, EPA's discussion is even more constricted than the determination reached in 1997, because the discussion expressly acknowledges that the available information is not adequate to establish a secondary standard based on adverse effects to urban/suburban landscaping (or ornamental vegetation) or the need for additional protection for agricultural crops.

[4] The Clean Air Act does not require that secondary standards be set at a zero-risk level, but rather at a level "requisite" to protect public welfare – that is, a standard neither more nor less stringent than necessary for this purpose.