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BEFORE THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

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Chairman Waxman, Ranking Member Davis, and distinguished Members of the Committee, thank you for inviting me to testify about the Environmental Protection Agency's recent final regulation strengthening the national ambient air quality standard (NAAQS) for ozone.

In the interest of public transparency, as part of the rulemaking, and before your Committee's inquiry was initiated, both OMB and EPA placed the key correspondence related to this rulemaking in the public record to ensure a clear presentation of the issues involved. Letters between EPA Administrator Stephen Johnson, Deputy Administrator Marcus Peacock and me are available on OIRA's website[1] and on www.regulations.gov.

This testimony (1) lays out the procedures by which OIRA oversees interagency review of agency regulations generally, and then (2) provides information on the specific discussions related to the secondary ozone NAAQS.

Regulatory coordination and review operates under authority of Executive Order 12866, issued by President Clinton in 1993. This Executive Order establishes principles and procedures for regulatory review,[2] including requirements for disclosure.[3] It also sets forth regulatory principles and procedures that are relevant to today's hearing. The Executive Order establishes OIRA as the entity that reviews significant regulations, observing that "[c]oordinated review of agency

[1] See http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf.
[2] Section 1 of Executive Order 12866, as amended.
[3] Section 6(b)(4) of Executive Order 12866, as amended.

rulemaking is necessary to ensure that regulations and guidance documents are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency."[4]

The confidential nature of interagency deliberations is necessary to allow the Executive Branch to engage in open and candid discussions as policy decisions are debated. Over several administrations, OIRA has sought to strike a balance between this legitimate need to protect the deliberative process and the Congress's and the public's need for information. As part of this effort to strike a balance, E.O. 12866 provides specific procedures on the disclosure of information associated with the review of rules. This Administration has expanded public disclosure by providing on OIRA's website lists of any meetings held with outside parties on rules under review.[5] We also list on our website all regulations under review.[6] Additionally, once a rule has been published, the public has access to the OIRA docket which contains, among other things, a copy of the draft rule as originally submitted to OIRA by the agency and a copy of the draft rule at the conclusion of interagency review.

Executive Order 12866 embraces the regulatory philosophy 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, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people,"[7] and lays out regulatory principles to which agencies should adhere, to the extent permitted by law.[8] Some of these principles cannot be applied to NAAQS regulations.[9] However, others do apply, for example:

[4] Section 2(b) of Executive Order 12866, as amended.
[5] See http://www.whitehouse.gov/omb/oira/meetings.html
[6] See http://www.reginfo.gov/public/do/eoPackageMain
[7] Section 1(a) of Executive Order 12866, as amended.
[8] Section 1(b) of Executive Order 12866, as amended.
[9] Whitman v. American Trucking Ass'n, 531 U.S. 457, 486 (2001) (EPA may not consider implementation costs in setting primary and secondary NAAQS under section 109(b) of the Clean Air Act).

- In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.[10]
- Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities…[11]
- Each agency shall draft its regulations and guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.[12]

Pursuant to Executive Order 12866 and its regulatory principles and philosophies, OIRA oversees the regulatory process for the Executive Branch by coordinating interagency review of significant agency regulations. When agencies submit draft regulations for review under Executive Order 12866, OIRA shares these with other agencies so as to "…avoid regulations and guidance documents that are inconsistent, incompatible, or duplicative with its other regulations and guidance documents or those of other Federal agencies."[13]

In most cases, OIRA is able to work with the regulatory agency to resolve any issues that arise during the interagency review process. For those rare circumstances when such resolution is not possible, the Executive Order provides a process for conflict resolution:[14]

> To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, with the assistance of the Chief of Staff to the President ("Chief of Staff"), acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of

[10] Section 1(b)(4) of Executive Order 12866, as amended.
[11] Section 1(b)(9) of Executive Order 12866, as amended.
[12] Section 1(b)(12) of Executive Order 12866, as amended.
[13] Section 1(b)(10) of Executive Order 12866, as amended.
[14] Section 7 of Executive Order 12866, as amended.

> an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.[15]

Under the Executive Order, "[a]t the end of this review process, the President, or the Chief of Staff acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter."[16]

EPA's NAAQS ozone rule is a significant regulation under Executive Order 12866,[17] and as such was submitted to OIRA for interagency review on February 22, 2008.

The Clean Air Act (the Act) provides the authority for setting NAAQS. Section 109 of the Act[18] directs the Administrator to propose and promulgate "primary" and "secondary" NAAQS for pollutants listed under section 108 of the Act. Section 109(b)(1) defines a primary standard as one "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." A secondary standard, as defined in section 109(b)(2), must "specify a level of air quality the attainment and maintenance of which, in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of the pollutant in the ambient air." Section 302(h) of the

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[15] Section 7(a) of Executive Order 12866, as amended.

[16] Section 7(d) of Executive Order 12866, as amended. Additionally, section 7(c) of the Executive Order provides disclosure procedures to be used during any period of Presidential review, when the President is resolving a dispute within the Executive Branch about a regulation under OMB review (communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review must be in writing, shared with the affected agency, and included in the public docket).

[17] Section 3(f) of Executive Order 12866, as amended, defines a "significant regulatory action" as "any regulatory action that is likely to result in a regulation that may:

(1) Have an annual effect on the economy of $ 100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

[18] 42 U.S.C. § 7409.

Act defines "welfare" broadly, by setting forth a non-exhaustive list of criteria: ". . . 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, whether caused by transformation, conversion, or combination with other air pollutants."

The draft final rule as initially submitted to OIRA included a primary (health-based) standard of 75 parts per billion (ppb) measured over an 8-hour period, and a separate secondary (welfare-based) standard of 21 parts-per-million hours (ppm-hrs) cumulated over three consecutive months during the ozone season.

In the course of interagency review, concerns were raised with the secondary (welfare-based) standard, which is based on ozone effects other than direct human health effects. These concerns focused on the *form* of the standard, not the *level*. EPA's proposed rule had sought comment on two alternative forms, one form identical to the form of the primary standard, and another form based on cumulative ozone levels over a growing season. [19]

Establishing a separate seasonal standard would have deviated 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, promulgated pursuant to President Clinton's July 16, 1997 directive to the EPA Administrator,[20] explained the rationale for deciding not to establish a separate secondary standard, 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

[19] "… [t]he Administrator is proposing two options for revising the current secondary standard: one option is a cumulative seasonal standard (section IV.E.2) and the other option is an 8-hour average standard consistent with the revised 8-hour average standard proposed above for the primary standard (section IV.E.3)," National Ambient Air Quality Standards for Ozone, 72 Fed. Reg. 37899 (proposed July 11, 2007).

> 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.[21]

Neither the draft initially submitted for review nor its accompanying analysis clearly supported a different conclusion than that reached in 1997 regarding the need for a separate secondary standard.

First, as EPA observed in the preamble to the proposed rule issued in 2007, a secondary standard set at a level identical to the proposed new primary standard would provide a significant degree of additional protection for vegetation as compared to the standard established in 1997.[22]

Second, EPA's analysis indicated that a separate secondary standard set at 21 ppm-hrs cumulated over a season would be unlikely to be *more protective* than one set equal to the primary (public-health based) standard of 75 ppb averaged over 8 hours. In fact, the preamble to the final rule states: "[t]he Staff Paper analysis shows that at that W126 standard level [21 ppm-h], there would be essentially no counties with air quality that would be expected both to exceed such an alternative W126 standard and to meet the revised 8-hour primary standard—that is, based on this analysis of currently monitored counties, a W126 standard would be unlikely to provide additional protection in any areas beyond that likely to be provided by the revised primary standard."[23] Since EPA's analysis showed the seasonal secondary standard is unlikely to be more protective than one set equal to the revised primary standard, concerns were raised that the draft rule did not contain a reasoned basis for concluding that a separate secondary standard was "requisite to protect the public welfare."

On March 6, 2008, I sent Administrator Johnson a memorandum outlining these concerns.[24] Given the public interest in this regulatory proceeding, I wanted to ensure that these concerns were laid out clearly to avoid misunderstandings. On March 7, 2008, EPA Deputy Administrator

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[20] Implementation of Revised Air Quality Standards for Ozone and Particulate Matter, 62 Fed. Reg. 38421 (July 16, 1997).
[21] National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38856 (July 18, 1997).
[22] National Ambient Air Quality Standards for Ozone, 72 Fed. Reg. 37904 (proposed July 11, 2007).
[23] National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16436, 16500 (March 27, 2008).
[24] A copy of the March 6, 2008 memorandum is attached hereto.

Peacock responded to my memorandum in writing.[25] I then advised EPA's Deputy Administrator that OIRA was still not in a position to conclude interagency review of the rule with the proposed secondary standard unaltered.

Pursuant to section 7(a) of the Executive Order as discussed above, EPA then sought further consideration of this disagreement regarding the form of the secondary standard. Following the established Presidential review process, the President concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard. This policy recognized the Administrator's judgment that the secondary standard needed to be adjusted to provide increased protection to public welfare and avoided setting a standard lower or higher than is necessary.[26]

On March 12, 2008, I sent a memorandum to Administrator Johnson memorializing the process.[27] EPA cited this memorandum in the preamble to the final rule but also noted that the final decision was the EPA Administrator's: "While the Administrator fully considered the President's views, the Administrator's decision, and the reasons for it, are based on and supported by the record in this rulemaking."[28]

As the preamble to the final rule states:

> Based on his consideration of the full range of views …, the Administrator judges that the appropriate balance to be drawn is to revise the secondary standard to be identical in every way to the revised primary standard. The Administrator believes that such a standard would be sufficient to protect public welfare from known or anticipated adverse effect, and does not believe that an alternative cumulative, seasonal standard is needed to provide this degree of protection. This

[25] A copy of the March 7, 2008 letter is attached hereto.
[26] See American Trucking, 531 U.S. at 475-76 (Justice Scalia observed, "we interpret [Section 109(b)(1) of the CAA] as requiring the EPA to set air quality standards at the level that is 'requisite'—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety.").
[27] A copy of the March 12, 2008 memorandum is attached hereto.
[28] National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. at 16497.

> judgment by the Administrator appropriately considers the requirement for a standard that is neither more nor less stringent than necessary for this purpose.[29]

In summary, let me reiterate a few key points. First, in the course of interagency review of EPA's final ozone NAAQS decision under Executive Order 12866, both OMB and EPA have been forthright in making key correspondence regarding initial disagreements over the form of the secondary standard available to the public. Second, the focus of my correspondence with EPA was not the primary (health-based) standard, but the secondary (welfare-based) standard. No changes were made to the level or form of the health-based standard. Third, the discussion regarding the secondary standard related exclusively to the *form* of the standard, and did not affect the level of protection from ozone exposure provided to vegetation. Contrary to some media accounts, the 8-hour form ultimately selected by the EPA Administrator is not lower, nor is it generally expected to be less protective than the alternative seasonal form of the standard. As EPA observed, "based on [its] analysis of currently monitored counties, a W126 standard would be unlikely to provide additional protection in any areas beyond that likely to be provided by the revised primary standard."[30]

Thank you for the opportunity to testify before you today. I hope this is useful for your inquiry.

[29] Id. at 16500.
[30] Id. at 16500.