

July 27, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
Washington, D.C. 20503

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Dear Administrator McCarthy and Administrator Shelanski:

In our July 27, 2015 letter to Administrator McCarthy on the ozone NAAQS, we requested particular attention to policies addressing background ozone levels, including meaningful changes to EPA's exceptional events policy. Subsequently, EPA has lowered the ozone NAAQS and proposed revisions to the exceptional events rules but has not addressed adequately the background issue. It has instead, published a white paper, sought and received public comment and held a public workshop. While these steps are laudable, they fall far short of the meaningful changes we believe are necessary to address the impact that background levels of ozone are having on states as they seek to demonstrate attainment with the lower ozone NAAQS.

We respectfully request that the Administration change its policies on background ozone to better assist states as implementation of the 2015 standard moves forward. The first step in this process will be to develop a final exception events policy that provides a less-burdensome, streamlined and more predictable method for states to demonstrate that exceptional events are impacting ozone attainment demonstration. We want to emphasize, however, that an improved exceptional events policy standing alone will not solve the background issues facing many states.

The remainder of this letter identifies relevant points made during the public comment period on the proposed standard and during the February 24-25 public workshop and delineates our policy recommendations moving forward regarding the background issue.

Key Points on the Proposed Standard

Business Roundtable submitted extensive public comments on background ozone in response to EPA's proposal to tighten the ozone NAAQS, as shown by the following excerpts from our submission.

Studies by NOAA researchers, the Western States Air Resources Council, Clark County, Nevada and others, have shown that background levels of ozone are very high in the west. In a recent article in *Science*, scientists associated with NOAA pointed out that EPA's own research showed that the magnitude of background ozone in Utah, Arizona, Colorado, New Mexico, Nevada and Wyoming can approach that of EPA's proposed range of 65-70 ppb.¹ The authors also point out that to ensure the standard does not create unnecessary control obligations, EPA and the states must be able to quantify background ozone accurately, which is not the case today. To do this first requires improvement in measurement of baseline ozone, which can then be used to improve the accuracy of global models, which in turn can be used to improve the regional models used by EPA to model attainment efforts by states.

Many states filing comments on the proposed ozone standard echoed our concern about the need to recognize and account for background levels in any new ozone regulation. The Western States Air Resources Council (WESTAR) representing 15 western state air quality managers, argued that "EPA downplays the ongoing significance of background ozone in the west and overstates the capability of the tools available to adequately address the regulatory requirements imposed on states".²

The Association of Air Pollution Control Agencies (AAPCA) noted in a recent survey of comments on the proposed ozone standards filed by state environmental agencies that "[a] majority of state agency comments raised concerns about the role of background ozone, including both naturally-occurring and internationally-transported contributions to ground-level ozone, as an achievability or implementation challenge (26 states)".³

Most of the commenting states that raised concern over the role of background ozone also maintained that EPA's existing policies are ill equipped to address this issue.⁴ The AAPCA survey

¹ Cooper, O.R., et al., "Challenges of a Lowered U.S. Ozone Standard." *Science*, Vol. 348 no. 6239, at p. 1097 (June 5, 2015); DOI: 10.1126/science.aaa5748.

² Western States Air Resources Council, Comments in Docket ID No. OAR-HQ-OAR-2008-0699, filed March 16, 2015, p. 2, available at: http://www.westar.org/Docs/O3NAAQS/WESTAR_O3-final-signed.pdf.

³ Association of Air Pollution Control Agencies, *State Environmental Agency Perspectives on Background Ozone & Regulatory Relief: Results of a Survey by the Association of Air Pollution Control Agencies (AAPCA)*, June 2015, at p. 2, available at: http://www.csg.org/aapca_site/documents/AAPCASurvey-StateEnvironmentalAgencyPerspectivesonBackgroundOzoneandRegulatoryRelief-June201.pdf (AAPCA Survey).

⁴ For example, the comments filed by the Colorado Department of Public Health and Environment, dated March 17, 2015 (see <https://www.colorado.gov/pacific/sites/default/files/AP-PO-ColoradoCommentsOzoneNAAQS.pdf>) explained at p. 5 that EPA's existing exceptional events rule – the primary means identified by EPA of addressing background ozone issues – imposes a "huge administrative burden without a corresponding public health and environmental benefit." Similarly, the Nevada Division of Environmental Protection (NDEP), in its comments submitted March 12, 2015 (see http://www.csg.org/aapca_site/news/documents/NevadaDEP.pdf) told EPA that in light of the "few implementation tools available to states (e.g., exceptional events exclusions, rural transport areas and international transport). . . . [c]ontrol of local sources in western states will have little effect on lowering monitored ozone concentrations. . . . Local contributions are so minor that, if areas within Nevada's jurisdiction are in nonattainment with the new proposed standard, the NDEP will be in the untenable position of having no meaningful control strategies to achieve attainment with the new standard." See NDEP Technical Comments at p. 3. The March 17, 2015 comments of the Wyoming Department of Environmental Quality, Air Quality Division to EPA on the proposed ozone standards (see http://www.csg.org/aapca_site/news/documents/Wyoming_3-17-15_DEQComment_2015OzoneNAAQSProposedRule.pdf) questioned the usefulness of the Rural Transport Areas (RTA)

found that “a majority of state comments identified limitations to the Clean Air Act tools highlighted by U.S. EPA for regulatory relief to address background ozone (24 states)”.⁵ EPA has acknowledged the limitation of existing policies and suggested that modifications may be made after the new standard is adopted. However, it is not clear if policies can or will be modified in time to address the background ozone issue adequately prior to the time nonattainment designations will be made. If fundamental changes are not made to address the contribution of background ozone, large numbers of areas may be cast into nonattainment status without effective tools to come into compliance with a lower standard.

The consequences of nonattainment designation are not to be taken lightly. Nonattainment brings with it retrofit requirements for existing sources, lowest achievable emissions rate technology (regardless of cost) for new or modified existing sources, the need to offset increased emissions by more than one-to-one, additional permitting burdens and transportation consistency requirements. Numerous studies have catalogued the consequences of a nonattainment designation, including lower productivity, loss of economic output and lower wages in the affected industries.⁶ In short, nonattainment designation acts as a brake on economic development. As business leaders, we are greatly concerned about erecting new barriers to economic growth.

EPA’s modeling that most areas will meet lower standard by 2025 does not adequately take into consideration background ozone. Even if existing policies on the books would allow these areas to come into attainment at some point in the future, in the meantime they are designated as in nonattainment.

Key Points from the Public Workshop

classification as a regulatory relief method, given that the RTA classification has only been approved for two areas since the RTA’s inception (p. 3), and expressed the view that “EPA’s recognition of the influence of International Transport on ozone levels under Section 179B of the Clean Air Act. . . to be too limiting, with little to no effective applicability in non-border states” (*Id.*).

⁵ APCA Survey, pp. 2, 5.

⁶ Studies have found that “more stringent environmental regulation deters new plant openings and may even cause firms to relocate plants to areas with more lax environmental regulations.” Shadbegian, R. and Wolverton, A., “Location Decisions of U.S. Polluting Plants: Theory, Empirical Evidence, and Consequences,” EPA National Center for Environmental Economics, 2010, p. 38, available at:

[http://yosemite.epa.gov/ee/epa/eed.nsf/ec2c5e0aaed27ec385256b330056025c/81d7332051b52ed88525772700744a02/\\$FILE/2010-05.pdf](http://yosemite.epa.gov/ee/epa/eed.nsf/ec2c5e0aaed27ec385256b330056025c/81d7332051b52ed88525772700744a02/$FILE/2010-05.pdf). A 2012 study estimated a 4.8 percent decline in total factor productivity levels for emitting plants located in non-

attainment areas, which corresponds to annual lost output in the manufacturing sector of nearly \$21 billion (2010 dollars). See Greenstone, M., et al., “The Effects of Environmental Regulation on the Competitiveness of U.S. Manufacturing,” MIT Center for Energy and Environmental Policy Research 2012 (Greenstone et al. 2012), pp. 2, 31-32. Available at:

<http://web.mit.edu/ceepr/www/publications/workingpapers/2012-013.pdf>. US-based multinational firms are estimated to have increased their foreign production by 9% and their foreign assets by 5% in response to tougher regulation under the Clean Air Act Amendments of 1990. See Hanna, R., 2010. “US Environmental Regulation and FDI: Evidence from a Panel of US-Based Multinational Firms” (Hanna 2010). *American Economic Journal: Applied Economics*, 2(3): 158-89, p. 187. Available at:

http://scholar.harvard.edu/files/remahanna/files/fdi_aej_july_2010.pdf. A 2013 analysis concluded that following a non-attainment designation, “[t]he average worker in a regulated sector experienced a total earnings loss equivalent to 20% of their preregulatory earnings.” Walker, W.R., “The Transitional Costs of Sectoral Reallocation: Evidence from the Clean Air Act and the Workforce,” *The Quarterly Journal of Economics* (2013) (Walker 2013), pp. 1787-1835, at pp. 1791, 1830. Available at:

http://faculty.haas.berkeley.edu/rwalker/research/walker_transitional_costs_CAA.pdf.

We share many of the concerns identified by states and/or other stakeholders in EPA's high-level summary of background ozone workshop on February 24-25:

- "A need exists for EPA guidance on appropriate applications of global models that provide the boundary conditions to regional assessments of U.S. background (USB)."
- "Concern was expressed over the short time between attainment year data being available and EPA's statutory duty to reclassify areas that fail to attain; that EPA would reclassify an area before the state had time to gather the information to conduct an approvable 'but for' demonstration."
- "Some attendees noted that in total, all existing CAA provisions do not provide the kind of regulatory relief that air agencies and communities want. There is a desire for alternate CAA provisions or EPA regulations that allow an area impacted by non-local emissions to be designated 'attainment' or 'unclassifiable' to avoid application of the 'CAA's nonattainment provisions'."
- "Interest was expressed in employing efficient practices to streamline demonstrations, such as templates and a concern was noted that the nearness of demonstration submission deadlines may preclude the use of some otherwise helpful tools and analyses."
- "Interest was expressed in EPA issuing additional guidance in the near future on demonstrating stratospheric ozone intrusions."
- "A concern was raised by some attendees that the science is not yet robust enough, or too uncertain, to adequately support the demonstrations that might be required to invoke some CAA relief provisions and that EPA's setting of a low ozone standard may be an example of policy making being out ahead of the science."

Policy Recommendations

EPA is currently developing several policies to address implementation issues, and these can and should be used to address the background issue: the exceptional events rule and wildfire guidance (currently under review at OMB), nonattainment rules/guidance for states (expected to be proposed by October 2016 and finalized in October 2017) and guidance on stratospheric intrusions to address the burden of proof on states (expected in the Fall). We request that OMB/OIRA pay particular attention to how the Agency plans to address background ozone in the context of these significant rulemakings and guidance documents. States and businesses should not be penalized for ozone levels outside of their control—a goal we all share.

More specifically, OMB/OIRA should request that EPA lessen the evidentiary burden on states when an exceptional event occurs, particularly in light of the serious consequences of a non-attainment designation. OMB/OIRA should also investigate how robust EPA's global models are, and how well they estimate realistic background ozone concentrations. Several current evaluations suggest that EPA's model consistently underestimate background ozone

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concentrations.

Business Roundtable appreciates the opportunity to provide these comments and we welcome additional opportunities to provide information and assistance on the ozone NAAQS implementation process. We also respectfully request a meeting with OMB/OIRA to convey our perspective as ozone implementation policy moves forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Nicholas K. Akins", with a stylized flourish at the end.

Nicholas K. Akins
Chairman, President and Chief Executive Officer
American Electric Power
Chair, Energy and Environment Committee
Business Roundtable