

NAAQS Regulatory Review & Rulemaking Coalition

EPA Can and Must Consider Costs and Implementation Challenges During Its Voluntary Reconsideration of the PM NAAQS Rule

The U.S. Environmental Protection Agency (EPA) has proposed to reconsider the previous administration's decision under §109(d) of the Clean Air Act not to revise the National Ambient Air Quality Standards for fine particulate matter (PM NAAQS). While the five-year deadline under §109 (d) limits EPA's timing to determine whether NAAQS revisions are "appropriate,"¹ EPA has no deadline to finalize a proposal to reconsider an earlier §109(d) decision. As outlined in detail in the NAAQS Regulatory Review & Rulemaking (NR3) Coalition's comments,² EPA must consider costs in deciding whether such a discretionary reconsideration proposal should be withdrawn, and, if the proposal is not withdrawn, EPA must consider costs in determining the appropriateness and effective date of any revised NAAQS.³

In 2020, EPA decided to retain the primary annual PM NAAQS at the current 12 ug/m³ standard level. In order to revise that standard, EPA must find the revisions are "appropriate" following consideration of the full record, including previous Clean Air Scientific Advisory Committee recommendations to retain the 12 ug/m³ standard and concerns about scientific uncertainties and limitations highlighted in the 2020 final rule. EPA has failed to engage fully the earlier record, and has failed to establish that revisions are "appropriate" under §109(d). Instead, EPA is undertaking an abbreviated review of the record, and simply questioning a past EPA Administrator's judgment without fully engaging the bases for that judgment.⁴

EPA ignores the enormous economic damage its proposal would cause. Lowering the PM NAAQS close to background levels, and without a workable implementation plan, would lead to permitting gridlock that would threaten the competitiveness of US manufacturing. EPA's own Regulatory Impact Analysis (RIA) grossly understates the costs and economic impacts of lowering the PM NAAQS close to background levels and fails to capture the uncertainty about public health benefits resulting from a more stringent annual PM NAAQS. In fact, the RIA fails to identify controls measures sufficient to attain the range of proposed standards.

If the current reconsideration proposal is not withdrawn and a more stringent NAAQS is finalized, the costs and permitting gridlock would harm US manufacturers and other businesses that provide critical infrastructure, affordable and reliable electricity, and climate innovations in the United States. A recent analysis conducted by Oxford Economics and commissioned by the National Association of Manufacturers⁵ found that if the proposed PM_{2.5} regulations are implemented, GDP

¹ At least every five years, EPA must review the standards and their scientific basis and determine whether changes are "appropriate." EPA's current §109(d) review deadline is December 2025.

² <https://www.regulations.gov/comment/EPA-HQ-OAR-2015-0072-2361>.

³ See, *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency may not neglect an important aspect of a problem).

⁴ See, e.g., *CA v. Bernhardt*, 472 F. Supp. 3d 573, 600-601 (N.D. Cal 2020) ("an agency cannot flip flop on the whims of each new administration").

⁵ <https://nam.org/competing-to-win/epa-overreach/>.

will be reduced by nearly \$200 billion, and nearly 1 million current jobs will be put at risk. A new report by the U.S. Chamber of Commerce⁶ identifies potential impacts of placing as much as 30% of all counties in permitting gridlock. Ironically, the resulting permitting gridlock would drive businesses to countries with weaker environmental standards, more greenhouse gas intensive supply chains, and less protective worker safety laws.

Established precedent supports EPA's consideration of costs and implementation burdens in deciding whether to withdraw a rule to reconsider an earlier §109(d) decision that NAAQ revisions are not "appropriate." During the Obama-Biden Administration, the White House Office of Information and Regulatory Affairs (OIRA) - at the direction of President Obama - sent EPA a letter directing the agency to withdraw its reconsideration of the ozone NAAQS.⁷ President Obama explicitly requested the withdrawal, recognizing "the importance of reducing regulatory burdens and regulatory uncertainty, particularly as our economy continues to recover."⁸ Like the current discretionary reconsideration, the Obama-Biden Administration's proposed reconsideration was outside the review requirements of §109(d) and would have had caused serious economic damage if more stringent revisions were finalized. Recognizing the need to "minimize regulatory *costs and burdens*, particularly in this economically challenging time," the OIRA letter stated that "finalizing a new standard now is not mandatory and could produce needless uncertainty."⁹ This precedent demonstrates that EPA has discretion to consider costs in deciding whether to withdraw a proposal to reconsider an earlier §109(d) decision that NAAQS revisions were not "appropriate."

With our country again facing multiple challenges, including inflation, supply chain issues, and high energy costs, the Biden Administration should follow the lead of the Obama Administration and direct EPA to withdraw this proposal, and consider whether any standard revisions are "appropriate" in connection with the five-year review that must be completed by December 2025.

⁶ <https://www.globalenergyinstitute.org/heres-why-epas-proposed-air-quality-standards-will-cause-permitting-gridlock-across-our-economy>.

⁷ Letter from Cass Sunstein, OIRA Administrator, to Lisa Jackson, EPA Administrator (Sep. 2, 2011) (OIRA Return Letter) <https://www.reginfo.gov/public/do/eoReturnLetters>.

⁸ White House Press Release, Statement by President Obama on EPA's Ozone National Ambient Air Quality Standards (Sep. 2, 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards>.

⁹ OIRA Return Letter at 1 (emphasis added). Notably, the D.C. Circuit declined to rule on this withdrawal, finding that it "lacks jurisdiction" over a "non-final decision" on a "voluntary revision" of NAAQS. Order # 1359125, *Am. Lung Assoc. v. EPA*, No. 11-1396 (D.C. Cir. Feb. 17, 2012).