

April 18, 2024

Dr. Elizabeth A. (Lianne) Sheppard  
Clean Air Scientific Advisory Committee  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460  
[Yeow.Aaron@epa.gov](mailto:Yeow.Aaron@epa.gov)

BY EMAIL

**Re: Draft Report on Advice on the National Ambient Air Quality Standards (NAAQS) Review Process**

Dear Dr. Sheppard and CASAC Members:

American Lung Association, Earthjustice, and Natural Resources Defense Council very much appreciate your proactively offering advice to EPA about the NAAQS review process. We offer the following comments to support and elaborate on your first recommendation—that EPA “provide the CASAC and the Administrator with a sufficient set of alternative standards to review, even in cases where the agency staff recommend that the current standard should be retained”—especially your recommendation that EPA change its approach to policy assessments (“PAs”).<sup>1</sup>

The Draft Report usefully summarizes the post-1997 reviews of the primary ozone standard. As you explain, the 2019-20 review and the aborted 2021-23 reconsideration were hamstrung by the sorely limited analysis of alternative standards.<sup>2</sup> That limited analysis disserved not just CASAC but also the EPA Administrator, who is a Senate-confirmed officer of the United States and the sole person vested with authority and responsibility to revise

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<sup>1</sup> Draft Report at L-1:30-:32, :36-:37, 1:6-:8, :13-:14.

<sup>2</sup> See *id.* 2:12-3:13.

NAAQS.<sup>3</sup> The resulting inadequate regulatory action or delays in the regulatory process were also a disservice to human health and the environment.

As the Draft Report recognizes, those limited analyses—and the resulting disservices it does—result from a fundamental flaw in the process EPA now follows for PAs: making the question “Does the available information call into question the adequacy of the current standard?” determine whether the PA will provide full analysis of alternative standards that the science might also support.<sup>4</sup> We agree with your discussion and add the following four points for your consideration:

- (1) EPA’s current approach is inconsistent with legal requirements;
- (2) EPA’s current approach is inconsistent with its own current and historical policy statements and proper emphasis on ensuring the Administrator has the necessary information to make fully informed policy decisions (and CASAC the necessary information to give the best advice possible);
- (3) CASAC should further urge EPA to make key additional clarifications about its NAAQS review process; and
- (4) We note one minor error in the Draft Report.

*First*, EPA’s current approach to PAs is inconsistent with directly applicable binding precedent about NAAQS revision. Though scientific judgments provide the guideposts of whether certain standards are insupportably weak or much too strong to meet the Clean Air Act’s requirement that NAAQS be “requisite to protect” public health (with “an adequate

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<sup>3</sup> See 42 U.S.C. § 7409(d)(1) (directed EPA Administrator to review and revise standards), § 7601(a)(1) (barring Administrator from delegating “powers and duties” for “the making of regulations subject to section 7607(d)”), § 7607(d)(1)(A) (applying § 7607(d) to “the promulgation or revision of any national ambient air quality standard”); Reorganization Plan No. 3 of 1970, § 1(b), 35 FR 15,623 (Oct. 6, 1970) (establishing EPA and decreeing that EPA will be headed by “Administrator...appointed by the President, by and with the advice and consent of the Senate”); *see also* Oral Comments of Seth Johnson, Attorney, Earthjustice, 2 (Mar. 29, 2023), [https://casac.epa.gov/ords/sab/r/sab\\_apex/casac/0?mm\\_id=6206&request=APPLICATION\\_PROCESS%3DMEETING\\_FILE&session=3015999631802](https://casac.epa.gov/ords/sab/r/sab_apex/casac/0?mm_id=6206&request=APPLICATION_PROCESS%3DMEETING_FILE&session=3015999631802) (“the second draft PA isn’t giving Administrator Regan the information he needs.... For the PA to really be a useful document, it has to give the Administrator meaningful advice about alternatives.”).

<sup>4</sup> See Draft Report 3:1-5:14 (describing and analyzing PAs’ discussion of review process).

margin of safety”) and welfare, science may not ever reveal that one and only one standard is “requisite.”<sup>5</sup> Yet that is the premise EPA’s current approach to PAs effectively adopts.

EPA’s current approach tracks the basic argument industry raised in challenging the 2008 and 2015 ozone NAAQS—an argument the D.C. Circuit has rejected twice. The D.C. Circuit explained that its “precedent is clear that prior NAAQS are not sacrosanct and are not granted presumptive validity.”<sup>6</sup> Per the Court, to view a previous NAAQS as binding on the agency “is a ‘conceptual error.’”<sup>7</sup> Rather, “when EPA reviews and revises the NAAQS, it does so against current policy considerations and existing scientific knowledge.”<sup>8</sup> If prior NAAQS remained controlling until clearly superseded by scientific developments, EPA would wrongly be bound “to potential deficiencies in past reviews.”<sup>9</sup> Thus, the D.C. Circuit, which handles any challenge to any EPA NAAQS action, has forcefully rejected the notion that a prior NAAQS decision should exert any meaningful control over future EPA NAAQS reviews.<sup>10</sup> EPA’s current approach to PAs, however, embraces that notion and therefore must change.

*Second*, EPA’s current approach to PAs also conflicts with EPA’s policy pronouncements and wrongly arrogates the current Administrator’s policy-making authority. EPA’s website

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<sup>5</sup> 42 U.S.C. § 7409(b)(1)-(2); see *Mississippi v. EPA*, 744 F.3d 1334, 1342-43 (D.C. Cir. 2013) (rejecting argument that “assumes only one standard at any given time can be ‘requisite’”).

<sup>6</sup> *Murray Energy Corp. v. EPA*, 936 F.3d 597, 609 (D.C. Cir. 2019) (citing *Mississippi*, 744 F.3d at 1343).

<sup>7</sup> *Id.* 620 (quoting *Mississippi*, 744 F.3d at 1344).

<sup>8</sup> *Id.* 609 (citing *Mississippi*, 744 F.3d at 1343).

<sup>9</sup> *Id.* (quoting *Mississippi*, 744 F.3d at 1343).

<sup>10</sup> For reference, we reproduce here a longer excerpt of the D.C. Circuit’s well-reasoned explanation of why it rejected the industry notion that at least implicitly undergirds EPA’s current approach to PAs:

[Even if EPA had to make a “contextual assessment of acceptable risk,”] that does not mean the initial assessment is sacrosanct and remains the governing standard until every aspect of it is undermined. Every time EPA reviews a NAAQS, it (presumably) does so against contemporary policy judgments and the existing corpus of scientific knowledge. It would therefore make no sense to give prior NAAQS the sort of presumptive validity [industry petitioners] insist[] upon. The statutory framework requires us to ask only whether EPA’s proposed NAAQS is “requisite”; we need not ask why the prior NAAQS once was “requisite” but is no longer up to the task. Following [industry petitioners’] approach would bind EPA to potential deficiencies in past reviews because discrepancies between past and current judgments as easily reflect problems in the past as in the present.

*Mississippi*, 744 F.3d at 1343.

describes PAs as being “an evaluation of policy implications...to help ‘bridge the gap’ between the Agency’s scientific assessments...and the judgments required of the EPA Administrator in” the NAAQS review process.<sup>11</sup> Thus, a PA must “provide[] a transparent staff analysis of the scientific basis for alternative policy options for consideration by senior EPA management prior to rulemaking.”<sup>12</sup> Nothing about EPA’s currently stated position suggests EPA staff should on any policy ground limit the scientifically justified options staff presents to senior management. To the contrary, a PA must be transparent and, to fulfill its further role of “facilitat[ing]... CASAC’s...advice to the Agency and recommendations to the Administrator,”<sup>13</sup> it must not limit its options on policy grounds. Anything less wrongly hampers the Administrator’s power, under our system of representative democracy, to make policy.

EPA has long held the position that the PA must simply present scientifically-sound policy options—not limit them on policy grounds, as EPA’s current approach to PAs does. In 2009, when then-Administrator Jackson reinstated inclusion of a staff-prepared policy assessment in the NAAQS review process, she used virtually identical language as EPA’s website currently contains.<sup>14</sup> Administrator Jackson’s reinstatement decision rejected a 2006-2008 change that curbed staff’s independent, full analysis of the science in assessing policy options in the NAAQS review process by skipping a PA and instead moving to an advanced notice of proposed rulemaking. This aspect of the 2006-2008 approach blurred the lines between scientific analysis and policy-making and limited EPA staff’s ability to fully and fairly assess what policies the science supported.<sup>15</sup> Administrator Jackson’s decision thus rejected staff being limited in its consideration of options on policy grounds, and EPA’s website indicates EPA still follows Administrator Jackson’s decision. Yet EPA’s current approach to PAs departs from this

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<sup>11</sup> <https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards> (last updated Oct. 5, 2023).

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> *Compare id.*, with Memorandum from Lisa P. Jackson, EPA Admin’r, 2, attach.2 (May 21, 2009), <https://www.epa.gov/sites/default/files/2020-09/documents/naaqsreviewprocessmemo52109.pdf>.

<sup>15</sup> Comment from California Air Resources Board 2 (June 21, 2006), <https://www.epa.gov/sites/production/files/2020-09/documents/carb.pdf> (explaining that “[i]t is essential that U.S. EPA staff scientists be able to present their assessment of options compatible with the science, requirements of the Clean Air Act, and adequate public health protection”).

long-standing EPA position and improperly limits the policy options presented to the Administrator.<sup>16</sup>

*Third*, CASAC should urge EPA also to expeditiously make key clarifications about the NAAQS review process it intends to follow moving forward. In 2018, the then-Administrator issued a memorandum that purported to amend EPA’s approach to NAAQS reviews in ways that included introducing legally irrelevant inquiries into the process and other ill-advised changes.<sup>17</sup> EPA has subsequently said in court that it “is reviewing this [2018 m]emorandum and is considering issuing a new or revised document that would reflect any changes or updates in the policies described in the 2018 [m]emorandum.”<sup>18</sup> CASAC should urge EPA to quickly finish its review and make revisions that ensure a robust and highly efficient, timely NAAQS review process. In the interim, CASAC should encourage EPA to consider withdrawing the 2018 memorandum entirely in the interim, or at least issue a clarification about its interim approach to the NAAQS review process.

*Fourth*, we note one minor error in the Draft Report. Figure 1 includes the words “Standard Upheld” above “1997.”<sup>19</sup> We believe those words should be omitted. The review that ended in 1997 predates the period the Draft Report describes as relevant to its discussion — “agency staff recommendations and CASAC advice on the ozone NAAQS since the 1997 rule” and “the past ~20 years.”<sup>20</sup> Thus, whatever CASAC may have said about the standard’s level before the 1997 rule is not relevant to the Draft Report’s analysis.

Sincerely,

Seth L. Johnson  
Attorney  
Earthjustice

Paul G. Billings  
Senior VP, Public Policy  
American Lung Association

Emily Davis  
Director, Clean Air & Senior  
Attorney  
Natural Resources Defense Council

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<sup>16</sup> EPA’s current approach to PAs also conflicts with other EPA policy documents regarding the NAAQS review process. In relevant part, these documents make clear that the Administrator must make the ultimate policy judgment, and that to do so, science and policy must be distinguished, and the Administrator must be given a range of science-based options to consider. *See* Memorandum from E. Scott Pruitt, EPA Admin’r, 10-11 (May 9, 2018), <https://www.epa.gov/sites/default/files/2018-05/documents/image2018-05-09-173219.pdf>; Letter from Marcus C. Peacock, EPA Dep. Admin’r, to CASAC 1-2 (Sept. 8, 2008), <https://www.epa.gov/sites/production/files/2020-09/documents/peacocklettertocasac090808.pdf>.

<sup>17</sup> *E.g.*, Memorandum from Pruitt, *supra* n.16, at 3-7, 10 fig.1.

<sup>18</sup> Decl. of Joseph Goffman ¶ 37 (Dec. 20, 2023), *New York v. EPA*, No. 21-1028 (D.C. Cir.).

<sup>19</sup> Draft Report 2 fig.1..

<sup>20</sup> *Id.* 1:21, A-1:7.