

MJB&A Summary ■ August 28, 2019

## D.C. Circuit Issues Decision Regarding Stringency of 2015 Ozone Standard

On August 23<sup>rd</sup>, the D.C. Circuit upheld EPA’s primary and secondary 2015 ozone national ambient air quality standards (NAAQS), which EPA had revised to a level of 70 parts per billion (ppb). However, the Court remanded certain aspects of the secondary ozone standard for EPA’s reconsideration and vacated the final rule’s grandfathering provision. The D.C. Circuit panel included Judges Griffith, Pillard, and Wilkins.

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### Background

The Clean Air Act (CAA) requires EPA to review primary and secondary NAAQS for criteria pollutants every five years and update the standards, if appropriate. EPA must set primary standards at a level that it determines is requisite to protect public health and set secondary standards at a level requisite to protect public welfare. In the opinion, the Court notes that “Congress required EPA to take CASAC’s [Clean Air Scientific Advisory Committee] recommendations into account while promulgating revised NAAQS and to fully explain its reasons when it departs from CASAC’s advice. However, the ultimate decision to revise the NAAQS—and determination of the new level—rests with the Administrator.”

In 2015, EPA lowered the primary and secondary ozone NAAQS from 75 ppb to 70 ppb, while retaining the 2008 indicator (ozone), averaging time (8-hours), and form (three-year average of the fourth-highest daily maximum 8-hour concentration). The final 2015 rule also included a grandfathering provision for the Prevention of Significant Deterioration (PSD) permitting program intended to allow compliance with the revised ozone standards not to delay the processing of certain pending permit applications. Specifically, the grandfathering provision applied to projects with pending applications that: (1) were deemed complete as of October 1, 2015, or (2) had a published notice of a draft permit or preliminary determination before the effective date of the revised 2015 ozone NAAQS (*i.e.*, December 28, 2015).

Industry and State Petitioners challenged the 2015 ozone NAAQS as overly stringent, and environmental NGOs and public health groups challenged the standard as not sufficiently stringent. The Environmental Petitioners also argued that the grandfathering provision was inconsistent with the CAA.

### Summary of D.C. Circuit Decision

#### *Challenges to Primary 2015 Ozone Standard*

The Industry and State Petitioners argued that EPA’s decision to revise the ozone standard to 70 ppb was arbitrary and capricious because EPA did not provide a reasoned explanation for increasing the stringency of the standard. The Court, however, disagreed finding that EPA’s reference to and review of clinical studies, epidemiological evidence, and human health and exposure risk assessments provided an adequate explanation to support EPA’s determination that the revised standard is “requisite” to protect public health.

Citing *Mississippi v. EPA*, the Court noted that “[t]he 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.” In addition, the Court noted that “[w]hile Industry Petitioners challenge the use of epidemiologic evidence given the uncertainties presented in these studies, even CASAC concluded that epidemiologic evidence would have alone been strong enough to justify revision of the 2008 NAAQS.”

In contrast, the Environmental Petitioners challenged the 2015 NAAQS revision as not stringent enough, arguing that the form of the standard allows for periodic, short-term exceedances of the standard and that ozone exposures of 70 ppb will cause adverse health effects, particularly for certain sensitive populations. The Petitioners argued that the standard was unlawful and arbitrary because areas with ozone levels above the 70 ppb threshold could still comply with the standard, but the Court disagreed and held that EPA’s use of the exposure assessment and decision to retain the form was rational and appropriate. In addition, while the Environmental Petitioners asserted that EPA’s decision represented an unexplained departure from CASAC’s recommendation and from EPA’s prior characterization of what constitutes adverse public health impacts, the opinion states that, “we consider only whether EPA’s 2015 Rule offers a rational explanation of whether the Administrator reasonably evaluated the evidence of adversity.”

Additionally, the Environmental Petitioners argued that EPA’s decision to set the primary standard at 70 ppb was an unexplained departure from CASAC’s recommendation that EPA set the standard below 70 ppm and within a range of 60 to 70 ppm. The Court, however, held that EPA reasonably explained its decision to set the primary standard at 70 ppb. The opinion focuses on the fact that the CASAC recommendation constituted policy rather than a scientific advice and notes that courts defer to EPA’s judgment on issues of “policy but require EPA to ‘fully explain its reasons for any departure from’ CASAC’s expert *scientific* recommendations.” Thus, the Court held that “EPA nonetheless chose a level for the primary standard that was within CASAC’s scientifically recommended range. In doing so, EPA did not abrogate its duty under the Clean Air Act to consider CASAC’s scientific recommendations but instead made a valid policy decision.”

Finally, the Environmental Petitioners argued that EPA should have set the standard below 70 ppb given new studies published after the 2008 standard that concluded that exposure to ozone levels below the standard can harm lung function. The Court, however, again found that EPA’s decision was rational and that the petitioners failed to show that the evidence “required EPA to decide differently.”

### *Challenges to Secondary 2015 Ozone Standard*

In challenging the secondary standard, the Environmental Petitioners contended that: 1) in considering tree growth loss, EPA acted arbitrarily in setting a standard “requisite” to protect public welfare; 2) EPA arbitrarily set the form and averaging time of the standard as a three-year average rather than a single-year, cumulative measurement of ozone exposure; and 3) EPA unreasonably failed to identify a level of air quality requisite to protect the public welfare against adverse effects from visible leaf injury.

For the first issue, the Court held that EPA adequately explained its decision in setting the standard “requisite” to protect public health and acted consistently with CASAC’s advice. However, the Court remanded the issue of using a three-year average as the benchmark without lowering the level to protect against single-year exposures. The Court explained that CASAC advised EPA that basing the secondary standard on a single-year period would provide more protection than a three-year average, but if EPA elected to retain the three-year average, then “the level of the standard should be revised downward such that the level for the highest three-month summation in any given year of the three-year period would not exceed [its] scientifically recommended range” of single-year exposure levels. Thus, the opinion remands the issue for EPA to either lower the standard, adopt the single-year

exposure index as the form and averaging time, or explain its conclusion that the existing secondary standard is appropriate notwithstanding CASAC’s contrary advice.

In terms of the second issue of form and averaging time, the Court noted that because EPA did not explain why it is reasonable to focus on a three-year average, the Court could not assess the claim and thus declined to reach the question.

For the final issue related to visible leaf injury, the Court remanded the question to EPA to reconsider because EPA failed to offer a reasoned explanation given that CASAC’s scientific conclusion that “unequivocally found that ‘damage to resource use from foliar injury’ was an ‘adverse welfare effect.’”

### *Cross-Cutting NAAQS Challenges*

In setting the primary and secondary ozone standards, the Industry and State Petitioners argued that EPA failed to consider the necessary factors required by law. Specifically, they asserted that: 1) EPA did not consider the “overall adverse, economic, social, and energy impacts” of the revised standards; 2) EPA did not adequately consider the impact of background ozone on the ability of states to attain the revised standard, a consideration allegedly required by the CAA; and 3) EPA’s interpretation of the CAA, which excluded consideration of background ozone, leaves no “intelligible principle” by which to set NAAQS, creating a constitutional nondelegation issue.” The Court rejected each issue.

With respect to the argument that EPA must consider overall adverse impacts of the revised standards, including the cost of compliance, the Court held that *Whitman v. American Trucking Associations* made clear that the Act “unambiguously bars cost considerations from the NAAQS-setting process.” The Court also explained that “Petitioners’ reliance on *Michigan* and the Act’s use of the word ‘appropriate’...fails twice over,” given that *Michigan* involved a different provision of the Act and in that prior case, the court made clear that the term “appropriate” is dependent on the statutory context.

In response to the Petitioners’ argument that background ozone levels may make it impossible for certain states to attain to the 2015 ozone standard, the Court held that the text of the CAA forecloses this issue. The opinion highlights three CAA provisions that provide compliance relief options for a state with ozone exceedances caused by events beyond a state’s control—Exceptional Events, International Transport, or Rural Transport provisions. The opinion further notes, “the fact remains that Congress decided that EPA should account for background ozone during enforcement, not when setting standards.”

In response to the nondelegation argument, the Court simply stated “[t]here is no nondelegation issue here.”

### *Grandfathering*

Finally, the Environmental Petitioners that the final rule’s grandfathering provision violates the CAA requirement that permit applications demonstrate compliance with any NAAQS regardless of when the application is completed. Based on the plain language of the Act, the Court agreed, holding that “the Act unambiguously precludes EPA’s interpretation”. Therefore, the Court vacated the grandfathering provision in the rule.

### *Next Steps*

This decision by the D.C. Circuit largely affirms EPA’s discretion to revise NAAQS provided the decisions are consistent with CASAC’s recommendations or EPA provides a reasoned justification for any departures. The grandfathering provisions of the final rule are no longer effective, and EPA must now revise the aspects of the secondary standard consistent with the opinion. Additionally, EPA is in the process of reviewing the 2015

primary and secondary ozone NAAQS with the goal of completing its review by the end of December 2020. This opinion will affect EPA's approach for this review.

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