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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE

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MEMORANDUM

April 12, 2016

To: Subcommittee on Energy and Power Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Legislative Hearings on H.R. 4775, the "Ozone Standards Implementation Act of 2016"

On **Thursday, April 14, 2016, at 10:15 a.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Energy and Power will hold a legislative hearing on H.R. 4775, the "Ozone Standards Implementation Act of 2016," which was introduced by Rep. Olson (R-TX) on March 17, 2016.

This is the third hearing this Congress on EPA's ozone standard. On June 12, 2015, the Subcommittee on Energy and Power held a hearing on EPA's proposed ozone standard with Acting Assistant Administrator for Air and Radiation, Janet McCabe. On June 16, 2015, the Subcommittees on Energy and Power and Commerce, Manufacturing and Trade held a joint hearing on the rule's potential impact on manufacturing. For further background information, please see the memos from the previous hearings.

I. EPA'S REVISON TO THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE

The Clean Air Act (CAA) requires EPA to set national ambient air quality standards (NAAQS) for certain pollutants that endanger public health and the environment. EPA sets primary NAAQS at concentration levels sufficient to protect the public health with an "adequate margin of safety." For certain pollutants emitted from "numerous and diverse sources", the primary NAAQS identify the level of ambient air pollution that is "safe" to breathe. While costs are not considered in establishing these standards, costs can be considered in developing plans to achieve the necessary reductions in air pollutants to meet these standards. These health-based standards are the cornerstone of the Clean Air Act.

On October 1, 2015, EPA issued a final rule tightening the ozone NAAQS from 75 ppb (parts per billion) to 70 ppb.[1] This decision was based on the review of thousands of studies showing ozone's effects on public health and welfare. The revised standard is consistent with the recommendations of the independent Clean Air Scientific Advisory Committee (CASAC), which had concluded that the science supports a standard within a range of 70 ppb down to 60 ppb.[2] EPA must review each NAAQS every five years and make revisions as appropriate.[3]

Now that EPA has established a new standard, there are a number of steps that state, tribal, and local permitting agencies must take to implement the rule. States and tribes will be required to meet the new primary health standard between 2020 and 2037, depending of the severity of an area's ozone problem. EPA has made it clear that it will work closely with state and tribal partners to "implement the updated standards in a way that maximizes common sense, flexibility and cost-effectiveness, while following the requirements of the Clean Air Act."[4]

The key milestones of the implementation schedule include the following dates:[5]

- October 1, 2016: States (and any tribes that choose to do so) make initial recommendations for designations of areas within each state as attainment, nonattainment or maintenance areas.

- June 1, 2017: EPA responds to the initial recommendations and identifies where it intends to make modifications to the area designations. States and tribes will then have the opportunity to comment and provide new information and analyses for EPA to consider.

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[1] U.S. Environmental Protection Agency (EPA), *National Ambient Air Quality Standards for Ozone*, 80 Fed. Reg. 65292 (Oct. 26, 2015) (final rule) (hereinafter "ozone NAAQS").

[2] CASAC noted that the decision about what standard provides the adequate margin of safety required by the Clean Air Act is a policy judgment left to the Administrator. *See* U.S. Environmental Protection Agency, *Overview of EPA's Updates to the Air Quality Standards for Ground-Level Ozone* (Oct. 1, 2015) (online at www.epa.gov/sites/production/files/2015-10/documents/overview_of_2015_rule.pdf).

[3] Clean Air Act at § 109(d)(1).

[4] U.S. EPA, *Overview of EPA's Updates to the Air Quality Standards for Ground-Level Ozone* (Oct. 1, 2015) (online at www.epa.gov/sites/production/files/2015-10/documents/overview_of_2015_rule.pdf).

[5] U.S. EPA, *Designation and Permitting Requirements for the 2015 Ozone Standard* (Oct. 1, 2015) (online at www.epa.gov/sites/production/files/2015-10/documents/20151001designations_permitting.pdf).

- October 1, 2017: EPA issues final area designations of attainment, nonattainment or maintenance areas. These would likely be based on 2014 to 2016 air quality data.

- 2020-2021: States and tribes complete development of state implementation plans (SIPs).

- 2020- 2037: States are required to meet the health-based standard, with staggered deadlines depending on the severity of the area's air pollution problem.[6] Extreme areas, such as Los Angeles, CA have until 2037 to comply.

Although the Clean Air Act requires EPA to set NAAQS at levels that will protect human health and welfare without considering costs, EPA's analysis shows that the health benefits of a 70 ppb ozone standard will significantly outweigh compliance costs by billions of dollars per year. EPA has estimated the cost of the 70 ppb ozone standard will be $1.4 billion in 2025, with $2.9-$5.0 billion in benefits (excluding California). Although these estimates may not legally be used in setting the standard, they were reviewed and approved by the Office of Management and Budget as part of EPA's Regulatory Impact Analysis.[7]

A. Background Ozone

Some stakeholders have voiced concerns about the impact of "background ozone" on their ability to meet the 70 ppb ozone standard. "Background ozone" is ozone that results from natural events – such as wildfires or the breakdown of hydrocarbons released by plants and soils – or from man-made pollution from sources outside the U.S. The CAA does not hold states responsible for these background emissions. These stakeholders argue that EPA should not have revised the ozone standard since background ozone concentrations in several areas are above 70 ppb, making the revised ozone NAAQS impossible to meet.[8] While EPA does anticipate that there may be a limited number of areas where high ozone levels could be attributed to background ozone, EPA analysis indicates that background ozone is "not the sole contributor to an exceedance of the revised NAAQS" and will not prevent areas from meeting the revised 70 ppb standard.[9]

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[6] "Marginal" areas have until 2020, "moderate" areas have until 2023, "serious" areas have until 2026; "severe" areas have until 2032-2034, and "extreme" areas have until 2037 to comply.

[7] U.S. EPA, *Regulatory Impact Analysis of the Final Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone* (Sept.2015) (online at www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0169-0057).

[8] U.S. EPA, *National Ambient Air Quality Standards for Ozone,* 80 Fed. Reg. 65292 at 65327 (Oct. 26, 2015) (final rule).

[9] *Id.*

Since states are not responsible for controlling emissions from background sources, EPA is working closely with all stakeholders on the background ozone issue. [10] To that end, EPA issued a white paper on background ozone in December 2015,[11] and held a workshop on background ozone in February as part of its "ongoing efforts to engage with states and stakeholders on implementation of the 2015 ozone" NAAQS.[12]

B. Preconstruction Permitting

The CAA requires major new or expanding stationary sources of air pollution to obtain permits before they start construction to ensure they will not significantly increase air pollution above levels that are safe to breathe. The preconstruction permitting provisions achieve this by: (1) requiring new and modified sources to use control technology to reduce their emissions; and (2) to assess, and if necessary address, their remaining air quality impacts. States, not EPA, issue the vast majority of preconstruction permits.

The permitting requirements differ depending on whether the new or modified source would be located in an attainment or nonattainment area. In attainment areas, the facility owner or operator must obtain a preconstruction permit under the Prevention of Significant Deterioration (PSD) program. The owner or operator must demonstrate that the facility is using best available control technology (BACT) and that "emissions from ... such facility will not cause, or contribute to, air pollution in excess of any ... [NAAQS] in any air quality control region."[13] As part of the permitting process, the facility must conduct an air quality impact analysis to show that the new emissions, in combination with emissions from other nearby sources, will not cause or contribute to a violation of the NAAQS.[14] If the analysis shows that the facility's emissions would drive the area into nonattainment, then the facility may have to take additional steps to lower its emissions impact. The law specifies that the permitting agency must grant or deny a PSD permit application no later than one year after the completed permit application was filed.[15]

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[10] U.S. EPA, *Implementing the 2015 Ozone National Ambient Air Quality Standards* (Oct. 1, 2015) (online at www.epa.gov/sites/production/files/2015-10/documents/implementation_memo.pdf).

[11] U.S. EPA, *Implementing the 2015 Primary Ozone NAAQS: Issues Associated with Background Ozone, White Paper for Discussion* (Dec. 30, 2015) (online at www.epa.gov/sites/production/files/2016-03/documents/whitepaper-bgo3-final.pdf).

[12] U.S. EPA, *EPA Workshop on Background Ozone, February 24 and 25, 2016*, (Mar. 16, 2016) (online at www.epa.gov/ozone-pollution/epa-workshop-background-ozone-february-24-and-25-2016).

[13] Clean Air Act §§ 165(a)(3) and (a)(4).

[14] *Id.* at § 165(e).

[15] *Id.* at § 165(c).

For nonattainment areas which already have unhealthy air, the facility owner or operator must obtain a preconstruction permit under the nonattainment new source review (NSR) program. The nonattainment NSR program requires the facility to install pollution controls sufficient to meet the lowest achievable emission rate (LAER). LAER is the most stringent emission limitation required by a state plan or achieved in practice by that type of source. The program also requires any proposed new emissions from the new or modified facility to be offset by reductions from existing sources.[16] The CAA does not set a time limit for the permitting agency to act on a nonattainment NSR permit application.[17]

Some stakeholders raised concerns about projects with pending preconstruction permit applications and the potential impact of a revised NAAQS.[18] EPA addressed this concern in the final 2015 ozone NAAQS rule. The rule grandfathered permit applications that were well along in the permitting process, specifically permits that had been determined to be complete on or before October 1, 2015, or for which public notice of a draft permit or preliminary determination had been published as of the effective date of the revised standard. Sources eligible for grandfathering are allowed to meet the requirements associated with the prior ozone NAAQS rather than the revised standard.[19]

II. H.R. 4775, THE "OZONE STANDARDS IMPLEMENTATION ACT OF 2016"

A. Section-by-Section

Section 2(a) of the bill would significantly extend the deadlines – by as much as eight years – for implementation of the 2015 ozone NAAQS. Under the bill, state recommendations on nonattainment areas would not be due to EPA until October 26, 2024, and EPA would have until October 26, 2025, to finalize designations. SIPs would then be due to EPA by October 26, 2026.

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[16] *Id.* at § 173.

[17] If the applicant or stakeholders disagree with a final permit decision, they can appeal the decision. The venue for this appeal depends on which permitting authority issued the preconstruction permit. For states that operate their own permitting programs, appeals are handled by state or local administrative review boards and state courts. For the few states that choose to operate EPA's permitting program through delegated authority, and the few permits issued by EPA directly, the applicant or stakeholders can petition the federal Environmental Appeals Board (EAB) for review. The EAB can uphold EPA's permit decision or remand it back to EPA to correct any identified legal deficiencies.

[18] *See, e.g.*, U.S. EPA, *National Ambient Air Quality Standards for Ozone*, 80 Fed. Reg. 65292 at 65431 (Oct. 26, 2015) (final rule).

[19] U.S. EPA, *National Ambient Air Quality Standards for Ozone*, 80 Fed. Reg. 65292 at 65433 (Oct. 26, 2015) (final rule).

Section 2(b) states that the 2015 ozone NAAQS does not apply to preconstruction permit applications if (i) an application is determined to be complete on or before the date final designation areas are promulgated under section 2(a); or (ii) the state or local permitting authority publishes a public notice of a preliminary determination or a draft permit, before the date that is 60 days after final designation areas are promulgated under section 2(a).

Section 3(a) would change the current statutory timeline for NAAQS reviews of criteria pollutants from every five years to every ten years. This section also bars EPA from proposing any changes to the ozone standard before October 26, 2025.

Section 3(b) would significantly alter how the Administrator determines whether to change an existing NAAQS. Currently, the Administrator determines, based solely on a review of the latest health and environmental science, whether the current standard is adequate to protect public health with an adequate margin of safety. Section 3(b) would change this long-standing practice by allowing the secondary consideration of "likely technological feasibility" in establishing and revising the primary NAAQS.

Section 3(c) would require, prior to establishing or revising any NAAQS, that the Administrator request –and CASAC provide- advice regarding any adverse public health, welfare, social, economic, or energy effects which may result from complying with such a standard.

Section 3(d) effectively requires the Administrator to issue regulations and guidance for implementing a new or revised air quality standard "concurrently" with issuing the new or revised NAAQS. If the Administrator fails to do so, then application of the new air quality standard to preconstruction permits is deferred "until the Administrator has published such final regulations and guidance."

Section 3(e) alters the CAA requirement that plans for nonattainment areas include contingency measures to be implemented if the area fails to make reasonable progress toward meeting the NAAQS. Section 3(e) would exempt extreme ozone nonattainment areas from these contingency measures.

Section 3(f) would allow states to assess economic feasibility – in addition to technological achievability, which is already in the CAA– when considering the measures to include in their SIPs. These criteria would be used for demonstrating reasonable progress toward meeting the standard in moderate and serious ozone nonattainment areas, and for demonstrating attainment using new or improved control technologies in extreme nonattainment areas.

Section 3(g) is similar to section 3(f) but applies to moderate and serious particulate matter nonattainment areas. The section would allow a state to consider technological achievability and economic feasibility in its SIP revision to demonstrate progress toward attainment of a NAAQS.

Section 3(h) amends section 319 of the CAA to allow additional circumstances to be included in the definition of "exceptional events" for purposes of reviewing and handling of air

quality monitoring data. Section 3(h) removes the exclusion of stagnation of air masses that are not "ordinarily occurring," meteorological inversions, high temperatures or lack of precipitation from the definition of "exceptional events."

Section 3(i) would require EPA to prepare a report to Congress regarding the impacts of foreign emissions on NAAQS compliance.

B. Analysis and Impact of H.R. 4775

H.R. 4775 would drastically alter the CAA to weaken air quality protections, allow more pollution, and threaten public health. Most of the changes specifically target the 2015 ozone NAAQS, however, the bill also undercuts the NAAQS process for all other air pollutants. These proposed changes would undermine significantly the features of the CAA that have driven important progress in improving air quality and public health.

The overall effect of the proposed changes included in H.R. 4775 is to delay the implementation of health-based air quality standards, make it more difficult to achieve more protective standards, and impose cost and technological feasibility considerations on the standard-setting process. The bill would also fundamentally alter those CAA provisions that ensure EPA's decisions to protect public health are informed by the most up-to-date scientific data, findings, and knowledge about air pollutants and their health and environmental impacts.

Section 2

Section 2 of the bill would make two key changes to deadlines in the CAA. First, section 2(a) would drastically extend deadlines associated with implementing the 2015 ozone NAAQS by up to eight years. As a result, the outdated ozone standard, which CASAC and the EPA Administrator found to be insufficient to protect public health, would remain in effect. This section also decreases the amount of time states have to develop and submit their SIPs demonstrating how they will bring nonattainment areas into attainment, from three to four years after EPA finalizes area designations, to only one year.

Second, section 2(b) adds an unnecessary provision to grandfather pending preconstruction permits under the old ozone standard. As noted earlier, the EPA already included such a provision in the final rule for the 2015 ozone NAAQS to help ensure a smooth transition to the new standard, so this section of the bill is not needed. However, the language in section 2(b) would go far beyond the reasonable timeframes in the rule by exempting from complying with the 2015 ozone NAAQS any preconstruction permits completed before October 26, 2025 or having a draft permit or preliminary determination published before December 26, 2025.

Section 3

Section 3 of H.R. 4775 contains changes to the CAA that would undermine the development, implementation and maintenance of the law's air quality standards which are essential to protecting public health.

First, section 3(a) extends the review period for all criteria air pollutant NAAQS from every five years to every ten years. A NAAQS review cycle of ten years would subvert the purpose of these standards, which is to establish a level of emissions that adequately protects public health based on the latest scientific knowledge. The current five-year cycle provides a reasonable amount of time for the development and review of new studies, and EPA is only required to make changes to a NAAQS if the latest information supports doing so to protect public health with "an adequate margin of safety."

Second, section 3(b) changes the criteria for establishing an air quality standard from one that is based solely on protecting public health to one that includes a consideration of the "technological feasibility" of the standard. This proposal has already been debated and rejected by the courts, and EPA notes that it "cannot consider the economic or technological feasibility of attaining ambient air quality standards, although such factors may be considered to a degree in the development of state plans to implement the standards."[20]

Third, section 3(c) requires that, before establishing or revising any NAAQS, the Administrator must request, and CASAC must provide, advice on any adverse public health, welfare, social, economic, or energy effects resulting from meeting that standard. This section is virtually identical to a provision in existing law, but notably the CAA does not make this information a prerequisite for a NAAQS revision.[21] Doing so would inject the consideration of costs into the standard setting process. As noted earlier, NAAQS standards are based solely on protecting public health; however, other criteria can be considered by states when developing a SIP.

Fourth, section 3(d) would create a loophole in the preconstruction permitting process, by establishing arbitrary procedural requirements for EPA to follow when setting a new air quality standard. If EPA does not issue rules and guidance concurrently with an updated NAAQS, then a new or expanding facility can apply for a preconstruction permit based on the old air quality standard, which is not adequate to protect public health. In effect, this bill could give new sources of pollution "amnesty" from new air quality standards leaving existing facilities with a burden to do more to reduce their emissions if the area is near or in nonattainment. This would worsen air quality, particularly in communities downwind of the facility, undermine the basic framework of the CAA, raise the economy-wide cost of cleaning up pollution, and undercut public confidence in permitting programs that are designed to protect public health.

As a practical matter, it is not always feasible or advisable for EPA to issue concurrent implementation regulations and guidance when revising a NAAQS. Most guidance develops organically as result of consultation with state and local air agencies and affected sources after they begin the process of implementing the NAAQS and ask EPA questions. Requiring EPA to issue unnecessary or premature rules and guidance, as the bill would do, could complicate the

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[20] U.S. EPA, *National Ambient Air Quality Standards for Ozone*, 80 Fed. Reg. 65292 at 65445 (Oct. 26, 2015) (final rule).

[21] Clean Air Act §109(d)(2)(C)(iv).

ability of EPA, the states, and regulated parties to meet their legal obligations and create greater regulatory uncertainty. Further, state and local permitting agencies do not need concurrent EPA rules and guidance to begin processing preconstruction permits under a new air quality standard, because it is well established that they have decades of experience managing this program with existing tools at their disposal.[22]

Fifth, section 3(e) would exempt extreme nonattainment areas, from having to establish contingency measures if they fail to make progress toward achieving the ozone standard. Without these contingency measures, there would be no incentive for extreme nonattainment areas to even attempt controlling their emissions. This may result in the area not meeting the ozone standard indefinitely or having to make any progress toward achieving the standard.

Sixth, sections 3(f) and 3(g) would allow states to use both economic feasibility and technological achievability as justification for achieving fewer emission reductions in moderate, serious, or extreme nonattainment areas under the ozone and particulate matter NAAQS. The changes in these sections would lower the bar for achieving reasonable progress toward meeting the standard, leading to fewer emissions reductions in nonattainment areas overall. As a result, states with nonattainment areas would be able to rule out using viable emissions reduction measures, make less progress on improving air quality, and still be in compliance with the requirements of the law.

Finally, 3(h) would narrow the list of circumstances that are excluded from the definition of "exceptional events," to include several common conditions and occurrences that are not, in fact, exceptional. Allowing states to seek relief by claiming additional exceptional events will artificially reduce reporting on the severity of air pollution in the area. It would also all but ensure that areas having stagnant air masses experiencing meteorological inversions, heat waves, or droughts; and that have poor air quality would remain in nonattainment. Further, changing air quality monitoring protocols in ways that lead to underreporting of poor air quality conditions will cause areas with poor air quality to appear much better under conditions of extreme heat and drought. Given how ozone levels are often higher on hotter days, such an expansion of the exceptional events definition would be a significant change.

[22] At a hearing in 2014, on a similar legislative proposal, one witness took issue with what he called the "underlying assumption of the legislation," that "permitting authorities are incapable of managing the pre-construction permitting process" despite "decades of experience showing otherwise." He testified that a "wealth of guidance and tools" exist that the state can use after EPA adopts or revises a NAAQS. He also noted that the state, on occasion, has "found that approaches that we developed during transition were more flexible and protective than those contained in the guidance issued later by EPA." (Energy and Power Legislative Hearing, May 21, 2014, O'Mara testimony)

V. WITNESSES

The following witnesses are expected to testify:

Misael Cabrera
Director
Arizona Department of Environmental Quality

Bryan W. Shaw
Chairman
Texas Commission on Environmental Quality

Alan Matheson
Executive Director
Utah Department of Environmental Quality

Seyed Sadredin
Executive Director/Air Pollution Control Officer
San Joaquin Valley Air Pollution Control District

Ali Mirzakhalili
Director, Division of Air Quality
Delaware Department of Natural Resources and Environmental Control