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Congress of the United States

House of Representatives

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To: Members of the Committee on Oversight and Government Reform

Fr: Republican Committee Staff

Re: Committee Hearing on EPA's New Ozone Standards

Overview:

On Tuesday, May 20, 2008, the full Committee on Oversight and Government Reform will examine Environmental Protection Agency ("EPA") Administrator Stephen Johnson's decision to revise the National Ambient Air Quality Standard ("NAAQS") for ozone and "the role of the White House in setting" the standard. Specifically, the Chairman has announced that the Committee will examine why the final NAAQS standard did not align with the recommendations of EPA's Clean Air Science Advisory Committee (CASAC).¹ The Chairman asserts that EPA's decision was purportedly a deviation from the historic precedent of "always accept[ing] CASAC's 'scientific advice with regard to final NAAQS designations.'"² This is not true.

The extensive public record and the Committee's investigation have failed to reveal or even suggest that the President or any official in the Executive Office of the President acted inappropriately or contrary to the law. First, Article II of the Constitution provides: "The Executive power shall be vested in a President of the United States." Second, Executive Order 12866, promulgated by President Clinton, openly declares the

¹ Letter from Henry Waxman, Chairman, House Oversight and Government Reform Committee to Stephen Johnson, Administrator, U.S. EPA (Mar. 14, 2008); Letter from the Henry Waxman, Chairman of the House Oversight and Government Reform Committee to Stephen Johnson, Administrator, U.S. EPA (March 12, 2008).

² See Letter from Waxman to Johnson, (March 12, 2008) *supra* note 1, (citing, Letter from Dr. Rogene Henderson, Chair of the Clean Air Science Advisory Committee, to EPA Administrator Stephen Johnson (Sept. 29, 2006).

President's role in major rulemakings -- namely that the President will resolve disagreements between an agency and the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA"). According to the record, the President himself accepted OIRA's conclusion that the uncertainties of the benefits of a standard lower than the one chosen justified not selecting the lower standard. The President appears to have carried out his constitutional responsibilities, consistent with E.O. 12866.

In addition, the assertion that this is the first time a final NAAQS standard deviated from CASAC's recommendation is false, as Congressional Hearings in 1997 revealed that while there was consensus support from moving from a one hour standard to an eight hour standard, there was no consensus opinion with respect to the appropriate level at which the NAAQS standard should be set. Half of the panel agreed with EPA's proposal and the other half favored a less stringent standard.³ Moreover, with respect to the setting of the Particulate Matter (PM) standard, Wolff testified under oath that CASAC did not endorse EPA's proposed standard.⁴ CASAC is also merely advisory and has no authority to set standards.

Finally, EPA and OIRA have engaged in an extensive process of accommodation with the Committee, while at the same time taking actions to protect the confidentiality of high-level Executive Branch deliberations involving the President and his senior staff. Throughout this process, the Majority has praised EPA for their efforts to accommodate the Committee's demanding production schedule and acknowledged the logistical difficulties involved with such voluminous document productions. This actual record of cooperation stands in contrast to any assertion by the Majority that EPA produced documents only after a subpoena was issued.

Statutory Framework

The Clean Air Act/ NAAQS/ and CASAC

The Clean Air Act (CAA) requires the EPA Administrator to review the NAAQS for criteria pollutants at 5-year intervals so that he may evaluate whether or not the standards are still acceptable based on current scientific knowledge. Section 109(d)(2) of the CAA also created CASAC, an independent scientific advisory panel that reviews EPA's work during NAAQS setting and revision.⁵ Historically, and in the case of the Ozone

³ Letter from Dr. George T. Wolff, Chair, Clean Air Scientific Advisory Committee to Carol M. Browner, Administrator, E.S. EPA (Nov. 30, 1995).

⁴ *Review of EPA's Proposed Ozone and Particulate Matter NAAQS Revisions: Joint Hearing Before the Subcom. on Health and the Environment and the Subcommittee on Oversight and Investigations of the Committee on Commerce*, 105th Congress 35 (statement of George Wolff, Chairman of CASAC, testifying "I would like to emphasize that CASAC did NOT endorse EPA's recommended ranges [for the 24-hour PM_{2.5} NAAQS]").

⁵ Clean Air Act § 109(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

standards at issue in the hearing, CASAC reviewed EPA's Criteria Document (CD), which summarizes the state of scientific knowledge regarding the effects of the pollutant in question, and the EPA Staff Paper, which summarizes the information compiled in the CD and provides the Administrator with policy options.⁶

The plain language of the CAA expressly states that CASAC is an **advisory committee**, not a standard setting panel. CASAC is directed to review the science and make *recommendations* to the Administrator. By definition, a recommendation can be accepted or rejected. With respect to Ozone NAAQS in particular, there is no bright line that science can identify above which there are health effects and below which there are none. Accordingly, setting the NAAQS level for Ozone is necessarily a policy judgment entrusted to the Administrator.⁷ Claiming that science dictates a certain outcome is contrary to both the science and the law. This is why the decision is not entrusted to CASAC.

The plain language of the statute also prohibits the Administrator from delegating his responsibility for setting NAAQS; only he may determine whether new standards are “*appropriate*” and what level, in his judgment, is “*requisite to protect health and welfare.*” The Administrator is under no legal obligation to follow CASAC's advice; rather in the case of a disagreement, the Administrator must explain the reasons for any differences from CASACs recommendations.⁸

Centralized Review of Agency Rulemaking

In addition to the proper role of CASAC in setting NAAQS standards, this hearing will examine the role played by the Office of Information and Regulatory Affairs (OIRA) and the White House in setting the 2008 NAAQS standard. OIRA is a federal office established by Congress in the 1980 Paperwork Reduction Act and is part of the Office of Management and Budget. In addition to reviewing collections of information under the

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 108 and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 108 and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

⁶ On December 7, 2006, EPA announced changes in review process, in order to speed up consideration of new NAAQS standards, however these changes did not affect CASACs review of Ozone NAAQS. *Id.*

⁷ Wolff, *supra* note 3.

⁸ James McCarthy, et al, *Air Quality Standards and Sound Science: What Role for CASAC?* Sept 18, 2007 (p.6)

Paperwork Reduction Act, OIRA reviews draft regulations before publication under Executive Order (E.O.)12866, issued by President Clinton.

E.O. 12866 requires all agencies to follow certain principles in rulemaking, which include consideration of alternatives to the rulemaking and analysis of the rule's effects on society, both its benefits and costs, where appropriate. OIRA is also responsible for coordinating the interagency review process, which is necessary to ensure that agencies coordinate their rules with other agencies to avoid inconsistent, incompatible, or duplicative policies. In the event a disagreement arises between OIRA and an Agency, Section 7 of E.O. 12866 provides that "*disagreements or conflicts between or among agency heads or between OIRA and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President.*"⁹ That is what happened in this case.

EPA's Final Rule Setting Ozone NAAQS at .075 ppm

On Thursday, March 13, 2008, EPA announced the publication of the final rule for the NAAQS for ozone, setting both the primary and secondary standards at .075 ppm.¹⁰ This is a significant tightening over the prior standard, issued during the Clinton Administration, which had set the maximum allowable limit at .084 ppm for both the primary and secondary standards.

The next morning the Washington Post ran a story claiming that EPA "weakened one part of its new limits on smog-forming ozone after an unusual last-minute intervention by President Bush"¹¹ On the same day, Chairman Waxman informed EPA of his intention to investigate the matter, citing the *Washington Post* article for support of the inquiry.¹²

As a result of the investigation, it is now apparent that the Washington Post was incorrect in its assertion that "*Solicitor General Paul D. Clement warned administration officials late Tuesday night that the rules contradicted the EPA's past submissions to the Supreme Court.*"¹³ EPA Associate Deputy Administrator Jason Burnett testified that the Post story inaccurately reported information he had given to a third person.

In addition to the White House's involvement, the Committee is also investigating why EPA Administrator Johnson did not adopt the specific advice given to EPA by the CASAC panel, even though the proposed rule, issued on July 11, 2007, explicitly contemplated setting the primary NAAQS standard at .075ppm and setting the secondary standard equal to that of the primary standard.¹⁴

⁹ Exec. Order No. 12,866, 62 Fed. Reg. 38421 (1997).

¹⁰ National Ambient Air Quality Standards for Ozone; Final Rule 40 CFR Parts 50 to 58 (2008) available at <http://www.epa.gov/fedrgstr/EPA-AIR/2008/March/Day-27/a5645.pdf>.

¹¹ Julie Eilperin, *Ozone Rules Weakened at Bush's Behest*, WASH POST (March 14, 2008) at A1.

¹² See Letter from Waxman to Johnson, (March 14, 2008) *supra* note 1.

¹³ Committee on Oversight and Government Reform, Transcript of Interview of Jason Burnett at 101.

¹⁴ National Ambient Air Quality Standards for Ozone; Final Rule 40 CFR Parts 50 (2007) available at http://www.epa.gov/ttn/naaqs/standards/ozone/data/frnotice_07-11-07.pdf.

OIRA and EPA

The primary disagreement between OIRA and EPA was over EPA's proposal to modify the manner in which compliance with the secondary standard is measured. According to the Clean Air Act, the secondary standard should be set at a level "*requisite to protect the public welfare.*" The CAA defines "welfare" broadly, and includes "*effects on economic values and on personal comfort and wellbeing.*" EPA submitted to OIRA a separate welfare measurement standard, referred to as W126 of 21(ppm-h), which was considered to be more biologically relevant to vegetation and eco-systems.

EPA published on their public docket a series of high level correspondence between OIRA Administrator Susan Dudley and EPA Administrator Stephen Johnson, which details the disagreement between the two agency heads regarding EPA's proposal to make a significant change to the secondary standards for ozone.¹⁵ OIRA articulated to EPA its concern that "*there is substantial uncertainty in the additional benefits of a separate secondary standard*" and that "*nothing in the draft or its supporting analysis supports a different conclusion.*"¹⁶ The dispute remained unresolved and as of March 12, 2008, OIRA was "*not in a position to conclude its review of the rule with the proposed secondary standard unaltered.*"¹⁷ In response, the Administrator of EPA invoked the Resolution of Conflict procedures, as set forth in E.O. 12866, which elevated the dispute to the President of the United States.¹⁸

In the March 13 letter, Administrator Dudley informed Administrator Johnson that as a result of EPA's request, President Bush concluded that "*added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard.*" Consistent with the President's conclusion, Administrator Johnson issued a final rule on March 13, which continued the precedent of setting the primary and secondary NAAQS for ozone at an equivalent level.

The President's involvement in the ozone NAAQS decision does not reflect any improper action. His involvement was pursuant to a process established by E.O. 12866. President Clinton involved himself in dozens of rulemakings, including the original 1997 ozone NAAQS rulemaking. The Majority simply refuses to recognize the President's role under the constitution and E.O. 12866, regardless of which President is in the White House.

Precedent for Presidential Involvement in Agency Rulemaking Decisions

While the President only became involved in the rulemaking as an outgrowth of the procedures outlined in E.O. 12866, there is also precedent for Presidential involvement in

¹⁵ Memorandum from Administrator Dudley on Secondary Ozone Standards (March 6, 2008); Memorandum from Marcus Peacock on Ozone Secondary Standards (March 7, 2008); Letter from Administrator Dudley to Administrator Johnson (March 12, 2008).

¹⁶ Memorandum from Administrator Dudley on Secondary Ozone Standards (March 6, 2008).

¹⁷ Letter from Administrator Dudley to Administrator Johnson (March 12, 2008).

¹⁸ See Memo from Dudley, *supra* note 12.

the promulgation of a significant regulation. According to a law review article published by former OIRA Administrator Sally Katzen, who served in the Clinton Administration, she can “recall several times when a White House office raised an issue about an agency’s rule-making and asked OIRA to transmit the comment/concern to the agency.”¹⁹

There is also judicial support for the proposition that the President has Constitutional authority to become involved in an agency’s rule-making. In the case of Sierra Club v. Costle:

*The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking.*²⁰

Moreover, according to Elena Kagan, a former Deputy Assistant to President Clinton for Domestic Policy, Clinton “increasingly made the regulatory activity of the executive branch agencies into an extension of his own policy and political agenda.”²¹ In fact, President Clinton brought the role of the President in agency decisions to a new level, as he issued 107 presidential directives, including many directing agencies to take regulatory action to deal with particular problems, while President George H.W. Bush issued only 9.²²

President Clinton’s Role in Setting the 1997 Ozone NAAQS Standards

In addition to President Clinton’s involvement in agency decision making generally, he was also particularly involved in the setting of ozone NAAQS standards. On June 25, 1997, fully one month before Administrator Carol Browner finalized the 1997 Ozone NAAQS rule, President Clinton announced that he “approved some strong new regulations that will be somewhat controversial.”²³

Moreover, on July 16, 1997, President Clinton announced in a memorandum, containing his own signature that he had “approved the issuance of new air quality standards to provide important new health protection for all Americans by further controlling pollution from ozone and particulate matter.”²⁴ At that time, Congressman Waxman was an active member of both the Commerce Committee and the House Oversight and Government Reform Committee, which both held a series of hearings on the 1997 ozone standard.

¹⁹ Sally Katzen, *A Reality Check on an Empirical Study: Comments on ‘Inside the Administrative State’* 105 MICH L REV 1497, 1504 (2006).

²⁰ *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981).

²¹ Elena Kagan, *Presidential Administration* 114 Harv. Law Rev. 2245 (2001).

²² *Id.* at 2294.

²³ *Clinton Endorses Tougher New Air Standards*, CNN, June 25, 1997 (available at www.cnn.com/ALLPOLITICS/1997/06/25/clinton.air/).

²⁴ Memo from Dudley to Johnson, *supra* note 12.

Given the involvement of President Clinton in the agency decision making processes, Ranking Member Davis requested that the Committee's investigation include an examination of the role of President Clinton and the White House in the 1997 Ozone standards. In an April 16, 2008 letter to Chairman Waxman, Ranking Member Davis suggested that the process that led to President Clinton's "approv[al]" could shed important light on the White House's role in the 1997 issuance of the ozone standard."²⁵ The Chairman rejected this request, reciting the extensive record of President Clinton's involvement in the 1997 ozone decision, as revealed in congressional hearings.²⁶ The Chairman's letter did not suggest that President Clinton's involvement was improper.

EPA and CASAC

The second subject of the hearing is the assertion that Administrator Johnson improperly ignored the scientific advice provided by the Clean Air Science Advisory Committee (CASAC), who recommended that the primary standard be .070 ppm or lower and that the secondary standard W-126 standard be within the range of 7 to 15 ppm-hr.²⁷ However, this assertion is based on the false premise that EPA is obligated to follow the recommendations of CASAC. In reality, the plain language of the CAA makes it clear that CASAC's role is advisory and that Congress delegated to the Administrator of EPA the authority and the responsibility to set NAAQS standards.²⁸

In addition to their refusal to recognize the statutorily mandated roles of CASAC and the Administrator, the Majority appears to disregard the distinction between a scientific determination and a policy choice. The Administrator has wide discretion under the CAA to establish a NAAQS standard based on both science and policy judgment and it is solely up to the Administrator to make the final decision, informed by CASAC's opinions. This principal is affirmed by Justice Breyer in his concurring opinion in American Trucking, which upheld the 1997 Ozone NAAQS. According to Justice Breyer, "*by its express terms [the CAA] does not compel the elimination of all risk*" and that the Administrator has "*considerable discretionary standard setting authority.*"²⁹ Moreover, the Administrator can "*consider the severity of a pollutants potential adverse health effects, the number of those likely to be affected, the distribution of the adverse affects, and the uncertainties surrounding each estimate.*"³⁰

²⁵ Letter from Ranking Member Tom Davis to Chairman Henry Waxman (April 16, 2008) (on file with Committee)

²⁶ Letter from Chairman Waxman to Ranking Member Davis (April 17, 2008) available at <http://oversight.house.gov/documents/20080418100659.pdf>.

²⁷ Letter from Dr. Rogene Henderson to Administrator Johnson (April 7, 2008) available at [http://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/\\$File/EPA-CASAC-08-009-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/$File/EPA-CASAC-08-009-unsigned.pdf).

²⁸ The Majority memorandum also fails to mention that CASAC had previously supported the EPA staff paper, where career EPA staff recommended that the Administrator consider a standard level within the range of somewhat below .080 ppm to .060 ppm.

²⁹ *Whitman v. American Trucking Associations*, 531 U.S. 457, 494 (2001).

³⁰ *Id.* (emphasis added)

As with all rulemakings, the Administrator is obligated to give due consideration to the comments EPA receives during the public comment period. Therefore, the language contained in the Clean Air Act, as well as the Supreme Court opinion, tells us that the Administrator is not bound by the policy recommendations of CASAC, and is free to consider other relevant considerations in setting the appropriate NAAQS level.

Finally, the Majority claims that EPA's divergence from a CASAC recommendation is an unprecedented departure from the past practice of always accepting its advice. However, that assertion is not accurate, especially upon review of the original record supporting the 1997 ozone standard. In that case, EPA Administrator Browner disregarded the opinion of CASAC when proposing standards for concentrations of ozone and particulate matter (PM).

George Wolff, an atmospheric scientist and former head of CASAC, is quoted in the *Wall Street Journal*, "the standards that have been chosen do not reflect the advice the CASAC has given."³¹ He explained that "in setting a new standard for particulate matter only four of the CASAC panel's twenty-one members supported EPA's guidelines."³²

Wolff elaborated on the discrepancy between CASAC's recommendations on particulate matter and ozone standards in a joint hearing between the Subcommittee on Health and the Environment and the Subcommittee on Oversight and Investigations of the Committee on Commerce. In this hearing, Wolff and other former CASAC Chairs clearly articulated that since "it appeared that some individuals may respond to ozone exposure no matter what the level [of ozone]...the panel concluded that the selection of a specific level ... is a policy judgment rather than a decision that can be based on underlying science."³³

Furthermore, he testified that CASAC reached no consensus on EPA's recommended ozone standard: ten members preferred five different standards and five members favored the concept of readjusting standards.³⁴ Moreover, with respect to the setting of the PM standard, Wolff testified under oath that CASAC did not endorse EPA's proposed standard.³⁵

Inquiry by the Committee

³¹ Editorial, *Whiter Than White*, WALL ST. J., Feb. 14, 1997 at A14.

³² *Id.*

³³ *Review of EPA's Proposed Ozone and Particulate Matter NAAQS Revisions: Joint Hearing Before the Subcom. on Health and the Environment and the Subcommittee on Oversight and Investigations of the Committee on Commerce*, 105th Congress.

³⁴ *Congressional Groups Go After EPA Rule*, 18 GENERATION WEEK 17 (1997).

³⁵ *Review of EPA's Proposed Ozone and Particulate Matter NAAQS Revisions: Joint Hearing Before the Subcom. on Health and the Environment and the Subcommittee on Oversight and Investigations of the Committee on Commerce*, 105th Congress 35 (statement of George Wolff, Chairman of CASAC, testifying "I would like to emphasize that CASAC did NOT endorse EPA's recommended ranges [for the 24-hour PM_{2.5} NAAQS]").

EPA has been extraordinarily accommodating in turning over more than 35,000 pages of responsive documents, for the Ozone investigation. Moreover EPA participated in more than 15 conference calls and meetings with Committee staff in order to accommodate the Committee's document requests. In the end, only 33 documents that relate specifically to the President's decision have been withheld from the Committee. Throughout both the California Waiver and Ozone investigations, EPA has participated in at least 25 meetings (including conference calls) with Committee staff relating to the Committee's investigation into the setting of the NAAQS and California Waiver. EPA has dedicated over 3,200 staff hours and produced over 65,000 pages of responsive documents. (This does not include the many interviews that were conducted with EPA staff involved in the California Waiver decision.)

Throughout this process, the Majority has praised EPA for their efforts to accommodate the Committee's demanding production schedule and acknowledged the logistical difficulties involved with such voluminous document productions. This actual record of cooperation stands in contrast to any assertion by the Majority that EPA produced documents only after a subpoena was issued. Before every subpoena was issued, the Committee had already obtained access to the information in the documents, and the subpoena was issued to obtain physical possession of the documents.

OIRA has been similarly responsive, turning over 6,800 pages of documents responsive to the Committee's request and continues to discuss ways they can accommodate the Committee's oversight needs without impairing legitimate executive branch confidentiality concerns and executive privilege. OIRA has also participated in a half dozen in-person meetings or conference calls in an effort to accommodate the Committee's needs. As a result of these conversations, OIRA had proposed a production schedule, and was in the process of complying with that schedule when the Chairman unilaterally issued a subpoena for the remaining documents. Accordingly, the Majority's claim that OIRA produced documents only because they had to comply with the subpoena is grossly distorted.

Despite their efforts of accommodation, Chairman Waxman has warned both Administrator Dudley and Johnson that if they do not personally turnover the remainder of the documents the morning of the hearing, the Committee will hold them personally responsible.³⁶

It appears that the Committee has reached a point in this investigation where no further accommodation by the Administration with respect to documents may be possible. However, that is not to say that the information desired by the Chairman cannot be obtained by other means, such as through the direct testimony of both Administrators Johnson and Dudley at the Committee's hearing.

Right Whale Letter

³⁶ Letter from Chairman Henry Waxman to Administrator Dudley (May 16, 2008); Letter from Chairman Henry Waxman to Administrator Johnson (May 16, 2008) available at <http://oversight.house.gov/story.asp?ID=1953>.

On April 30, 2008, the Majority sent another information request letter to OIRA Administrator Dudley, this time regarding OIRA's review of a rule proposed by the National Marine Fisheries Service that would restrict shipping routes in order to protect the Right Whale.³⁷ While the Majority has agreed that this subject is beyond the scope of the hearing, they have also informally communicated to OIRA staff that Administrator Dudley should be prepared to answer questions on the subject. Pursuant to the Committee's request, OIRA has turned over all communications with outside parties, but has not turned over decision making documents, because unlike Ozone, the rulemaking is still ongoing.

³⁷ Letter from Cong. Henry Waxman to Administrator Dudley (April 30, 2008) available at <http://oversight.house.gov/story.asp?ID=1921>.