

WebMemo



Published by The Heritage Foundation

No. 3330
August 1, 2011

High on Ozone: The EPA's Latest Assault on Jobs and the Economy

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The U.S. economy won a temporary reprieve with the Environmental Protection Agency's (EPA) announcement last week that new ozone standards, which had been slated for this summer, will be delayed. The EPA's "reconsideration" of the ozone standards it set in 2008 and issuance of more stringent standards violate all three of the fundamental values EPA Administrator Lisa Jackson pledged to honor: "science-based policies and programs, adherence to the rule of law, and overwhelming transparency."¹

This enormously expensive regulation is unsupported by scientific evidence, violates the Clean Air Act (CAA), and appears timed to evade ongoing judicial review of the rulemaking process. Even the EPA's estimate that the new rule will impose up to \$90 billion in compliance costs annually² severely understates the impact on economic development and jobs in communities where attainment of the new standards will be impossible. Congress should make the EPA's temporary postponement of its new ozone standards a permanent one.

Background. The CAA requires the EPA to set National Ambient Air Quality Standards (NAAQS) for ozone, among other pollutants, at a level that is not "higher than is necessary...to protect the public health with an adequate margin of safety."³ Areas that are not in attainment must reduce emissions from existing sources and impose stringent controls on new ones. Even areas in attainment must strictly regulate new sources to prevent any increase in emissions.

In 2008, as part of the regular NAAQS review process, the EPA revised the ozone standard to 0.075 parts per million (ppm), down from the 0.080 ppm level set by the Clinton EPA.

In 2009, just months after President Obama took office, the EPA announced that it would "reconsider" and revise the 2008 standard, circumventing the mandatory process for revisions specified in the CAA. On January 19, 2010, the agency proposed to set a primary standard in the range of 0.060 to 0.070 ppm and, in an unprecedented step, introduce a separate and additional secondary standard (intended to protect such things as vegetation) based on cumulative ozone concentrations in summer. The EPA's case for the new NAAQS is based on its controversial re-analysis of the data from two small studies that even their author states does not support reduced standards. Indeed, Jackson concedes that the scientific support for both the 2008 standards and the current proposal is "limited."⁴

Unprecedented Expense. The Obama EPA continues to outdo itself, proposing a series of CAA rules each more expensive than the last. Its new ozone standards would be among the most expensive yet,

This paper, in its entirety, can be found at:
<http://report.heritage.org/wm3330>

Produced by the Center for Legal & Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
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with the agency estimating costs of \$19 billion to \$90 billion annually, depending on stringency.

Why are the costs so high? Because, as the EPA acknowledges, the technology needed to comply does not exist. Spending on “known controls” would amount to only \$3.3–4.5 billion, while the remainder would go to “other, currently unknown technologies that would be needed to attain the proposed primary standards.”⁵ Given that uncertainty, the costs may be higher, or it may prove more cost-effective to simply shutter industrial capacity.

Beyond compliance costs, the new standards will exact a toll on many communities. Even assuming “aggressive technological change,” the EPA projects that its new primary standard would force up to 451 counties into non-attainment—and even that is a low-ball estimate, due to forthcoming rules that will push more areas into non-attainment.⁶ The secondary standards would throw an additional “large number of counties”—exactly how many is unclear—into non-attainment status.⁷

The economic consequences of non-attainment are severe. New and modified sources—factories, power plants, and the like—in non-attainment areas must employ costly emissions control tech-

nologies and offset emissions by taking other industrial capacity offline, directly costing jobs. At best, this drives up the cost of development and discourages businesses from expanding. At worst, it is a near prohibition on new industry. And where businesses are unable to relocate—such as is often the case with utilities—the result is higher costs for consumers.

Finally, the primary standards may be impossible to attain. The Clean Air Scientific Advisory Committee (CASAC) explained that “as levels for ozone standards move closer to ‘background’ levels, new issues may arise with implementation.”⁸ In many areas, background levels of ozone approach or exceed the proposed standard, placing those areas in permanent non-attainment, with all the economic consequences. This problem will only get worse: Mexican and Canadian emissions already have a large and growing impact on bordering states’ ozone levels,⁹ and a recent study concluded that rising Asian emissions “may hinder the USA’s compliance with its ozone air quality standard.”¹⁰

Inflated Benefits. Even the EPA concedes that the ozone NAAQS will likely flunk the cost–benefit test. The EPA claims, however, that the costs of the

1. Press release, “Statement by Administrator-designate Lisa Jackson,” Environmental Protection Agency, January 23, 2009, at <http://yosemite.epa.gov/opa/admpress.nsf/0/2297C12A9F4773D285257547006497D4> (August 1, 2011).
2. Total costs will depend on the stringency of the final standard. See Environmental Protection Agency, “Ozone NAAQS (National Ambient Air Quality Standards) Reconsideration: Supplement to the 2008 Regulatory Impact Analysis, Briefing for Office of Management and Budget (OMB) and Interagency Group,” November 5, 2009, at <http://www.regulations.gov/#/documentDetail;D=EPA-HQ-OAR-2007-0225-0402> (August 1, 2011).
3. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475–67 (2001) (quoting 42 U.S.C. § 7409(b)(1)).
4. *Federal Register*, Vol. 75, No. 11 (January 19, 2010), p. 2,993.
5. Environmental Protection Agency, “Fact Sheet: Supplement to the Regulatory Impact Analysis for Ozone,” January 7, 2010, at <http://www.epa.gov/glo/pdfs/fs20100106ria.pdf> (August 1, 2011).
6. Environmental Protection Agency, maps on proposed revisions to national standards for ground-level ozone, January 6, 2010, at <http://www.epa.gov/air/ozonepollution/pdfs/20100104maps.pdf> (August 1, 2011).
7. Environmental Protection Agency, “Supplemental Regulatory Impact Analysis (RIA) for the Reconsideration of the 2008 Ozone National Ambient Air Quality Standard (NAAQS),” January 6, 2010, at http://www.epa.gov/ttn/ecas/regdata/RIAs/s1-supplemental_analysis_full.pdf (August 1, 2011).
8. Jonathan M. Samet, Chair, Clean Air Scientific Advisory Committee, letter to Lisa Jackson, Administrator, Environmental Protection Agency, February 19, 2010.
9. H. Wang *et al.*, “Surface Ozone Background in the United States: Canadian and Mexican Pollution Influences,” *Atmospheric Environment*, Vol. 43 (2009), p. 1310. The authors found, for example, that, by 2020, “Canadian pollution influence in the Northeast will become comparable in magnitude to that from domestic power plants.”
10. O. R. Cooper *et al.*, “Increasing Springtime Ozone Mixing Ratios in the Free Troposphere over Western North America,” *Nature*, Vol. 463 (January 21, 2010), p. 344.

rule will be partially offset by tens of billions of dollars in annual benefits. But the agency runs up the numbers by manipulating assumptions,¹¹ exaggerating harms, and double-counting the hypothetical indirect benefits that it relies upon to justify many of its most expensive proposals.

The biggest purported benefits—alleged to be worth tens of billions of dollars per year—have to do not with ozone but with reductions in airborne particulate matter that would supposedly be achieved by the emissions controls required to meet a new ozone standard. This claim is speculative, because the “unknown technologies” necessary to comply may or may not achieve these reductions. Moreover, the EPA claims these same benefits for its rule on interstate air pollution, its massively expensive Utility MACT proposal, and its NAAQS for fine particulate matter and sulfur dioxide.¹² If a private entity followed the EPA’s lead and quintuple-counted profits, its executives would wind up in prison.

Nor does the science suggest that the new NAAQS will yield much of a direct benefit to anyone. The EPA relies solely on findings of minor physical effects from low-level ozone exposure in its statistical re-analysis of two small studies that, in their original form, provided no support for stricter standards. The EPA’s re-analysis has proven controversial and been criticized by the two studies’ author and other scientists. For example, CASAC member Dr. Sverre Vedal of the University of Washington stated

that the EPA’s re-analysis “amounts to attempting to find effects in a very few individuals when the statistical tests are not significant.”¹³ And former CASAC chair Roger McClellan testified, “The validity of this re-interpretation and the significance of the functional changes is open to debate.”¹⁴

Check the EPA’s Overreaching. The usual check on the EPA overreaching is judicial review, but the EPA’s unlawful “reconsideration” will end or indefinitely postpone the pending challenges to the EPA’s 2008 NAAQS, delaying judgment on the EPA’s bad science by years.

It is therefore incumbent on Congress to rein in the agency’s excesses. In addition to vigorous oversight directed at convincing the EPA to obey the law and halt its “reconsideration,” Congress should act to avert the enormous damage to economic growth and job creation that the EPA’s current regulatory program promises. In light of the EPA’s string of expensive and job-destroying CAA regulations, lawmakers should impose a moratorium on all major CAA actions by the EPA—and halt those published over the past year—and investigate the agency’s misrepresentation of science and regulatory benefits. With the economy already burdened with billions of dollars of EPA regulations, the agency must be held accountable for its actions.

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11. For example, substantially increasing the dollar values of preventing various health conditions.

12. Environmental Protection Agency, “Final Cross-State Air Pollution Rule,” July 18, 2011, at http://www.epa.gov/airtransport/pdfs/TR_070611_WEB.pdf (August 1, 2011). See also *Federal Register*, Vol. 76 (May 3, 2011), p. 24,976; Vol. 71 (October 17, 2006), p. 11,144; Vol. 75 (June 22, 2010), p. 35,520.

13. Sverre Vedal, “CASAC Critique of the Ozone OAQPS Staff Paper (Henderson 2007b),” at C-30.

14. Roger McClellan, testimony before the Clean Air Subcommittee, Environment and Public Works Committee, U.S. Senate, July 11, 2007.