



The New NAAQS Review Process Begins to Take



Assessing the near- and long-term impacts of recent changes to the NAAQS review process.

The U.S. National Ambient Air Quality Standards (NAAQS) are the centerpiece of the U.S. Clean Air Act (CAA) and establish allowable concentration levels for six “criteria air pollutants”: ozone, particulate matter, lead, carbon monoxide, nitrogen dioxide, and sulfur dioxide. The CAA requires the U.S. Environmental Protection Agency (EPA) to review and, as appropriate, revise the NAAQS at least every five years, and EPA has, since 1970, regularly adopted increasingly stringent standards. Whether those revisions have gone far enough or too far has become a predictably contentious issue, with each review involving debates over science, the role of EPA’s Clean Air Science Advisory Committee (CASAC), the discretion of the EPA Administrator, and the format of the review process itself, among many other issues.

Presidential Memo

Changes to the NAAQS review process have been an apparent priority for the Trump administration’s EPA. The first definitive statement on the administration’s plans came from the White House in an April 12, 2018, Presidential Memorandum for the Administrator of the Environmental Protection Agency.¹ Much of the Presidential Memo is concerned with ensuring timely EPA action in processing state implementation plans, permit applications, and other agency activities, like approvals of exceptional event demonstrations. Other provisions venture further into policies that are likely to be controversial.

Perhaps most significant, the Presidential Memo, in a section titled “Future NAAQS Reviews,” addresses several issues that have been key points of contention in past reviews. First, it directs the Administrator to evaluate whether EPA is complying with the CAA provisions governing “the scope and characterization of advice provided by its Clean Air Act Scientific Advisory Committee [CASAC], including requirements that the Committee advise the Administrator regarding background concentrations and adverse public health or other effects that may result from implementation of revised air quality standards.”¹ The role of CASAC, the type of advice it should and should not provide to EPA, and under what circumstances EPA can depart from CASAC advice are all issues that have been litigated and will likely be litigated again. Also

significant, the Presidential Memo directs EPA to examine the current NAAQS review process, to develop criteria to ensure transparency in the review of relevant science, and to prepare guidance for distinguishing between science and policy considerations.¹

Back-to-Basics Memo

A number of the Presidential Memo’s general directives received further attention in Administrator E. Scott Pruitt’s May 9, 2018 memorandum titled “Back-to-Basics Process for Reviewing National Ambient Air Quality Standards.”² The Basics Memo is described in detail in the September issue of *EM* in “EPA’s ‘Back-to-Basics’ Process for Review of the National Air Quality Standards” by Alexander Dominguez and Clint Woods. A few key points are relevant here.

First, in seeking to further the goal of meeting statutory deadlines, the Basics Memo calls for expediting the NAAQS review process, including the manner in which CASAC provides advice to the agency. In particular, it calls for combining CASAC’s review of the key NAAQS review documents—the Integrated Science Assessment (ISA), the Risk and Exposure Assessment, and the Policy Assessment—into a single round of comment.²

Similarly, in its call for the streamlining and standardization of the review process, the Basics Memo suggests identifying the policy-relevant considerations for each review earlier in the process to more effectively contain the scope of each review. To that end, it calls for a more concise ISA that focuses on the key studies most likely to influence a NAAQS review, and for eliminating the production of more than one draft of each review document.²

Another key principle discussed in the Basics Memo is expansion of the types of information considered by the agency. The Basics Memo calls for ensuring that CASAC provides advice on all of the categories of information described in section 109(d)(2) of the CAA, a role that CASAC has not consistently performed. That includes providing information on the role of natural and international emissions and “any adverse public health, welfare, social, economic, or



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energy effects which may result from various strategies for attainment and maintenance of "a NAAQS.³ The Basics Memo also calls on EPA and CASAC to distinguish between scientific and policy concerns more clearly, perhaps in an effort to more consistently identify and be cognizant of areas that fall exclusively within the judgment of the administrator.²

Finally, the Basics Memo calls for more timely issuance of NAAQS implementation regulations and guidance, and where possible the publication of those materials concurrently with the issuance of the revised NAAQS.² The lack of timely implementation rules has hindered efforts by state regulators to comply with the standards. Further, the public's inability to fully perceive how a revised NAAQS will be implemented at the time a revision is under consideration has been a shortcoming of the process in the eyes of many stakeholders.

First Test: Ozone NAAQS

We are likely to see these policies in fully put into action first, and to get a sense of their real scope and ambition, in the recently-initiated review of the ozone NAAQS. EPA has committed to completing that review by the statutorily prescribed deadline of October 2020. In an August 1, 2018, status report filed in the D.C. Circuit litigation concerning the 2015 ozone NAAQS, EPA stated that it had begun a new ozone NAAQS review using the administration's newly devised process and that EPA would specifically address whether background ozone concentrations should be considered when deciding whether to revise a NAAQS.⁴

Completing the ozone review on this schedule will be a challenge, so how might EPA streamline the process to achieve its goal? A new or updated ISA, perhaps more concise than we have seen in recent reviews, would be required under section 108(d)(1) of the CAA, and EPA would have to submit that ISA to CASAC for review. But, as noted in the Basics Memo, multiple drafts are not required.


Although the Basics Memo does not suggest their elimination, EPA is under no legal obligation to prepare either a Risk and Exposure Assessment or a Policy Assessment as part of a NAAQS review. EPA could dispense with both documents to speed up the review process. Such a decision would be most defensible if EPA determined that the most recent science could not support any NAAQS revision. For example, in the review resulting in EPA's recent decision to retain the existing primary nitrogen dioxide NAAQS, EPA did not prepare a separate Risk and Exposure Assessment.

Notice-and-comment rulemaking, an important step in completing a NAAQS review, requires publication of a proposed rule in the *Federal Register* and a "reasonable time" for public comment, which is almost certain to be at least 30 days.⁵ A proposed rule on revising the ozone NAAQS could be released at the same time EPA released its final ISA, which might also speed up the typical review process.

A final rule, according to the CAA, should be published within 90 days of publication of the proposed rule.⁵ EPA has

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not been able to keep to that schedule, given its obligation to review and respond to public comments on the proposal, and any modification to the process could result in legal risks for a resulting standard. Nevertheless, EPA could conceivably reduce the time between the closing of the record on the proposed rule and publication of a final rule to hit its 2020 target for completing the ozone NAAQS review.

Review Process under Scrutiny

As to the substance of the ozone NAAQS review and future reviews for other criteria pollutants, the administration's public statements suggest that certain issues will particularly resonate with the agency and be the focus of EPA action. Public comment on these issues is likely to be unusually impactful.

For instance, EPA's renewed commitment to examine background emissions and how to address them suggests that comments addressing legal and policy justifications for taking background into account, and how to do so, could be partic-

ularly helpful to the agency. Likewise, comments addressing the proper definition of background and the role of international emissions could also affect significant change in EPA policy. Similarly, factors to consider in determining what constitutes an adverse effect and how to distinguish between scientific issues and policy issues could result in considerable changes from past EPA practice and have a meaningful impact on CASAC's role as well.

EPA's goals for reforming the NAAQS review process could result in significant changes to the program. Completing reviews in compliance with the statutory schedule will be a challenge. There may be enough legal flexibility in the statute to make that possible, however, under the right circumstances. The bigger questions are how much substantive change these procedural modifications will bring and how long the reforms will last. Whether or not EPA seeks to make significant changes to the NAAQS themselves, the new review process will be under intense scrutiny. **em**

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3. U.S. Clean Air Act § 109(d)(2)(C).
4. Respondent EPA's Final Status Report at § 8. *Murray Energy Corp. v. EPA*, No 15-1385 (D.C. Cir. Aug. 1, 2018).
5. CAA § 109(a)(1)(B).

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