

## D I A L O G U E

# EPA's New Ground-Level Ozone Standard

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### Summary

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On October 1, 2015, after years of delay punctuated by litigation and political maneuvering, the U.S. Environmental Protection Agency issued revised national ambient air quality standards for ground-level ozone. Last set at 75 parts per billion (ppb) in 2008, the new standard of 70 ppb has already elicited promises of legal challenges from industry and environmental advocates. High levels of ozone are linked to respiratory illness, especially among children and the elderly. Environmental and public health advocates had succeeded in obtaining a court order setting the October deadline, but many have expressed disappointment that the new standard does not go far enough to adequately protect public health. Industry groups, on the other hand, have decried the rule as unnecessary and claim it will cripple the economy in any place deemed out of compliance with the new standard. On October 15, 2015, the Environmental Law Institute convened a panel of attorneys who either worked on promulgating the rule or advocated for clients during its development. Below we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

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**Jenny Howard** (moderator) is Deputy General Counsel at the Tennessee Department of Environment and Conservation.

**Lorie J. Schmidt** is Associate General Counsel for Air and Radiation at the U.S. Environmental Protection Agency.

**Lucinda (Cindy) Minton Langworthy** is Counsel at Hunton & Williams LLP.

**John D. Walke** is a Senior Attorney and Clean Air Director at the Natural Resources Defense Council.

**Jenny Howard:** Today, we are discussing the new standard for ground-level ozone promulgated by EPA under the Clean Air Act (CAA).<sup>1</sup> EPA revised the national ambient air quality standards (NAAQS) for ground-level ozone on October 1, 2015, the court-mandated deadline.<sup>2</sup> The

standard was last set at 75 ppb, in 2008. As of October 1, 2015, it is now set to a new standard of 70 ppb. High ozone levels have been linked to respiratory illnesses, especially in vulnerable populations.

We have three distinguished panelists today. Our first speaker will be Lorie Schmidt, Associate General Counsel for Air and Radiation at EPA. Cindy Langworthy, a member of Hunton & Williams LLP's environmental team, will be our second speaker. Last, but not least, John Walke, a senior attorney and clean air director for the Natural Resources Defense Council in Washington, D.C., joins us to discuss the new ozone standard.

**Lorie Schmidt:** The first NAAQS that I worked on were the 1997 standards, where EPA set the fine particle standards for the first time and also significantly tightened the ozone standard, moving from a one-hour averaging period to an eight-hour averaging period. It suddenly dawned on me last night that it's been almost 20 years since we set those standards. A lot has changed since then. Most significantly, air quality has improved dramatically. Of the areas that were designated nonattainment for the 1997 NAAQS for ozone, over 90% of those areas now have air quality that meets the 1997 ozone standard.

One thing that's unchanged, though, is that setting an ozone standard continues to be a very controversial Agency action. As evidenced in part in the D.C. area, there were numerous TV ads over the summer on both sides of the issue. (Just as an aside, let me say that I like spirited policy debates as much as the next person, but I really wish we could declare baseball games policy-free zones. It was hard enough watching televised Washington Nationals games last summer without having work come through during the commercials.)

This Environmental Law Institute forum, however, is the perfect place for discussing important legal and policy issues. I'm looking forward to hearing what my fellow panelists have to say and engaging with the audience. What I hope to do now is to give you some insight into the standards-setting process, and then talk very briefly about implementation.

On the standard-setting side, the CAA requires us to review and, if appropriate, revise the NAAQS every five years. The CAA provides that the EPA Administrator must

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1. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.  
2. National Ambient Air Quality Standard for Ozone, 80 Fed. Reg. 65292 (Oct. 26, 2015) (to be codified at 40 C.F.R. pts. 50, 51, 52, 53, and 58),

available at <https://www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-26594.pdf>. The October 1, 2015, deadline was set by the court in *Sierra Club v. United States Environmental Protection Agency*, No. 13-cv-2809 (N.D. Cal. Apr. 30, 2014).

set the primary NAAQS at the level that, in her judgment, is requisite to protect public health, with an adequate margin of safety; and must set a secondary NAAQS at the level that, in her judgment, is requisite to protect the public welfare from any known or anticipated adverse effects. Historically, the primary and secondary NAAQS have been set at identical levels. I would note also in this context that “requisite” means that the standards must be neither more nor less stringent than necessary. That point was discussed by the U.S. Supreme Court in its 2001 decision in *Whitman v. American Trucking Associations, Inc.*, which upheld EPA on the 1997 NAAQS.<sup>3</sup>

Our review this time of the ozone standard started the way that all reviews of the ozone NAAQS do, which is a thorough and transparent review of the science. In particular, we focused on studies that were used since 2008, the last time we set a standard. As Jenny mentioned, there’s a large body of evidence showing that ozone causes public health harm, particularly harm related to the respiratory system. Breathing ozone can result in more emergency room visits, more hospital admissions, and an increased risk of premature death—not to mention things like missed school or work days.

For the primary standard, there were three main components to the Administrator’s review. First, the Administrator looked at the exposure level that was of concern, with a focus on new clinical studies because clinical studies provide the most certain evidence of health effects in adults. The clinical studies clearly show that ozone at 72 ppb can be harmful to healthy, exercising adults. What this evidence told us was that the 2008 standard of 75 ppb was no longer adequate to protect public health. There were also clinical studies showing effects in some adults following exposure as low as 60 ppb; however, there was not enough certainty that the effects were actually adverse. Because of that uncertainty, we did not believe it was appropriate to require complete elimination of exposures to ozone at levels as low as 60 ppb.

Second, the Administrator reviewed analyses of exposure to ozone in the real world, how people in the real world were actually exposed to ozone and at what levels they were exposed to it, and took that into account in setting the standard. Third, the Administrator considered advice from independent scientific advisers, people on the Clean Air Scientific Advisory Committee.<sup>4</sup> The advisers concluded that the science supported issuing a standard within the range of 60-70 ppb.

Based on these considerations, Administrator Gina McCarthy revised the standard from 75 ppb to 70 ppb. The standard of 70 ppb, the Administrator believes, is requisite to protect public health with an adequate margin of safety. It is below the level shown to cause adverse effects in

clinical studies. It also essentially eliminates the exposure of concern, the ones that have been shown to cause adverse effects. For example, with the standard of 70 ppb, we project that 99.5% of children will not have even a single exposure in any given year to ozone of 75 ppb. The standard also substantially reduces exposure to levels at lower than 70 ppb. Here, we were most concerned with multiple exposures, and the standard of 70 ppb reduces multiple exposures to 60 ppb by more than 60%.

The Administrator also set the secondary standard at 70 ppb. Although the secondary standard is identical, it’s based on a very different rationale. For the secondary standard, which is supposed to protect public welfare, the effects of concern that we looked at were damage to plants and trees and harm to ecosystems. One of the differences, looking at the studies on the public welfare versus public health, is that for public health, when you’re looking at humans, the exposures of concern are exposures that occur over an eight-hour average, which is why that’s the standard that’s set for an eight-hour averaging period.

For vegetation, though, the exposures of concern that we looked at are measured, or more appropriately characterized, as cumulative through a growing season. It’s not a short-term exposure, but rather the longer growing season’s exposure that is important. EPA uses an index called W-126 that measures the seasonal cumulative exposure or seasonal cumulative levels of ozone.<sup>5</sup> When we looked at the studies on that, EPA determined that the appropriate standard that would limit cumulative seasonal exposures to a W-126 index level was 17 ppm-hours. So, that was the goal that we looked at, something that would limit exposures to 17 measured on the W-126 scale. And we looked at air quality monitors.

What we found, when we looked at the air quality data and compared W-126 exposures to eight-hour averaging exposures, was that a 70 ppb standard would limit exposures of concern so that they would be generally below the W-126 standard of 17. So, what we wound up doing is, although the level of protection we’re looking for is 17 on the W-126 scale, we set a standard of 70 ppb, so we do have a secondary and a primary standard that are identical.

I would note that EPA is precluded from taking cost into account in setting NAAQS. This was determined by the Supreme Court in the *Whitman* case on the 1997 NAAQS, and reaffirmed this year by *Utility Air Regulatory Group v. EPA*, the Court’s decision on the Mercury and Air Toxics Standard (MATS).<sup>6</sup> Nonetheless, we did perform a regulatory impact analysis that looked at costs and benefits. We estimated benefits at \$2.9 billion to \$5.9 billion. Those estimated benefit figures outweigh the estimated cost of about \$1.4 billion.

3. *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 31 ELR 20512 (2001).

4. EPA’s Clean Air Scientific Advisory Committee was established under CAA §109(d)(2) to provide independent advice to EPA. For more information, visit the CASAC web page, <http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommittees/CASAC>.

5. The W-126 (named after portions of its equation) is a weighted seasonal index that measures the impact of ozone exposure on trees, vegetation, and ecosystems. For more information, visit EPA’s web page about the index, <http://www.epa.gov/air-quality-analysis/ozone-w126-index>.

6. *Utility Air Regulatory Grp. v. EPA*, No. 12-1146, 44 ELR 20132 (U.S. June 23, 2014).

I should note that those national numbers exclude California because California's air quality problem is severe enough that the state will have a longer time to attain the standards. That makes comparing the national numbers to the California numbers somewhat of an apples and oranges situation. So, we pull the national numbers out separately from California.

Turning to implementation, I'm going to touch on it only very briefly. The first part of NAAQS is obviously setting the standards. But setting the standards doesn't do any good unless we bring all parts of the country into attainment with them. The attainment process, the implementation process, is accomplished through a cooperative federalism approach, where state, local, tribal, and federal governments work together. This approach has worked very well over the years. It's how we got to a point where over 90% of the nonattainment areas are now achieving the 1997 standards.

Since I am only going to be able to touch on the implementation issues quickly, probably the most important thing I can tell you is that at our website on the ozone standard, there is an October 1, 2015, memo from Janet McCabe, Acting Assistant Administrator for Air and Radiation.<sup>7</sup> It's addressed to EPA's regional administrators and does an excellent job of laying out what EPA's approach will be to implementation. If you have implementation questions, the first source to check would be that memo. It will tell you how things work, when we're relying on past policies or guidance, and where we think we're going to be doing things that are new and what our plan is for doing so.

What I want to do is not get into the specifics of implementation, but just look at the big picture. The most important part of implementation is: What do we need to do to actually deliver better air quality to the public? When we looked at the 2012-2014 monitoring data, what we found is that there are 213 counties (outside California) that have air quality below 70 ppb; 213 counties with air quality of concern. That doesn't mean that all 213 counties, or even that only 213 counties, will be designated nonattainment.

For one thing, the attainment designations are slated to occur in October 2017. Using that time frame, the designations will be based on 2014-2016 air quality data. So, there will be some differences just because we'll be looking at different data. What's important, though, is less where we are going to be in 2017 and more where we're going to be down the road and what areas are actually going to have to do.

EPA and the states already have a number of rules in place that will help areas reach the 70 ppb standard. These rules include regional haze regulations, mercury and air toxics standards, and a wide variety of vehicle and fuel standards. When we look at the standards that are already

in place and project out to 2025, the projection is that, outside of California, of those 213 counties where we're monitoring nonattainment, by 2025, 199 of those would meet the new standard without any additional actions to reduce pollution. So, the problem going forward is much smaller than what it looks like if you focus just on the attainment designations or nonattainment designations in the short run.

Regarding a couple of key dates to think about on implementation, states will need to submit infrastructure state implementation plans (SIPs) in October 2018. The states have to submit attainment plans. Those will be due in 2020 or 2021. The exact year depends on the area's nonattainment classification, whether it's moderate, serious, severe, or extreme. Although attainment dates are to be as expeditious as practicable, they generally can run from 2020 to 2037, again depending on the area's classification.

We did a bit on prevention of significant deterioration (PSD) grandfathering—this is for permitting. We took the same approach that we did on the 2012 particulate matter (PM) standards, so that if your permit is far enough along as of the date that we signed the rule or as of the date that the new NAAQS goes into effect, for part of your permit application, rather than showing that you don't cause violations of the 2015 standard, you only need to show that you don't cause or contribute to violations of the 2008 standard. There's a bit of a grandfathering so that people who are already far through the permitting system don't get pulled back because of the new standard.

Another implementation issue to be on the lookout for, and something that's been a very big concern to people, is background ozone. A concern is that background levels of ozone are so high that the areas will not be able to attain the new standard. First, I should say that our analysis does not show that to be the case. Our analysis does not show that that's going to be a problem. However, given the concern, EPA will be doing a couple of things in the near future that you should be on the lookout for.

One, we will be developing a white paper that will be available for stakeholder review. We hope to have that out soon.<sup>8</sup> Two, in the next few months, we intend to hold a workshop to discuss information in the paper and collect information to further advance our collective understanding of the technical and policy issues related to background ozone.<sup>9</sup> Based on the input we get, we'll decide whether there's a need for further guidance, for regulatory tools.

**John Walke:** I'm going to devote most of my time to the standard-setting process, and finish with just a few remarks on implementation. The environmental and public health community considers the 70 ppb standard adopted by the Barack Obama Administration to be unprotective. We believe it to be a failure of responsibility.

7. Memorandum from Janet G. McCabe, Acting Assistant Administrator, EPA Office of Air and Radiation, to EPA regional administrators (Oct. 1, 2015), available at <http://www3.epa.gov/ozonepollution/pdfs/20151001memo.pdf>.

8. U.S. EPA, Implementation of the 2015 Primary Ozone NAAQS: Issues Associated With Background Ozone, White Paper for Discussion, <http://www3.epa.gov/ozonepollution/pdfs/whitepaper-bgo3-final.pdf>.

9. EPA will hold the workshops on February 24 and 25, 2016. For more information, visit <http://www3.epa.gov/ozonepollution/registration.html>.



It badly missed opportunities to actually protect public health with a safe standard.

I'd like to relate a story that in many ways encapsulates for me that missed opportunity. On the press call with reporters announcing the standard in which EPA Administrator Gina McCarthy participated, she was asked by a *New York Times* reporter about the fact that Administrator Lisa Jackson in 2011 supported setting the ozone standard at 65 ppb. The reporter asked Administrator McCarthy why she now believed 70 ppb to be in fact protective, and protective with an adequate margin of safety. Administrator McCarthy replied that, in her view, newer ozone studies showed higher ozone levels to be safer than EPA had understood in 2011. I submit that that is badly wrong and in fact a stunning statement that in many ways, to me, encapsulates this decision. In fact, the opposite of McCarthy's statement is true: Newer studies since 2011 show that lower ozone levels are more harmful than previously understood in 2011.

The Clean Air Scientific Advisory Committee recommended that EPA adopt a standard lower than 70 ppb to protect vulnerable populations such as children and persons with asthma. Lorie very carefully and correctly stated that the advisory committee offered a range based on a scientific view between 60 ppb and 70 ppb. But when it came to a unanimous recommendation about what they believed was warranted to protect the public, they said it should be lower than 70 ppb. Administrator McCarthy apparently disagreed.

I want to draw a contrast with steps taken by the George W. Bush Administration in 2008 when EPA lowered the standard from 84 ppb to 75 ppb. The Bush Administration noted that they did so based upon a study showing actual harm at 80 ppb. They felt that it was necessary and important to provide a 5 ppb margin of safety, so they set the standard at 75 ppb. The Obama Administration, as we see, acted much differently and more weakly than that, adopting a mere 2 ppb margin of safety based upon studies that they said found actual harm in healthy exercising adults at 72 ppb. So, they merely lowered the standard to 70 ppb rather than to 67 ppb as they would've done if they had followed even the example of the Bush Administration.

There was a reference made to epidemiological studies in a docket showing that in fact there was harm occurring in cities that experienced air quality with ozone concentrations in the 60 ppb range, including at 65 ppb. Unfortunately, again, the Obama Administration followed the practice of the Bush Administration, hand-waving and incanting the words, "uncertainty, uncertainty, uncertainty" in order to dismiss all those studies—notwithstanding elevated emergency room admissions and hospital visits in cities with ozone concentrations below 65 ppb. We now know in the administrative record for the rule after it was released that my friends at the Edison Electric Institute were actively lobbying for 70 ppb, the worst end of the range proposed by EPA. The reason for that, I submit, is because they knew it was going to require very little of the utility industry.

In fact, that is borne out in EPA's regulatory impact analysis, where EPA says that its standard of 70 ppb would require a mere 45,000-ton reduction of nitrogen oxides (NO<sub>x</sub>) from existing electric utilities. Forty-five thousand tons of NO<sub>x</sub> represents about 2% of the 2-million-ton 2011 baseline used by EPA in its modeling. That amount represents a mere 3% of NO<sub>x</sub> emissions from utilities in the year 2025, so not much is being required.

What does it mean for new nonattainment areas? There are far fewer new nonattainment areas required by this standard than by the Bush Administration standard in 2008. Lorie referenced the compliance cost. If you add in California (this is a rough calculation), I think the figure comes closer to about \$2.2 billion for the Obama Administration standard. The Bush Administration standard was \$8.8 billion based upon their projections—four times higher, which again is a testament to the weakness of the Obama Administration standard and just how many opportunities for reductions were left on the table. The Obama Administration 70 ppb standard allows many more deaths to occur each year than standards of 65 or 60 ppb. A standard of 70 ppb allows hundreds of thousands more asthma attacks than would occur with the standard at 65 or 60 ppb. The standard is simply unprotective on any number of metrics.

Let me turn quickly to implementation measures. There will be some new nonattainment areas and obligations to undertake reasonably available control technology (RACT). If you read the tables, particularly Tables 3.3 and 3.2 in the regulatory impacts analysis, you'll see that outside of California, the levels of reductions are relatively modest, especially in comparison to the Bush Administration action in 2008. That results in what Lorie has already correctly summarized for us, which is a situation in which business-as-usual laws already adopted on the books, overwhelmingly at the federal level, will deliver the vast majority of the country into attainment, with the exception of about 14 counties (outside of California, with California facing more noteworthy challenges).

There's an obligation to ensure that upwind areas do not contribute in an adverse fashion to nonattainment problems in downwind areas. EPA will almost certainly face calls to have a transport rule, potentially even for the western United States for the first time, in order to deal with downwind nonattainment in new areas gauged by the 2015 standard. The Agency recently proposed a transport rule tied to the current 2008 standard.<sup>10</sup> Unfortunately, what the Agency's proposal says is, well, all you have to do is to operate existing control devices on electric utilities and that should be just fine. EPA is not really projecting new controls. The regulatory impact analysis for the ozone standard found a whopping five power plants might be required to do something in order to achieve those projected 45,000-ton NO<sub>x</sub> reductions that you can model to attain 70 ppb

10. U.S. EPA, Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 80 Fed. Reg. 75705 (proposed Dec. 3, 2015), available at <https://www.gpo.gov/fdsys/pkg/FR-2015-12-03/html/2015-29796.htm>.

(again, outside of California). (EPA did not name those plants because they're just modeled plants.)

The final thing I'll touch upon is something that we have seen in every single NAAQS since 1997. That is the adoption of unlawful implementation measures or guidance by the Agency. That trend began in 1997. It continued with rules issued by the Bush Administration for fine particulate matter (PM<sub>2.5</sub>) and ozone. The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit struck down those various deregulatory implementation measures in response to lawsuits by the Natural Resources Defense Council, the American Lung Association, and others. We are studying carefully the implementation pronouncements by EPA in its final rule. We'll do so certainly with respect to future guidance, white papers, and the like in order to determine whether that trend will continue.

**Cindy Langworthy:** Let me begin by pointing out that the air quality index was revised to lower the level at which health warnings are issued, and as a result, the public will be hearing more frequently, at lower levels, that there is unhealthy air or air quality that is unhealthy for sensitive individuals. I think it's really important that EPA and the states communicate that this is not an indication that air quality is getting worse; rather, the more numerous health warnings would be because of the change in the standard. In fact, air quality continues to improve.

I want to talk more about implementation concerns, focusing particularly on two issues. One issue is permitting, and the other is what happens in nonattainment areas. Prevention of significant deterioration (PSD) permitting applies immediately once the standard becomes effective. It applies everywhere because there are no nonattainment areas for the revised NAAQS at that time. It requires that any major new sources or major modifications utilize best available control technology (BACT) and provide a demonstration that the source will not cause or contribute to a violation of NAAQS.

I don't remember Lorie's exact number, but I think that, including California, EPA indicated that 241 counties exceeded the new NAAQS for the period 2012-2014. That's a lot of counties where making a demonstration that a new source would not cause or contribute to a NAAQS violation is just going to be impossible, as opposed to the 28 counties that EPA indicated had exceeded the 75 ppb NAAQS during that period. EPA has proposed using PSD offsets. The program isn't in place and it's not clear how offsetting would work. Certainly, some of the areas that would be included and areas that exceeded the standard have never had to deal with offsets. This is a brand-new problem for them. That's potentially an issue.

But even in areas where monitoring data from 2012 to 2014 shows the standards would be met, PSD permitting is likely to be quite difficult. EPA has proposed requiring major sources to use a photochemical grid model to make a demonstration that it's not causing or contributing to a violation of NAAQS. Photochemical grid models are very

costly to run, they require a lot of input data, and they're very time-consuming. So, this is a significant burden. EPA has said that it understands the burden and that it intends to limit the number of instances in which the use of that kind of model would be required. The Agency said that it will come up with significant impact levels (SILs) and something called Maximum Emission Rates for Precursors (MERPs) that would help screen some sources out of having to do this kind of modeling. But those steps haven't even been proposed yet.

So, permitting is a real and immediate concern. And then there are nonattainment areas. EPA says that they intend to do designations by 2017, which means that for most areas, marginal areas and moderate areas, compliance will be required well before 2025. EPA's assessment that many areas will come into attainment using business-as-usual approaches—which, by the way, can be pretty costly for some industries, including the electric utility industry—that assessment is just really not relevant to what actions the nonattainment areas are going to have to take.

Even if an area would come into attainment based on business as usual in a timely manner, there are requirements that apply to nonattainment areas in addition to attainment. John mentioned RACT. There's also nonattainment new source review. There are other requirements that those areas are going to have to deal with. In the long run, EPA has been requiring antibacksliding measures in areas that come into attainment, although the CAA only requires antibacksliding measures if the Agency sets the standard at a more lenient level than the prior standard, which of course is not the case here.

Let me talk about feasibility because Lorie, I think, mentioned it. There really is a concern about background ozone levels and whether they will effectively preclude attainment in certain areas. Background ozone levels are from natural emissions—for example, vegetation gives off ozone precursors—and, in particular, international transport. We know that international transport of ozone and ozone precursors has been leading to increased background ozone levels in the United States. And as the standard gets lower, background ozone becomes an increasing proportion of the total allowable ozone. In connection with the rulemaking, EPA has said that they have tools that will deal with this, including the exceptional events rule, a rural transport provision of the CAA, and an international boundary provision of the CAA. I note that the Agency has sent to the White House a proposed revision to the exceptional events rule.<sup>11</sup>

But historically, none of these tools has worked very well. In fact, I don't think that there's even been a rural transport area designated for ozone, and there are very

11. See Treatment of Data Influenced by Exceptional Events, 80 Fed. Reg. 72840 (proposed Nov. 20, 2015), available at [http://www.epa.gov/sites/production/files/2015-11/documents/ee\\_nprm\\_11-20-15\\_80\\_fr\\_72840.pdf](http://www.epa.gov/sites/production/files/2015-11/documents/ee_nprm_11-20-15_80_fr_72840.pdf); see also U.S. EPA, Draft Guidance on the Preparation of Exceptional Events Demonstrations for Wildfire Events That May Influence Ozone Concentrations (Nov. 2015), available at [http://www.epa.gov/sites/production/files/2015-11/documents/o3\\_draft\\_wildfire\\_guidance.pdf](http://www.epa.gov/sites/production/files/2015-11/documents/o3_draft_wildfire_guidance.pdf).

few cases in which international boundaries have been used. This is a real concern. Also of real concern is timely guidance and rules on implementation in general: The final implementation rule for the 2008 Ozone NAAQS was only issued this year. That occurred after the attainment dates for some areas. There is no final implementation rule yet for the 2012 PM<sub>2.5</sub> NAAQS, although there were designations and states are on the clock for doing their SIPs.

So, these are real concerns. I think that whether my clients agree with the standard level or not, they really are concerned and want to work with EPA and the states to come up with workable approaches to implementation of the new NAAQS.

**Jenny Howard:** We'll now open up the discussion. Let me kick off with a question. EPA has taken several recent actions designated to improve air quality and reduce pollution, such as the new ozone standard, clean power plan (CPP) for existing power plants, and new source performance standards (NSPS). This is a question for any panelist. Do you see planning for compliance with these regulations as an opportunity for states to engage in multi-pollutant planning to improve air quality? Or do you see this as more of a challenge to states to comply in an increasingly stringent regulatory environment?

**John Walke:** I'll take an initial crack at that, but I'm interested in my co-panelists' views as well. The planning time frame for SIPs for the ozone standard will correspond to the planning time frame for the CPP for a very important sector in the air pollution world: electric utilities. I think it makes perfect sense and will just logically happen that the same state air regulators who are responsible for both tasks will look at opportunities for lower-carbon resources in the utility sector that will also generate lower ozone levels and lower PM<sub>2.5</sub>, hazardous air pollutants, mercury, and the like. I've spoken with state regulators who probably see this simultaneously as an opportunity and a challenge. I think it will logically occur because those two efforts were released in essentially the same time frame.

**Cindy Langworthy:** I think that both state regulators and regulated industries probably want to see some coordinated planning. Industries want to know what they need to do and when they need to do it. On the other hand, John talked about the utility industry. There are many industries affected by NAAQS. It is not a utility industry standard, despite what you may get from John. Multi-pollutant planning is difficult because there are different time frames for many of these things. I don't think anybody objects to multi-pollutant planning to the extent that it works.

**Jenny Howard:** Here's a question from our audience: How will the new exceptional events policy work better than it has for coarse particulate matter (PM<sub>10</sub>)?

**Lorie Schmidt:** First, I think John and Cindy discussed the multi-pollutant planning generally. We think that it is always smart for regulators and smart for the regulated industry to be thinking about multi-pollutant issues together and trying to coordinate policies on that. I would note that although the PM-fine planning time line is a little bit earlier than what we see for ozone and the CPP, I would expect that people would be taking those and the other NAAQS into account as well.

As for exceptional events, we recognize that states have been unhappy with the way some of the exceptional events processing has happened in the past. I don't think we've actually proposed it yet, but what we're looking to do is make the process more streamlined, make it easier for states to know what they need to submit, and make it easier for us to figure out what EPA needs to act on. We will be doing that through a notice-and-comment process. There will be time for folks to look at what we're doing and then give us comments if they think we still have a process that doesn't work. We are very aware that people are likely to be more interested in using the exceptional events process and will have more of a need to use that in relation to the new ozone standard than they have for some other standards.

**Jenny Howard:** Here's a crystal ball question for any speaker to address: What is the likelihood of legislative efforts to block the rules, given that the final standard is the least stringent standard considered in a proposed rule? We've all heard of certain legislators calling for legislative action to block the rule.<sup>12</sup> Any thoughts on that?

**Lorie Schmidt:** The most likely vehicle for legislative efforts to block the rule would be under the Congressional Review Act because there are expedited procedures for disapproving the standard under the Congressional Review Act. But even under the Congressional Review Act, the legislation would have to be signed by the president. If the president vetoes it, then the bill proponents would have to get enough votes to override his veto. I haven't done vote counting on Capitol Hill in quite a while, but I think it would be quite difficult to get enough votes. Even if members of Congress could get by the initial resistance to pass legislation blocking EPA's rule, I don't see how they could override a veto of that legislation, assuming that's what the president would do.

**John Walke:** There was a bill targeting the ambient air quality program generally introduced by House Republicans several years ago, and certainly in anticipation of a strengthened ozone standard. The White House issued a statement of administrative policy vowing to veto that bill. Subsequent bills, and as Lorie said, the Congressional Review Act resolution that we expect to see, have not

12. See, e.g., Devin Henry, *Republicans Vow to Fight EPA's New Ozone Rule*, THE HILL, Oct. 1, 2015, at <http://thehill.com/policy/energy-environment/255684-republicans-bash-epas-new-ozone-rule>; *Bill Would Block New EPA Ozone Regulation*, ARIZ. DAILY INDEP., Nov. 21, 2015, at <https://arizonadailyindependent.com/2015/11/21/bill-would-block-epa-new-ozone-regulation/>.

made it to the House floor in order to have a statement of administration policy issue. I predict that the White House would veto any efforts attacking the ozone standards. White House Chief of Staff Denis McDonough said as much when talking about not just the CPP, but also any threats to our bedrock environmental laws.<sup>13</sup> So, I don't expect that legislation to overturn EPA's new ozone standard will succeed.

**Jenny Howard:** Next audience-member question: What are the implications from lowering the ozone NAAQS and the new methane volatile organic compound (VOC) regulations affecting the oil and gas sector industry that were recently issued by EPA? Will additional existing oil and gas sources be affected by the methane VOC regulations as a result of lowering the ozone standard?

**Lorie Schmidt:** We only recently proposed those regulations, so they are out for public comments at this point.<sup>14</sup> Generally, what we do with NSPS, which is what we are proposing for oil and gas, is we look at what standards are achievable by the industry. I wouldn't think achievability would be affected by where we set the ozone standard. I don't know whether there are other reasons to think that it would be different here. I haven't analyzed that specific issue.

**John Walke:** EPA's regulatory impact analysis, for what it's worth, projected a whopping 1,000-ton reduction in the VOCs from all point sources in order to meet the 70 ppb standard. From that information, one would not expect significant obligations vis-à-vis VOCs. I think you would see more activity on the NO<sub>x</sub> front, but that's subject to subsequent SIP development.

**Jenny Howard:** Given that EPA set the standard at the least stringent from what had been proposed, do you expect communities to voluntarily overcomply to make sure they hit the new standard?

**Cindy Langworthy:** I have not generally seen communities choosing to overcomply, which is not to say that as part of an overall strategy ozone levels might not decrease below the level of the new standard. I think that could happen.

But I don't think that communities generally decide that they want to go below the NAAQS on their own to provide additional protection.

**Jenny Howard:** Lorie, you already spoke a bit about the implementation guidance that EPA has at the website and other guidance expected to come. Would you mind addressing that one more time?

**Lorie Schmidt:** What we did on implementation was to some extent a response to some of the concerns that Cindy raised. In past NAAQS, it has taken us a long time to make implementation guidance available. We recognize that the delay makes it harder for states to bring areas into attainment in a timely fashion and to know what it is they need to do to comply with their obligations under the CAA. So, over the last few years, we have tried to be more proactive about getting guidance or implementation rules out earlier in the process. For example, with respect to the ozone standard, on the same day that the standard was issued, we also released an implementation memo, something that I'm not sure we've done before. As I mentioned in my earlier remarks, the acting assistant administrator for air and radiation sent the memo out to all the regional offices and it is available publicly on our website.<sup>15</sup>

The implementation memo is about 14 pages long. It explains in particular what guidance and policies are already out there that will also govern implementation and steps for the 2015 standard. The memo also discusses what we're going to be doing in other areas; talks a bit about the PSD grandfathering issue that I've mentioned earlier; provides some information about what we'll be doing on exceptional events; discusses background ozone; and tries to set up a plan and get us on a schedule that is more consistent with the obligations the states have in terms of getting SIPs and eventually attainment demonstrations in. Reading that memo will give folks a good starting point in terms of what they should be looking at and what they should be expecting on the implementation front.

**Jenny Howard:** We've come to the end of our time. Many thanks to our panelists and audience members for an excellent Dialogue.

13. See, e.g., Suzanne Goldenberg, *Obama Will Use Veto to Defend Climate Change Plan if Necessary*, GUARDIAN, July 30, 2015, at <http://www.theguardian.com/environment/2015/jul/30/obama-will-use-veto-to-defend-climate-change-plan-if-necessary>.

14. U.S. EPA, Source Determination for Certain Emission Units in the Oil and Natural Gas Sector, 80 Fed. Reg. 56579 (proposal Sept. 18, 2015); U.S. EPA, Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, 80 Fed. Reg. 56593 (Sept. 18, 2015); U.S. EPA, Control Techniques Guidelines for the Oil and Gas Industry (Draft), EPA-453/P-15-001 (Aug. 2015), [http://www3.epa.gov/airquality/oilandgas/pdfs/og\\_ctg\\_draft\\_081815.pdf](http://www3.epa.gov/airquality/oilandgas/pdfs/og_ctg_draft_081815.pdf).

15. Memorandum from Janet G. McCabe, *supra* note 7.