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THE CAMPAIGN TO PROTECT PUBLIC HEALTH FROM GROUND-LEVEL OZONE: A THIRD OF A CENTURY AND COUNTING

1967 -- Congress enacted the Air Quality Act of 1967, which assigned to the States responsibility for issuing and implementing air quality standards. As later described by Justice Rehnquist, under the 1967 Act "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so." Train v. Natural Resources Defense Council, 421 U.S. 60, 64 (1975).

1970 -- Concerned that the States' response to the 1967 Act was "disappointing" and that they "had made little progress" in implementing that Act, Train, 421 U.S. at 64, "Congress reacted by taking a stick to the States" in the form of the Clean Air Act Amendments of 1970. Id. "[A] drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution," Union Electric Co. v. EPA, 427 U.S. 246, 256 (1976), the 1970 Amendments "sharply increased federal authority and responsibility in the continuing effort to combat air pollution." Train, 421 U.S. at 64. While retaining primary responsibility for assuring air quality within their boundaries, "the States were no longer given any choice as to whether they would meet this responsibility." Id.

Instead of State air quality standards, the 1970 Amendments required the United States Environmental Protection Agency within a matter of months to issue federal standards that "protect the public health" with "an adequate margin of safety." Pub. L. 91-604, § 4(a), 84 Stat. 1679-80 (Dec. 31, 1970) (Clean Air Act § 109). States were then required to submit pollution control plans to achieve the standards within three years -- and if they did not, EPA was directed to step in and promulgate federal plans. Pub. L. 91-604, § 4(a), 84 Stat. 1680-82 (Dec. 31, 1970) (Clean Air Act § 110). As stated by Senator Edmund Muskie, a key architect of the Amendments: "Within four and one-half years, the level of air quality in American cities, as to these major pollutants, should be adequate to avoid adverse effects on public health." 116 Cong. Rec. 42384 (Dec. 18, 1970).

1971 -- The Administrator promulgated the initial predecessor to the current national ambient air quality standard (NAAQS) for ozone. 36 Fed. Reg. 8187 (April 30, 1971). Although this NAAQS was nominally addressed to "photochemical oxidants," a group of pollutants that includes ozone among others, id., compliance was gauged by measuring only ozone. American Petroleum Inst. v. Costle, 665 F.2d 1176, 1182 (D.C. Cir. 1981). Substantially more protective than the ozone NAAQS later issued in 1997, the 1971 NAAQS was violated if hourly average ozone levels exceeded 0.08 parts-per-million ("ppm") more than once per year. Id.

1975 -- The deadline for attainment of the 1971 photochemical oxidants NAAQS expired, with many areas around the country still in violation. See 43 Fed. Reg. 8962-63 (March 3, 1978).

1977 -- Congress enacted strengthening amendments to the Clean Air Act. In exchange for allowing extension of attainment deadlines until 1982, with a possible further extension until

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1987, Congress required more aggressive anti-pollution programs -- including designation of areas violating standards as "nonattainment areas," and adoption of more protective pollution control requirements in those areas. Pub. L. 95-95, 91 Stat. 685 (Aug. 7, 1977).

Congress also included a new provision requiring EPA to reevaluate NAAQS at intervals of no more than five years, and make appropriate revisions. The authors of this provision noted their expectation that more protective NAAQS might well be required, given the direction in which scientific knowledge was developing. H. Rep. 294, 95th Cong., 1st Sess. 182 (1977) ("deficiencies and limitations of the national ambient air quality standards suggest that greater not lesser control of emissions are likely to be needed") (emphasis added); 127 ("all indicators point to the likely necessity for tightening the ambient air quality standards to protect public health") (emphasis added); 108-09 (quoting Johns Hopkins study on photochemical oxidants that found "'the current standard of 0.08 ppm to have little margin of safety for susceptible populations (such as the elderly or chronically ill patient), and thus a lower standard is justified … [A] 1 hour standard of 0.06 ppm would appear to be appropriate.'") (emphasis added by House committee); 109 (noting that the standard recommended by the Johns Hopkins study "would be 25 percent more stringent than the present standard") (emphasis added).

1979 -- Despite the expectations of the drafters of the 1977 Amendments, and over the protests of public health advocates, EPA weakened the 1971 0.08 ppm NAAQS, promulgating a one-hour ozone NAAQS at 0.12 ppm. 44 Fed. Reg. 8202 (February 8, 1979).

1982 -- Notwithstanding the less stringent level of the 1979 ozone NAAQS, numerous areas around the country still failed to attain it by the extended deadline established by the 1977 Amendments.

1985 -- EPA missed the statutory five-year deadline for reviewing the ozone NAAQS and making appropriate revisions.

1986 -- As a component of its review of the ozone NAAQS, EPA completed a "criteria document" -- a compilation of scientific studies on ozone's health effects.

1987 -- Numerous areas failed to attain the 1979 ozone NAAQS by the extended fallback deadline established by the 1977 Amendments.

1990 -- EPA missed another statutory five-year deadline for reviewing the ozone NAAQS and making appropriate revisions.

Later that same year, Congress enacted extensive amendments to the Clean Air Act. Like the 1977 Amendments, the 1990 enactment extended the deadlines for attainment of the existing ozone NAAQS, but required more aggressive pollution control measures in the meantime. Pub. L. 101-549, 104 Stat. 2399 (Nov. 15, 1990).

In the legislative history of the 1990 Amendments, Congress noted the harmful effects of ozone on the respiratory system, and stated: "New evidence is ... accumulating that the current ozone standard may not be sufficiently protective of public health." S. Rep. 228, 101st Cong., 1st Sess.

6 (1989). Citing a human clinical study showing lung function decreases in response to ozone levels meeting the 1979 NAAQS, the legislative history noted: "EPA's results may indicate that the current air quality standard for ozone does not protect public health with the adequate margin of safety required by the Act. ... EPA anticipates it will take approximately two more years to resolve this issue." Id. 6-7.

1991 -- Concerned about EPA's having missed the 1985 and 1990 Clean Air Act deadlines for revising the 1979 ozone NAAQS, and about the new science indicating adverse effects at levels allowed by that NAAQS, American Lung Association went to court to compel EPA to act. American Lung Association v. Reilly, E.D.N.Y. No. 91-CV-4114 JRB.

1992 -- Disregarding the most recent scientific studies, EPA proposed not to change the 1979 ozone NAAQS. 57 Fed. Reg. 35542 (Aug. 10, 1992). In comments on the proposal, public health and environmental organizations as well as several States urged EPA to consider the studies.

1993 -- EPA issued its final ozone NAAQS review decision, declining to revise the 1979 NAAQS. 58 Fed. Reg. 13008 (March 9, 1993). The agency persisted in its refusal to consider the most recent studies, claiming they should await the next NAAQS review cycle -- which the agency promised to expedite.

EPA's decision noted that the Clean Air Scientific Advisory Committee, a committee of scientists statutorily assigned by Congress with the responsibility to advise EPA concerning NAAQS and criteria, advised EPA that many of its members believed the 1979 ozone NAAQS provided "little or no margin of safety," and some of them favored strengthening the NAAQS to 0.10 ppm or lower. 58 Fed. Reg. 13018. Moreover, CASAC noted:

> Of particular concern to CASAC is the potential for effects arising from exposures to ozone with daily peak concentrations at or near 0.12 ppm for periods of 6-8 hours and with co-exposure to other pollutants. This concern is due to air quality analyses which have shown that even in areas which do not repeatedly exceed the ozone standard, ozone concentrations can remain close to 0.12 ppm for several hours per day for extended periods of time in summer. There was concern based on recent controlled human exposure, epidemiology and toxicology studies, that such prolonged exposures could result in increased respiratory impairment.

Id.

1994 -- In response to a court challenge by American Lung Association, taking issue with EPA's refusal to consider the most recent studies, EPA sought and obtained from the court a voluntary remand based on a promise to consider the newer studies.

1996 -- EPA issued a three-volume criteria document encompassing hundreds of new scientific studies, finding "strong" scientific evidence of adverse health effects from ozone at levels allowed by the 1979 NAAQS. EPA, Air Quality Criteria for Ozone and Related Photochemical Oxidants (July 1996), at 7-171. Subsequently, the agency proposed to issue a revised ozone NAAQS. 61 Fed. Reg. 65716 (December 13, 1996).

1997 -- In a public comment period and several public hearings, all interested parties -- including those favoring more protective ozone NAAQS and those opposed -- have the opportunity to present their views.

After consideration of those views, and review of the extensive scientific record, EPA issued a new ozone NAAQS at 0.08 ppm, eight-hour average. 62 Fed. Reg. 38856 (July 18, 1997). The 1997 NAAQS is consistent with the recommendation of EPA's scientific advisory panel, and -- while not as protective as the original photochemical oxidants NAAQS promulgated by the Nixon Administration in 1971 -- represents a major step forward in public health protection from the 1979 ozone NAAQS. In an analysis addressing nine cities (and which thus understates benefits nationwide), EPA concluded that each year the new standard will protect tens of thousands more children against hundreds of thousands more occurrences of significant respiratory effects.

Soon after the 1997 ozone NAAQS was issued, dozens of industry plaintiffs and three States filed suit challenging it. American Lung Association and several other States opposed the challenges.

1998 -- Congress enacted legislation setting a July 18, 2000 deadline for EPA to make attainment status designations under the 1997 ozone NAAQS. Pub. L. 105–178, § 6103, 112 Stat. 465 (June 9, 1998).

1999 -- The U.S. Court of Appeals for the D.C. Circuit, though rejecting most of industry's challenges, ruled that the 1997 ozone NAAQS violated a little-known constitutional theory known as the non-delegation doctrine. American Trucking Assns. v. USEPA, 175 F.3d 1027 (D.C. Cir. 1999), rehearing granted in part, denied in part, 195 F.3d 4 (D.C. Cir. 1999), rev'd in part, aff'd in part sub nom. Whitman v. American Trucking Assns., 531 U.S. 457 (2001). At the same time, the Court declined to vacate the NAAQS, and reaffirmed that EPA is "required" to make attainment status designations under the NAAQS. Id. at 1048, 1057.

Subsequently, the D.C. Circuit declined to rehear its constitutional ruling -- even though the judges voted 5-4 in favor of rehearing. American Trucking Assns. v. USEPA, 195 F.3d 4 (D.C. Cir. 1999), rev'd in part, aff'd in part sub nom. Whitman v. American Trucking Assns., 531 U.S. 457 (2001).

2000 -- EPA, Massachusetts and New Jersey, and American Lung Association appealed the D.C. Circuit's constitutional ruling to the U.S. Supreme Court.

In July, the statutory deadline for making attainment status designations under the 1997 ozone NAAQS expired, without EPA having made such designations.

In October, Congress enacted an appropriations rider barring use of funds for nonattainment designations until the Supreme Court's ruling, or June 15, 2001, whichever occurred first. Pub. L. 106-377, App. A, § 427, 114 Stat. 1441A-56 (Oct. 27, 2000).

2001 -- On February 27, the Supreme Court unanimously reversed the D.C. Circuit's constitutional ruling, and also unanimously rejected another industry argument by ruling that NAAQS must be based on public health, not compliance costs. The Court sent the case back to the D.C. Circuit to address any remaining unresolved claims. Whitman v. American Trucking Assns., 531 U.S. 457 (2001).

On the issue of ozone implementation, the Court unanimously ruled that EPA's approach to implementing the 1997 ozone NAAQS was "astonishing," "unreasonable" and "unlawful." Specifically, EPA had shunted aside the detailed statutory anti-ozone protections enacted in 1990 ("Subpart 2" of Part D of the Act), in favor of the weaker and less prescriptive generic Subpart 1 provisions. The Court sent the matter back to EPA to develop a lawful approach. 531 U.S. at 481-86.

With the issuance of the Supreme Court's decision, the October 2000 appropriations rider expired. Nonetheless, EPA still did not make attainment status designations under the 1997 ozone NAAQS.

2002 -- In March, the D.C. Circuit rejected all remaining industry challenges to the 1997 ozone NAAQS:

> [N]ot only is the record replete with references to studies demonstrating the inadequacies of the old one-hour standard, but EPA discussed at length the advantages of a longer averaging time, including reduced risk of prolonged exposures to unhealthy ozone levels and increased uniformity of protection across different urban areas. Moreover, EPA specifically cited [the Clean Air Scientific Advisory Committee]'s "consensus ... that an [eight]-hour standard [is] more appropriate for a human health-based standard than a [one]-hour standard" and its recommendation that "the present ... standard be eliminated and replaced with an [eight]-hour standard." Given this record evidence, our deferential standard of review, and the Clean Air Act's requirement that EPA must either follow CASAC's advice or explain why the proposed rule "differs ... from ... [CASAC's] recommendations," Petitioners cannot seriously expect us to second-guess EPA's conclusion regarding the inadequacy of the old, one-hour-average standard.

American Trucking Assns. v. USEPA, 283 F.3d 355, 378-79 (D.C. Cir. 2002) (citations omitted). Notwithstanding that ruling, EPA still failed to make attainment status designations under the 1997 NAAQS.

In November, citizen groups filed suit to compel EPA to make the attainment status designations. American Lung Association v. Whitman, D.D.C. Civ. No. 02-2239 RMU.

2003 -- In January, EPA issued final decision rejecting industry arguments that the 1997 ozone NAAQS should be weakened because of alleged public health benefits of ground-level ozone. Responding to industry's claim that ground-level ozone benefits health by shielding against ultraviolet sunlight, EPA determined that "information linking (a) changes in patterns of ground-level O3 concentrations likely to occur as a result of programs implemented to attain the 1997

O3 NAAQS to (b) changes in relevant patterns of exposures to ultraviolet (UV–B) radiation of concern to public health is too uncertain at this time to warrant any relaxation in the level of public health protection previously determined to be requisite protect against demonstrated direct adverse respiratory effects of exposure to O3 in the ambient air. Further, it is the Agency's view that associated changes in UV–B radiation exposures concern, using plausible but highly uncertain assumptions about likely changes in patterns of ground-level ozone concentrations, would likely be very small from a public health perspective." 68 Fed. Reg. 614 (January 6, 2003).

In March, the United States District Court for the District of Columbia signed a consent decree directing EPA make attainment status designations under the 1997 ozone NAAQS by April 15, 2004. American Lung Association v. Whitman, D.D.C. Civ. No. 02-2239 RMU.

In April, the D.C. Circuit -- upon being informed of EPA's January 2003 decision concerning the ultraviolet light issue -- terminated the court's jurisdiction over all challenges to the 1997 ozone NAAQS. That order left the Supreme Court's February 2001 remand on the implementation issue as the only unresolved item from the litigation.

In June, EPA published a proposal addressing the implementation remand. 68 Fed. Reg. 32802 (June 2, 2003). Notwithstanding the Supreme Court's Whitman ruling, the proposal announced EPA's intention to largely jettison the extensive public health protections in the Clean Air Act's Subpart 2 in favor of the weaker Subpart 1 provisions, and to allow areas that have been polluted for decades to slacken their cleanup efforts. (Complicating the public's ability to comment meaningfully was the agency's failure to include in the proposal any actual regulatory text. Instead, the proposal consisted exclusively of a narrative presentation of options.)

DATED: August 1, 2003.

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