

This blog is co-authored with [Sean Hecht](#).

On October 1, 2020, on behalf of 40 environmental and administrative law scholars affiliated with 33 universities in 18 states, Sean Hecht and I filed a [comment letter](#) urging EPA to withdraw its decision to keep the National Ambient Air Quality Standards (NAAQS) for ozone at the current level. We wrote to express our serious concerns with the role of EPA's Clean Air Scientific Advisory Committee (CASAC) in developing these standards.

In this administration, there have been dramatic changes to the composition of CASAC, the independent committee that advises EPA on setting NAAQS, and an accelerated process for development of the standards. The committee composition has already been held to have been the product of an unlawful process, as well.

Key changes EPA has made to CASAC and the ozone review process that render the Proposed Action legally deficient include:

- Replacing all seven members of CASAC in one year (October 2017 – October 2018) under an October 2017 Pruitt Directive that barred nongovernmental recipients of EPA scientific research grants to serve on the committee. A federal court vacated the Directive after finding it arbitrary and capricious. See *Res. Def. Council, Inc. v. EPA*, 438 F. Supp. 3d 220, 224, 231 (S.D.N.Y. 2020).
- Cutting the number of academic researchers serving on seven-member CASAC from four (even in November 2017) to two, leaving the current CASAC with no experts on key scientific issues relevant to the health and welfare effects of ozone such as epidemiology, exposure assessment, impacts on plants, climate impacts, and controlled human studies.
- Abandoning the four-decade tradition of forming an Ozone Review Panel to assist CASAC in providing sound scientific advice on the ozone NAAQS through interactive discussion and deliberation. Instead—after initially providing no subject matter expert support at all, and a resulting outcry from the scientific community—EPA appointed 12 subject matter experts that CASAC members may consult with, but only through CASAC's chair, and only in writing.
- Compressing the review schedule to two and half years and removing key steps in the review process to a degree that inappropriately commingled science and policy. Most significantly, EPA both skipped the separate Risk and Exposure Assessment drafting and review process, and required CASAC to review the Integrated Science Assessment and the Policy Assessment simultaneously.

Dr. H. Christopher Frey, the former CASAC chair, outlines many of the above concerns in his own [comments](#) and [testimony](#). Our comments focus on this aspect of the standard-setting process, amplifying Dr. Frey's concerns and providing a legal framework for articulating them.

We believe that the Clean Air Act's mandate that the standards reflect the latest scientific knowledge and be set at a level requisite to protect public health with an adequate margin of safety, together with the clear and important role Congress gave CASAC in that process, render the new air quality standard, set with the advice of this CASAC, inadequate. As we stated in the comment letter:

In our view, recent changes to the science advisory committee's role and composition render the Proposed Action legally deficient, and will result in standard-setting that contravenes Congress's will. First, the current CASAC lacks the depth and breadth of expertise necessary to review proposed National Ambient Air Quality Standards as Congress intended, to ensure the application of the best and latest science to standard-setting. Second, CASAC, as currently constituted, fails to meet basic standards for the composition of federal expert panels. And finally, EPA has used a shortened process that commingles science and policy and cannot ensure that the science behind the standard is up-to-date and of the highest quality.

As a result, the whole rulemaking process is arbitrary and capricious, and contrary to the statutory mandate that ozone NAAQS be set at levels requisite to protect public health and welfare, based on the latest scientific knowledge. The changes to the composition of CASAC, the limitations on its ability to draw on broader expert support, and the compressed review timeline have been unprecedented and have raised novel legal questions.

Courts have correctly viewed scientific conclusions reached by CASAC in NAAQS rulemaking as reflections of state-of-the-art science, based on [Section 307](#) of the Clean Air Act. Under Section 307, if EPA's proposal differs in any important respect from CASAC's findings and suggestions on science, EPA must offer an explanation for such deviation. The current CASAC, however, was appointed based on criteria contrary to law, lacks expertise and expertise in key scientific fields essential to understanding the state of the science regarding public health and welfare effects

of ozone at varying concentrations, and conducted reviews based on an inappropriately shortened process that commingled science and policy. In light of all that, courts should not defer to an EPA decision that relies on this CASAC's findings and suggestions.