

Appendix B

Memo on Supplemental Information on
the Ozone NAAQS

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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MEMORANDUM

May 20, 2008

To: Members of the Committee on Oversight and Government Reform

Fr: Committee on Oversight and Government Reform, Majority Staff

Re: Supplemental Information on the Ozone NAAQS

This memorandum provides additional information about the Environmental Protection Agency's revision of the national ambient air quality standards for ozone. The memorandum is based on a review of approximately 30,000 pages of previously undisclosed documents received from EPA and the White House Office of Management and Budget, as well as publicly available documents.

On March 12, 2008, pursuant to a court-ordered deadline, EPA issued two revised national ambient air quality standards (NAAQS) for ozone (O₃): a "primary" standard that protects human health and a "secondary" standard that protects the environment. EPA Administrator Stephen Johnson set both the primary standard and the secondary standard at the same level: 75 parts per billion over an eight-hour period.

The Committee's investigation shows that the process that led to the new standards was highly unusual, particularly the process of setting the secondary standard. EPA's expert advisory panel, the Clean Air Scientific Advisory Committee, had unanimously recommended that to protect crops and vegetation, EPA establish a secondary standard that limited long-term, cumulative exposure over a three-month growing season, not a short-term eight-hour standard. EPA Administrator Johnson agreed with this recommendation. The draft rule, as submitted to the White House by Administrator Johnson, described the evidence supporting a cumulative, seasonal standard as "compelling."

Late on March 11, the evening before the court-ordered deadline, EPA was informed that the President had rejected the position of the EPA Administrator and the Clean Air Scientific Advisory Committee. This decision set off what one official described as an "emergency rewrite" to justify setting the secondary standard at the same level as the primary standard, as the White House directed. The final rule dropped the language in the draft that concluded a

cumulative, seasonal standard was “necessary ... to ensure the requisite degree of protection.” In its place, the final rule stated: “The Administrator ... does not believe that an alternative cumulative, seasonal standard is needed.”

The documents show that the EPA staff questioned both the legality and motivation for the last-minute change in the secondary standard:

- An EPA associate director commented: “Looks like pure politics.”
- An EPA lawyer wrote: “we could be in a position of having to fend off contempt proceedings. ... The obligation to promulgate a rule arguably means to promulgate one that is nominally defensible.”
- A career official stated: “I have been working on NAAQS for over 30 years and have yet to see anything like this.”
- A career official charged with revising communications materials for the final rule wrote: “I don’t think that we need to repeat all this ...um... stuff about ‘parks and forests’ when we’re not doing anything to protect them. ... No need to distinguish which types of vegetation are in need of additional protection, since we’re not really protecting any of them properly!”

The Committee sought to learn the basis for the President’s decision to reject the recommendations of the EPA Administrator and the Clean Air Scientific Advisory Committee. The White House, however, is withholding hundreds of pages of documents that would explain what happened inside the White House.

I. Background

Ozone is an air pollutant that contributes to what is typically referred to as smog. When ozone is inhaled, it reacts chemically with biological molecules in the respiratory tract, causing serious adverse health effects. Exposure to ozone can decrease lung function, cause inflammation of airways, and induce respiratory symptoms such as coughing, throat irritation, chest tightness, wheezing, pain, burning, discomfort, and shortness of breath. Exposure to ozone can result in school absences, doctor visits, emergency room visits, hospital admissions, and even premature death.

Ozone can also damage sensitive vegetation and ecosystems. According to EPA, ozone injures crop production and native vegetation and ecosystems “more than any other air pollutant.”¹ Ozone exposure can damage leaves, interfere with photosynthesis, and reduce the ability of sensitive species to adapt to or withstand environmental stresses, such as freezing

¹ Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone: Policy Assessment of Scientific and Technical Information*, at 7-1 (Jan. 2007) (EPA-452/R-07-003).

temperatures and pest infestation.² Exposure to ozone reduces crop yields for fruits and vegetables and can stunt the growth of trees.³

The Clean Air Act requires EPA to protect against the public health and environmental effects of ozone by establishing national ambient air quality standards.⁴ Under the Act, EPA is required to establish two standards: (1) a primary standard for the protection of public health; and (2) a secondary standard for the protection of “public welfare,” including the environment.⁵ These standards must be established without regard to compliance costs. In 2001, in the case of *Whitman v. American Trucking Association*, the Supreme Court ruled that “EPA may not consider implementation costs in setting the secondary NAAQS.”⁶

Once national ambient air quality standards are established, states must develop plans to ensure that the standards are not exceeded. In the case of primary standards, the Clean Air Act establishes deadlines for compliance, with areas with greater pollution challenges being given more time to achieve healthy air.⁷ In the case of secondary standards, the Act requires eventual compliance, but does not establish any mandatory deadline.⁸ Although costs cannot be considered when establishing the NAAQS, they become a prime factor that the states consider in developing strategies for achieving compliance with the standards.

In 1997, the Clinton Administration set a primary and secondary standard for ozone at 80 ppb.⁹ Under the Clean Air Act, these standards were supposed to be reviewed and updated within five years.¹⁰ After EPA failed to meet this deadline, the American Lung Association filed suit against the agency.¹¹ This litigation resulted in EPA agreeing to a consent decree requiring EPA to promulgate final ozone NAAQS by March 12, 2008.¹²

² *Id.* at 7-6 – 7-9.

³ *Id.* at 7-9, 7-10.

⁴ Clean Air Act § 109 (2005).

⁵ *Id.*

⁶ *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

⁷ *See*, Clean Air Act, Title I (2005).

⁸ *Id.*

⁹ Environmental Protection Agency, *National Ambient Air Quality Standards for Ozone*, Fed. Reg. Vol. 62, No. 138 (July 18, 1997) (online at www.epa.gov/ttnamti1/files/cfr/recent/o3naaqs.pdf).

¹⁰ Clean Air Act § 109(d)(1) (2005).

¹¹ Complaint for Declaratory and Injunctive Relief, *American Lung Association v. Whitman*, D.D.C. (No. 03-778) (Mar. 31, 2003).

¹² Joint Stipulation to Modify Deadlines in Consent Decree, at 3 (Mar. 2007), *American Lung Association v. Johnson*, D.D.C. (No. 03-778) (online at www.epa.gov/ttn/naaqs/standards/ozone/data/march_2007_stipulation.pdf).

II. The Development of EPA's Draft Final Rule

In January 2007, EPA's Office of Air Quality Planning and Standards finalized its "Staff Paper" on ozone.¹³ The staff paper presented to EPA Administrator Johnson "staff conclusions and recommendations on a range of policy options ... concerning whether, and if so how, to revise the primary (health-based) and secondary (welfare-based) O₃ NAAQS."¹⁴ It followed a multi-year review of the science regarding ozone's effects on public health and welfare by EPA staff, which first began in September 2000.¹⁵ The recommendations in the staff paper represented years of work by EPA staff.

In the staff paper, EPA recommended that the primary NAAQS for ozone be reduced from 80 ppb to as low as 60 ppb.¹⁶ In addition, the staff concluded that it was no longer appropriate "to use an 8-hr averaging time for the secondary O₃ standard" and recommended to Administrator Johnson that the "8-hr average form should be replaced with a cumulative, seasonal, concentration weighted form."¹⁷ EPA staff recommended that the new secondary standard be a "cumulative, weighted total of 12-hour (8 a.m. – 8 p.m.) exposures over a 3-month period giving greater weight to exposures at higher levels of ozone."¹⁸ The staff made this recommendation because the cumulative, seasonal form is more "biologically relevant" to vegetation and new research showed that the eight-hour standard would not cover the same "areas of concern for vegetation" as the cumulative, seasonal standard.¹⁹

The Clean Air Act establishes a Clean Air Scientific Advisory Committee (CASAC) to guide the EPA Administrator on setting the NAAQS.²⁰ CASAC reviewed the staff recommendations and unanimously supported them. In the case of the secondary standard, its Ozone Review Panel members were "unanimous in supporting the recommendation in the Final Ozone Paper that protection of managed agricultural crops and natural terrestrial ecosystems requires a secondary Ozone NAAQS that is substantially different from the primary ozone standard in averaging time, level and form."²¹

¹³ Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone: Policy Assessment of Scientific and Technical Information* (Jan. 2007) (EPA-452/R-07-003).

¹⁴ *Id.* at 1-1.

¹⁵ *Id.* at 1-5.

¹⁶ *Id.* at 6-77.

¹⁷ *Id.* at 8-24.

¹⁸ Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone Final Staff Paper, Human Exposure and Risk Assessments and Environmental Report* (Jan. 2007) (online at www.epa.gov/ttn/naaqs/standards/ozone/data/2007_01_finalsp_factsheet.pdf).

¹⁹ *Id.* at 8-20.

²⁰ Clean Air Act § 109(d)(2) (2005).

²¹ Letter from Dr. Rogene Henderson, Chair of the Clean Air Scientific Advisory

In July 2007, EPA submitted its proposed ozone NAAQS for public comment.²² EPA Administrator Johnson proposed a primary standard within a range between 70 ppb and 75 ppb and two alternatives for the secondary standard: (1) a cumulative, seasonal form based upon recommendations presented in the staff paper and (2) a short-term secondary standard identical to the proposed primary standard.²³ During the comment period, the proposal to set a seasonal secondary standard was supported by individual states, state and local air pollution control authorities, and the National Park Service, as well as many other organizations.²⁴

Internal EPA documents show that the “option selection” meeting with the Administrator occurred on January 7, 2008.²⁵ At this meeting or shortly thereafter, the Administrator decided to proceed with a primary standard of 75 ppb and a cumulative, seasonal secondary standard.²⁶ A draft final rule reflecting these decisions was submitted by Administrator Johnson to the White House Office of Management and Budget on February 22, 2008.²⁷

The draft final rule submitted by Administrator Johnson stated that adoption of a seasonal secondary standard was supported by “compelling” evidence and was “necessary” to protect the environment. According to Administrator Johnson’s draft:

the Administrator ... agrees with the CASAC Panel and the Staff Paper conclusions that in revising the secondary standard to provide increased protection it is appropriate to establish a secondary standard that is distinct from the primary standard in that it is based on a biologically relevant form. The Administrator finds the evidence is compelling that O₃-related effects on vegetation are best characterized by an exposure index that is cumulative and seasonal in nature, and that revising the current standard in part by

Committee, to EPA Administrator Stephen L. Johnson (Mar. 26, 2007).

²² Environmental Protection Agency, *National Ambient Air Quality Standards for Ozone; Proposed Rule*, 72 Fed. Reg. 37818 (July 11, 2007).

²³ *Id.*

²⁴ Environmental Protection Agency, *Responses to Significant Comments on the 2007 Proposed Rule on the National Ambient Air Quality Standards for Ozone*, at 105 (Mar. 2008) (online at www.epa.gov/ttn/naaqs/standards/ozone/data/2008_03_rtc.pdf).

²⁵ Environmental Protection Agency, *Ozone NAAQS Review; SAN 5008; Tier 1* (Revised on Mar. 4, 2008).

²⁶ *Id.* EPA has not responded to a Committee request to identify the exact date on which Administrator Johnson made the option selection.

²⁷ Memorandum from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 6, 2008).

adopting such a form is both necessary and appropriate to ensure a requisite degree of protection.²⁸

According to the draft approved by Administrator Johnson: “EPA has found no evidence that, from the perspective of biological impact of O₃ exposure, the 8-hour standard form is an appropriate metric to protect vegetation.”²⁹ The draft added: “the Administrator concludes that to provide adequate protection, the standard should be revised by establishing a distinct secondary standard with a cumulative, seasonal form that is biologically relevant to O₃-related effects.”³⁰

III. White House Objections

On March 6, 2008, six days before the court-ordered deadline, Susan Dudley, Administrator of OMB’s Office of Information and Regulatory Affairs, sent a memorandum to EPA informing the agency that OMB disagreed with its proposed secondary ozone standard.³¹ She stated that the “draft does not provide any evidence that a separate secondary standard would be more protective than one set equal to the draft primary standard.”³² Ms. Dudley argued that EPA failed to properly consider “economic values” in the setting of the secondary standard and that there was no reason to set a secondary standard that was not identical to the primary standard.³³

On the following day, EPA Deputy Administrator Marcus Peacock sent a response to OMB that disagreed with OMB’s assessment.³⁴ Mr. Peacock’s memo explained that the Supreme Court has clearly stated that “EPA cannot consider implementation costs in setting” the secondary standard, that the agency had appropriately considered the statutory criteria for establishing the secondary standard, and that a “secondary standard that is distinctly different in form and averaging time from the 8-hour primary standard is necessary.”³⁵ In an internal EPA e-

²⁸ U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 243 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

²⁹ U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 252 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

³⁰ U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 243 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

³¹ Memorandum from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 6, 2008).

³² *Id.*

³³ *Id.*

³⁴ Memorandum from EPA Deputy Administrator Marcus Peacock to Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget (Mar. 7, 2008).

³⁵ *Id.*

mail, the counsel to the Assistant Administrator for Air and Radiation commented that the White House was apparently “p.o.’D about the separate std” and that “the hornets are already worked up.”³⁶

On March 8, Susan Dudley and Stephen McMillin, the Deputy Director of the Office of Management and Budget, called EPA’s Deputy Administrator to inform the agency that “OMB does not concur,” thereby blocking EPA from issuing the rule.³⁷ No written explanation of the OMB position was provided to EPA.

According to Jason Burnett, the EPA Associate Deputy Administrator, Administrator Johnson had multiple meetings with White House officials regarding the secondary ozone standard in March 2008.³⁸ However, at the direction of EPA, Mr. Burnett refused to discuss his knowledge of the substance of the meetings or the identities of the White House officials involved when he testified in a deposition.³⁹

Throughout most of the day on March 11, 2008, the day before the consent decree deadline, EPA staff continued to prepare a final rule that included a secondary ozone standard based upon a cumulative, seasonal form. Drafts from March 11 of the rule, the response to comments, the fact sheet, the answers to anticipated questions, and the “Action Memorandum” from Deputy Administrator Marcus Peacock to Administrator Johnson all reflected a secondary ozone standard based upon a cumulative, seasonal form.⁴⁰

EPA staff also drafted talking points, apparently for Administrator Johnson to use in conversations with the White House. The talking points stated: “The seasonal form is the most scientifically defensible.”⁴¹ The document also stated: “The Administrator must decide how best to set the secondary standard and a seasonal form is the most legally defensible.”⁴²

During the evening of March 11, 2008, EPA staff was directed to reject the seasonal standard and make the secondary standard equal to the primary one, as OMB had previously urged. An e-mail from an EPA attorney working on the ozone standard explained:

³⁶ E-mail from George Sugiyama to Lydia Wegman (Mar. 7, 2008; 7:30 p.m.).

³⁷ E-mail from Marcus Peacock to Robert Meyers and Charles Ingebretson (Mar. 8, 2008; 2:55 p.m.).

³⁸ Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 69 (May 15, 2008).

³⁹ *Id.* at 67-70.

⁴⁰ *See e.g.*, E-mail from Erika Sasser to Sara Terry (Mar. 11, 2008; 9:25 a.m.); E-mail from Diann Frantz to Josh Lewis and Cheryl Mackay (Mar. 11, 2008; 1:03 p.m.); E-mail from Dave Mckee to Joseph Dougherty (Mar. 11, 2008; 2:23 p.m.); E-mail from John Millett to Alison Davis (Mar. 11, 2008; 6:28 p.m.)

⁴¹ Environmental Protection Agency, *Ozone Secondary NAAQS* (Mar. 11, 2008).

⁴² *Id.*

Well, we lost on the secondary. the decision came in about 7:00 to make it equal to the primary. About an hour later we heard there was also to be some sort of presidential announcement.⁴³

The following day, Ms. Dudley sent a letter to EPA Administrator Johnson explaining that the President had reviewed the secondary standard. According to Ms. Dudley's letter:

The President has concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard.⁴⁴

The last-minute change triggered what one EPA staff called an "emergency rewrite" of the final rule.⁴⁵ Just before 1:00 a.m. on March 12, 2008, the Director of EPA's Health and Environmental Impacts Division informed EPA staff that "the primary and secondary standards are going to be identical" and asked that the "implementation section" be reworked "first thing in the morning."⁴⁶

The final rule was issued late in the day on March 12. The statements in the draft rule that described the evidence supporting a seasonal standard as "compelling" were deleted, as was Administrator Johnson's finding that a seasonal standard was "necessary ... to ensure the requisite degree of protection." In its place, the final rule contained language justifying the decision to adopt a secondary standard equal to the primary standard, asserting:

The Administrator believes that such a standard would be sufficient to protect public welfare from known or anticipated adverse effects, and does not believe that an alternative cumulative, seasonal standard is needed to provide this degree of protection.⁴⁷

EPA employees worked at such a furious pace to edit the rule that not every statement in support of a separate secondary standard was deleted from the signed rule published in the *Federal Register*. On March 13, the Group Leader of the Air Quality Analysis Group e-mailed

⁴³ E-mail from John Hannon to Richard Ossias and Kevin McLean (Mar. 12, 2008; 7:40 a.m.).

⁴⁴ Letter from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 12, 2008). The letter is misdated as March 13, but was actually transmitted on March 12 as evidenced by its availability on that date and the citation to the letter in the March 12 final regulation.

⁴⁵ E-mail from Lewis Weinstock to Richard Wayland (Mar. 11, 2008; 9:32 p.m.).

⁴⁶ E-mail from Lydia Wegman to Bill Harnett, et al. (Mar. 12, 2008; 12:55 a.m.).

⁴⁷ U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 255 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

two other EPA employees stating, “I’m wondering if a ... sentence was inadvertently left in the signature version of the ozone rule.”⁴⁸ The sentence stated:

The National Park Service (NPS) comment ... specifically stated that “the NPS supports ... the conclusion that a seasonal, cumulative metric is needed to protect vegetation.” ... EPA agrees with these comments for the reasons discussed above.⁴⁹

IV. The Views of EPA Career Staff

The reaction of EPA career staff and managers to the decision to drop the secondary standard, as revealed in internal communications obtained by the Committee, illustrates the degree to which the staff viewed the decision as unfounded. In their internal communications, they raised questions about both the legality of and motivation for the last-minute change. They also expressed personal dismay.

On March 10, the Associate Director for Health for EPA’s National Center for Environment Assessment commented on the objections raised by OMB, stating: “Looks like pure politics.”⁵⁰

On the morning of March 11, an EPA lawyer warned about the legal danger of dropping the seasonal standard:

One additional thought did occur to me today in discussing with my client what we would do if we were to change the rule at this late date to set a secondary standard equal to the primary. In short, we would have a hard time doing anything other than putting out an obviously legally deficient notice given the time frames. You may have already thought of this, but it occurred to me that we could be in the position of having to fend off contempt proceedings for that sort of action. The obligation to promulgate a rule arguably means to promulgate one that is nominally defensible, i.e. that meaningfully responds to at least most significant comments and has a clear explanation of the basis for the decision.⁵¹

Another agency lawyer expressed his legal view, “We believe that it is legally stronger to go forward with a seasonal standard ... than to go forward with an 8-hour identical to a primary.”⁵²

As EPA staff worked on March 11 and March 12 to revise the materials for the final rule to reflect the President’s decision, one EPA staffer wrote:

⁴⁸ E-mail from Phil Lorang to Karen Martin and Erika Sasser (Mar. 13, 2008; 5:08 p.m.).

⁴⁹ Environmental Protection Agency, *National Ambient Air Quality Standards for Ozone: Final Rule*, 73 Fed. Reg. 16499 (Mar. 27, 2008).

⁵⁰ E-mail from John Vandenberg to Ila Cote and Peter Preuss (Mar. 10, 2008; 4:22pm).

⁵¹ E-mail from Lea Anderson to Mary Ann Poirier (Mar. 11, 2008; 11:24 a.m.).

⁵² E-mail from John Hannon to Mary Ann Poirier (Mar. 11, 2008; 7:05 a.m.).

I don't think that we need to repeat all this ...um... stuff about "parks and forests" when we're not doing anything to protect them. ... No need to distinguish which types of vegetation are in need of additional protection, since we're not really protecting any of them properly!"⁵³

Career EPA staff reacted with frustration when they heard of the decision to drop the seasonal standard. In response to an e-mail referring to "the secondary standard being set the same as the primary," the Acting Group Leader of the Ambient Air Monitoring Group wrote: "My sympathies to all and you in particular for all the work that went down the drain."⁵⁴ An agency veteran replied: "I have been working on NAAQS reviews for over 30 years and have yet to see anything like this."⁵⁵ The Group Leader of the Ambient Standards Group told her staff: "I know how incredibly frustrated and disgusted we all are at the moment."⁵⁶ After midnight, the Director of the Health and Environmental Impacts Division summed up the events of the evening in the subject line of her e-mail: "We lose."⁵⁷

The next day, a career attorney in the Office of General Counsel informed his colleagues: "Well, we lost on the secondary."⁵⁸ The Associate General Counsel for the Air and Radiation Law Office replied: "Sorry to hear that. Hopefully the hard work you all did on it will bear fruit in the long run, when a different crew is in charge."⁵⁹

In a consolation e-mail to her staff, the Director of the Health and Environmental Impacts Division made it clear that the White House, not EPA, made the decision on the secondary standard: "While I was quite disappointed that we did not succeed in promulgating a [seasonal secondary] standard, we certainly had the full support of the Administrator in our effort."⁶⁰ The Acting Director of Policy Analysis and Communications in the Office of Air Quality Planning and Standards stated: "Bad day for EPA. Primary has held but we lost the 2ndary."⁶¹ Another career EPA employee reported to his colleagues:

EPA was moving to have a new form of the secondary standard (SUM06, an important change); OMB last Friday said 'no'. I hear final decision came down last night seeing

⁵³ E-mail from Erika Sasser to Sara Terry (Mar. 11, 2008; 8:43 p.m.).

⁵⁴ E-mail from Lewis Weinstock to Dave McKee (Mar. 11, 2008; 8:41 p.m.).

⁵⁵ E-mail from Dave McKee to Lewis Weinstock (Mar. 11, 2008; 9:39 p.m.).

⁵⁶ E-mail from Karen Martin to Susan Stone, et al. (Mar. 11, 2008; 8:43 p.m.).

⁵⁷ E-mail from Lydia Wegman to Bill Harnett, et al. (Mar. 12, 2008; 12:55 a.m.).

⁵⁸ E-mail from John Hannon to Richard Ossias and Kevin McLean (Mar. 12, 2008; 7:40 a.m.).

⁵⁹ E-mail from Richard Ossias to John Hannon (Mar. 12, 2008; 9:01 a.m.).

⁶⁰ E-mail from Lydia Wegman to Karen Martin, et al. (Mar. 12, 2008; 8:20 p.m.).

⁶¹ E-mail from Jenny Noonan to Jeffrey Clark (Mar. 12, 2008; 11:27 a.m.).

the wisdom of OMB on this point, so secondary standard will be equal to the primary. To hell with the trees.⁶²

In response to an article quoting Administrator Johnson as saying “I followed my obligation. I followed the law. I adhered to the science,” a veteran employee in the Ambient Standards Group wrote: “I guess that means that he doesn’t have to pay attention to the scientists, who were overly worried about vulnerable citizens.”⁶³

V. Unanswered Questions about the Decision

As part of the investigation, the Committee has sought to understand the rationale for rejecting the seasonal standard advocated by the EPA Administrator, the Clean Air Scientific Advisory Committee, and the EPA staff. Under the Clean Air Act, the secondary standard is required to be set based on a scientific assessment of harm to public welfare. The decision may not consider the economic costs of compliance as a factor in setting the standards. In its 2001 decision in *Whitman v. American Trucking Association*, the Supreme Court wrote that if EPA established a NAAQS standard by “secretly considering the costs of attainment without telling anyone . . . , it would be grounds for vacating the NAAQS, because the Administrator had not followed the law.”⁶⁴

There is some evidence that the White House intervention was motivated by an illicit consideration of costs. The March 6 memo from Ms. Dudley, the OIRA Administrator, asserted that the EPA proposal was flawed because it did not consider “economic values.” Moreover, news reports have suggested that the White House rejected the EPA position because of the costs of compliance. According to the *Washington Post*:

Solicitor General Paul D. Clement warned administration officials late Tuesday night that the rules contradicted the EPA’s past submissions to the Supreme Court, according to sources familiar with the conversation. As a consequence, administration lawyers hustled to craft new legal justifications for the weakened standard.⁶⁵

The Committee sought — and ultimately issued a subpoena for — documents from Ms. Dudley that would explain why the White House rejected the EPA position. Ms. Dudley provided the Committee with copies of OMB’s communications with EPA and access to copies of communications between OMB and other agencies. These documents shed little light on the decision, however. Comments to OMB from the Department of Agriculture on March 11, 2008, at 7:07 p.m. did raise concerns about the science supporting the EPA position, asserting that one study relied upon by EPA was not peer-reviewed. But it is unclear what influence these

⁶² E-mail from John Vandenberg to Linda Tuxen (Mar. 12, 2008; 1:05 p.m.).

⁶³ E-mail from Dave McKee to Chris Trent (Mar. 12, 2008; 10:50 p.m.).

⁶⁴ *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

⁶⁵ *Ozone Rules Weakened at Bush's Behest*, *Washington Post* (Mar. 14, 2008).

comments had. Moreover, they appear to be based on a misunderstanding of the basis for EPA's position.⁶⁶

At the same time, Ms. Dudley withheld from the Committee documents that could explain the basis for the White House objections to Administrator Johnson's recommendation. According to White House counsel, approximately 1,900 pages of internal White House communications are being withheld. White House counsel explained that the documents were being withheld because they reflected the contents of deliberations inside the White House.

The Committee staff asked EPA Associate Deputy Administrator Jason Burnett about the White House position in a deposition. Mr. Burnett confirmed that the White House was involved. According to Mr. Burnett, Administrator Johnson had multiple meetings with officials in the White House regarding the primary ozone standard in January 2008 and additional meetings with officials in the White House regarding the secondary ozone standard in March.⁶⁷ However, based on instructions from EPA, Mr. Burnett refused to answer the Committee's questions about the substance of these meetings, who the meetings were with, and whether the President was personally involved.⁶⁸

On May 16, 2008, Chairman Waxman wrote Ms. Dudley and Administrator Johnson that unless the White House was prepared to assert a valid claim of executive privilege over the withheld documents, they should appear with the documents when they testify before the Committee. Chairman Waxman's letter explained that the Committee cannot assess whether the Clean Air Act was lawfully administered without access to the documents explaining the basis for the rejection of the EPA position.⁶⁹

⁶⁶ The comments suggest that the Department of Agriculture believed that a Forest Service database of foliar damage was an "unpublished study" that EPA relied upon for the standard it sent to the White House. Majority staff notes, facsimile from Department of Agriculture to Heidi King (Mar. 11, 2008; 7:07 p.m.); Majority staff notes, e-mail from Department of Agriculture to Michele Laur (Mar. 11, 2008; 8:13 p.m.). In fact, EPA based its draft on numerous published studies, as Dr. Gretchen Smith, who served for ten years as the National Ozone Advisor for the USDA Forest Service Ozone Biomonitoring Program, explained in a May 14, 2008, letter to the Committee. Letter from Dr. Gretchen Smith to Chairman Henry A. Waxman (May 14, 2008).

⁶⁷ Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 67-70 (May 15, 2008).

⁶⁸ *Id.*

⁶⁹ Letter from Chairman Henry A. Waxman to Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget (May 16, 2008).