May 13, 2013

The Honorable Robert Perciasepe
Acting Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Acting Administrator Perciasepe:

We, the undersigned stakeholders, write in response to Earthjustice's March 13, 2013 60-day notice of intent to file suit under the Clean Air Act concerning EPA's review of the national ambient air quality standards ("NAAQS") for Ozone. The National Association of Manufacturers, American Chemistry Council, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Road & Transportation Builders Association, American Wood Council, Brick Industry Association, Corn Refiners Association, National Mining Association, National Oilseed Processors Association and Utility Air Regulatory Group collectively represent tens of thousands of stakeholders in a wide range of industry sectors across the nation, many of whom could be substantially impacted by any revisions to the Ozone NAAQS. Thus, the undersigned organizations have a strong interest in assuring that EPA's Ozone NAAQS review is informed by the best possible scientific analysis, including consideration of all relevant information and factors, and that it is conducted over a reasonable, not artificially compressed, period of time. To those ends, we have set forth below several considerations we urge you to take into account when deciding EPA's position in response to the notice letter. Importantly, we also hereby respectfully request that any response be transparent and fair by including *all* key stakeholders—including representatives of the undersigned organizations—not just the citizen petitioners in any process and discussions to reach a plan for completing the required review.

At the outset, it is critical that EPA not engage in closed-door settlement discussions affecting the timeframe of the Ozone NAAQS rulemaking without creating a transparent process that involves all interested stakeholders. The Ozone NAAQS rulemaking will impact a wide range of parties and organizations across the nation, and given EPA's commitment and obligation to ensure transparency, it must provide all parties an equal opportunity to be heard in such discussions on the timeframe of the rule. There is a recent history of groups threatening or filing lawsuits against EPA and then using a closed settlement process to establish rulemaking schedules outside of the established and transparent regulatory process. Not only are the state governments and private stakeholders impacted by future regulations shut out of negotiations, but EPA has often agreed to short rulemaking deadlines that greatly limit its consideration of public comments. Recent experience shows that rulemakings resulting from a "sue and settle" approach see EPA give only perfunctory consideration to public comments. Such a "sue and settle" approach is therefore contrary to the principles of transparency and public participation evident in the Administrative Procedure Act and President Obama's January 21, 2009 Open Government Directive.

Thus, given Earthjustice's 60-day notice letter, we ask that we be involved in any dialogue related to the schedule for completing EPA's review of the Ozone NAAQS. A full opportunity for participation will ensure that EPA does not rush its analysis of complex scientific

data and affords proper consideration to public comments. Such participation will also reduce the likelihood of subsequent reconsiderations, technical amendments, and corrections.

Second, to the extent EPA engages in such discussions, EPA must not commit to an insufficient timeline for completing the Ozone NAAQS review. On several recent occasions, EPA agreed to regulatory schedules that failed to account for the necessary amount of time needed to conduct a high-quality scientific review process under the Clean Air Act, with unfortunate consequences. For example, in signing a consent decree agreeing to complete its five-year review of the particulate matter NAAQS, EPA stipulated to an unreasonably short time period for promulgating a final rule, with the result that it could not meet its commitment. This included a mere 100 days to (1) review and evaluate a large volume of comments that included new scientific and technical data, (2) draft EPA's final rulemaking containing the agency's rationale justifying the rule, including a response to all comments and new scientific and technical data, and (3) coordinate with the Office of Information and Regulatory Affairs. EPA has an obligation to fully consider and respond to the comments it receives from a proposed rulemaking. *See Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (rules are arbitrary and capricious where an agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); *Hall v. EPA*, 273 F.3d 1146, 1163 (9th Cir. 2001) (notice-and-comment rulemaking exists so that the agency will consider public comments "and the agency may alter its actions in light of those comments."). A full and fair review of comments is less likely when EPA rushes to meet an arbitrary deadline, especially when those comments concern highly complex scientific and technical data.

In the particulate matter NAAQS litigation, EPA itself recognized that artificially short deadlines degrade the quality of its scientific and technical analysis. Assistant Administrator Gina McCarthy recently described the NAAQS review process in a declaration filed in that case, asserting that the agency requires a significant amount of time to review "a very large body of new science, and highly significant public health and welfare considerations." *Am. Lung Ass'n v. EPA*, Case Nos. 1:12-cv-00243, 1:12-cv-00531, Decl. of Regina McCarthy at 14 (D.D.C. May 4, 2012) ("McCarthy Decl."). According to the Assistant Administrator, the growing body of scientific studies means that "more time and effort are needed to interpret and apply the science in the context of this rulemaking compared to the last review, not less." *Id.* In the case of reviewing the Ozone NAAQS, EPA will similarly face new studies, including those submitted through thousands of public comments. *See, e.g.,* McCarthy Decl. at 15 ("it will also be important that EPA conduct a provisional assessment of the new science, including those studies cited in comments, so that the Administrator will be aware of the new science that is relied upon by commenters but was published too recently to be included in the rigorously reviewed Integrated Science Assessment.").

Therefore, it is paramount that EPA not agree to any schedule that fails to provide adequate time for a thorough and thoughtful review of comments and scientific data given how arbitrarily truncated deadlines undermine the quality of the agency's decision making. This will avoid situations such as those involving Boiler MACT and Cross-State Air Pollution Rules. As you are aware, due to an unreasonably short deadline imposed by the court, EPA simultaneously issued the final Boiler MACT rule along with a stay of the effective date pending reconsideration of several aspects of that rule. 76 Fed. Reg. 15,266 (Mar. 21, 2011). For the Cross-State Air Pollution Rule, the rushed schedule forced EPA to subsequently issue two sets of technical revisions, 77 Fed. Reg. 10,342 (Feb. 21, 2012); 77 Fed. Reg. 34,830 (June 12, 2012), one of which it had to withdraw, 77 Fed. Reg. 28,785 (May 16, 2012), as well as a

supplemental final rule. 76 Fed. Reg. 80,760 (Dec. 27, 2011). Both rulemakings illustrate how rushed decision making can result in significant uncertainty and frustration for both the regulated community and for EPA itself.

Additionally, it is important to note that the Clean Air Act Section 113(g) requirement for after-the-fact public notice of an already-negotiated settlement agreement is no substitute for the full participation of *all* stakeholders in any negotiation of EPA's regulatory schedule or policy requirements. The exclusion of affected stakeholders from the actual formation of EPA's settlement is a significant breach of transparency that cannot be cured by after-the-fact notice and perfunctory opportunity for comment on essentially final Agency policy.

We would welcome an opportunity to discuss this matter with you. Please direct any responses to Ross Eisenberg at the NAM (reisenberg@nam.org; 202-637-3173), who will coordinate with the other undersigned stakeholders.

Sincerely,

National Association of Manufacturers

American Chemistry Council

American Forest & Paper Association

American Fuel & Petrochemical Manufacturers

American Petroleum Institute

American Road & Transportation Builders Association

American Wood Council

Brick Industry Association

Corn Refiners Association

National Mining Association

National Oilseed Processors Association

Utility Air Regulatory Group