DRAFT

July __, 2011

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Jackson:

We are writing to express significant concerns regarding the Environmental Protection Agency's (EPA) reconsideration of the 2008 National Ambient Air Quality Standards (NAAQS) for ground level ozone. EPA's reconsideration is occurring outside of the statutorily directed 5-year review process for NAAQS and without any new scientific basis necessitating a change in the 2008 standard. Moreover, this decision will burden state and local air agencies that, in the current budgetary climate, can hardly cope with existing obligations. Likewise, the economic impact of EPA's proposal, while not determinative in setting NAAQS, are highly concerning, particularly in light of the billions of dollars in new costs that EPA has acknowledged would be imposed on America's manufacturing, energy, industrial, and transportation sectors. In light of EPA's intention to issue the final reconsideration rule by the end of July, the undersigned members of the United States Senate respectfully request that EPA continue its ongoing statutory review of new science, due in 2013, and not finalize the reconsideration at this time.

Regulatory Background

As you are aware, under the Clean Air Act (CAA), EPA establishes "primary" and "secondary" national ambient air quality standards (NAAQS) for ground level ozone (O_3) and other air pollutants. Primary standards are those "the attainment and maintenance of which … are requisite to protect the public health." 42 U.S.C. 7409. While EPA must allow an "adequate margin of safety" when setting primary standards, the CAA's legislative history indicates that these standards should be set at "the *maximum permissible* ambient air level … which will protect the health of any [sensitive] group of the population." *See* S.Rep. No. 91–1196, 91st Cong., 2d Sess. 10 (1970) (emphasis added).[1] Secondary standards "specify a level of air quality the attainment and maintenance of which … is requisite to protect the public welfare from any known or

[1] In its proposed rule, EPA acknowledged that this obligation to establish NAAQS at the "maximum permissible" level. 75 Fed. Reg. at 2940 n. 1.

anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. 7409. Under Section 109(d)(1) of the CAA, EPA must complete a "thorough review" of the national ambient air quality standards "at 5-year intervals" and revise as appropriate.

Over time, EPA has tightened the ozone standard from 125 parts per billion (ppb) in the 1970s to 85 ppb in the 1990s. In March 2008, after a review process that took eight years, EPA further revised the primary ozone standard to 75 ppb and made the secondary standard identical to the revised primary standard. *See* 73 Fed. Reg. 16,436. EPA determined in 2008 that the 75 ppb standard was adequate, but not more stringent than necessary, to protect public health. Important decisions by state and local governments, businesses, and citizens have been made since that date in reliance on the 2008 standard.

In January of 2010, less than two years after issuing the 2008 standards, EPA announced its decision to revisit EPA's 2008 decision and to set new NAAQS for ground level ozone. This was a voluntary decision by EPA that was neither ordered by the courts nor mandated by law. Nor does administrative reconsideration of the NAAQS contain the public participation and mandatory review of new science required under the ongoing statutory 5-year review process. EPA's public statements indicate that the finalization of the new ozone standards could occur as soon as July of 2011.

Significant Concerns with EPA's Current Approach

Several aspects of EPA's decision in this regard are troubling. First, the standard selected by EPA may force most large populated areas of the United States into non-attainment status for ground level ozone. In fact, a report by the Congressional Research Service in December 2010 made this point in very clear terms: "At 0.060 ppm [60 parts per billion], 650 counties—virtually every county with a monitor—exceeded the proposed standard." Even EPA's own estimates suggest that the new standard could add $90 billion dollars per year to already high operating costs faced by manufacturers, agriculture, and other sectors. Areas that will not be able to meet EPA's proposed new NAAQS will face increased costs to businesses, restrictions on infrastructure investment, and limits on transportation funding. Recent studies indicate that each affected state could lose tens of thousands of jobs.

Second, EPA's new ozone standards are being finalized just three years after the agency's original decision. This is at odds with the CAA's statutory NAAQS review process that includes mandatory reviews of new science and affords public participation and comment. EPA is already more than three years into the current statutory five-year review cycle for the 2008 ozone NAAQS. We are concerned that EPA's current ozone rulemaking is at odds with important procedures and safeguards afforded by the Clean Air Act.

Third, the new standards will create significant implementation challenges for the states and local air agencies that oversee nonattainment areas. As you know, most states are facing constrained fiscal situations and meeting existing obligations is already difficult. Many states will likely find it difficult if not impossible to develop and implement new compliance plans for the new standards.

For the foregoing reasons, we would respectfully urge EPA to withdraw the current proposed reconsideration and continue the ongoing 5-year NAAQS review process set forth in the Clean Air Act.

Sincerely,