EPA-2839

John Hannon/DC/USEPA/US
03/11/2008 07:05 AM

To MaryAnn Poirier
cc Lydia Wegman, Karen Martin, Lea Anderson
bcc
Subject Re: per my vm

Mary Ann, here are some thoughts. I'm ccing Lydia and Karen as will to check this.

I think the two ideas need to be tied together a little closer. In 1997 we had two main factors at issue:

(1) uncertainty over how plants reacted to ozone exposure in the field, and uncertainty over how to characterize air quality distribution in more rural areas, with the result being only rough estimates of the increased protection that would be afforded by either an 8-hour or a seasonal standard. P21 col 1.

(2) CASAC advice that the science was uncertain in the areas of both form and level, and the choice between an 8 hr and a seasonal standard was a policy choice not just a science choice. P20 col 2 bottom

In that context EPA recognized that the new 8-hour standard would provide increased protection and it wasn't clear what additional or different protection would be afforded by a seasonal. This was more than just a desire to compare the incremental protection from a policy perspective - it was also science based as there was uncertainty over how plants reacted to ozone in the field, and to 8-hour exposures versus seasonal exposures.

So Browner's approach of looking at incremental protection was both science and policy driven.

Even in 1997 EPA recognized that the goal was to decide what standard was right for public welfare, and looking at 8-hour v seasonal was a way of looking at alternatives to get to that result, not a presumption that the primary starts off the right way and we should just look at incremental protection compared to the primary. The 8-hour and the seasonal were looked at as two separate alternatives to make that separate decision of what was the right secondary standard. P20 col 2 top.

The 1997 decision was not litigated.

What we are now facing:

(1) Less uncertainty in all of the science areas discussed in 1997. There is still uncertainty, for sure, but there have been advances in the use of field studies to evaluate how plants react under field conditions, and advances in evaluating air quality distribution.

(2) CASAC now has a consensus advices - the science is more than clear enough that you need a seasonal standard, both wrt form and level.

So the ability of the Administrator to rely on uncertainty over incremental protection is reduced compared to 1997 - there is less of a science basis for it, and less of a policy basis - he is in a better position than 1997 to evaluate what seasonal standard is appropriate.

We believe that it is legally stronger to go forward with a seasonal standard, even at 21 level, than to go forward with an 8-hour identical to a primary. Our weakness under the seasonal will be on the issue of level, and there we will basically argue the policy judgment of how much protection is needed, and rely on uncertainty over the relationship between level and damage as well as our policy judgment on the where to focus protection. We will not have to argue about the form, and we will be inconsistent with CASAC only on level. If we go forward with the 8-hour, we will have to argue about both the form and the level, and be inconsistent with CASAC on both.

The 1997 decision was not litigated, but we think it was very important that CASAC had a no consensus advise and agreed it was a policy choice back then, and absent that ti would have been much harder to defend in 1997. Here, we know we will be litigated, the science is clearer, and we have a unanimous CASAC view against us.

MaryAnn Poirier/DC/USEPA/US

MaryAnn Poirier/DC/USEPA/US
03/10/2008 11:34 PM

To John Hannon/DC/USEPA/US@EPA
cc
Subject Re: per my vm

PRIVILEGED ATTORNEY WORK PRODUCT

Hi John --

In case my voicemails never show up (I do understand we were having phone issues on the 4th floor late today), here's the question I have... Suppose someone argues that it's not that the evidence of appropriateness of seasonal standard is too uncertain for a separate secondary NAAQS, but rather that, under the Browner rationale from 1997, it's "the potentially small incremental degree of public welfare protection that such a standard may afford." (p. 21 of the 1997 ozone rule). My response would be that the 1997 standard relied on *both* deficiencies -- deficiency in scientific evidence (i.e., uncertainty) AND small incremental degree of additional public welfare protection. And we don't have the uncertainty here any more. Plus, it's doubtful that the 1997 standard determination to not set a separate secondary standard would've survived scrutiny had it NOT had an uncertain scientific record but ONLY the small incremental degree of public welfare protection...since the scientific basis is a statutory element and the size-of-benefits idea is more a policy rationale. That is, had the 1997 decision on secondary only been grounded in the negligible impacts idea, in the face of a good record of scientific evidence, it likely would not have withstood judicial review. Your thoughts?

Thanks!

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John Hannon/DC/USEPA/US

John Hannon/DC/USEPA/US
03/10/2008 08:56 PM

To MaryAnn Poirier/DC/USEPA/US@EPA
cc
Subject Re: per my vm

Mary Ann, I don't have any message in my voice mail.

MaryAnn Poirier/DC/USEPA/US

MaryAnn
Poirier/DC/USEPA/US
03/10/2008 06:54 PM

To [redacted]@epa.gov
cc
Subject per my vm

p. 21 of the following link: http://www.epa.gov/ttn/oarpg/naaqsfin/o3naaqs.pdf

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