



PETROLEUM ASSOCIATION OF WYOMING

951 Werner Court, Suite 100
Casper, Wyoming 82601
(307) 234-5333

fax (307) 266-2189
e-mail: paw@pawyo.org
www.pawyo.org

August 12, 2009

FILED

AUG 13 2009

**Jim Ruby, Executive Secretary
Environmental Quality Council**

Mr. Dennis Boal
Chairman, Environmental Quality Council
122 West 25th Street
Herschler Building, Room 1714
Cheyenne, Wyoming 82002

Attn: Docket # 09-1101

Dear Mr. Boal:

The Petroleum Association of Wyoming (PAW) welcomes this opportunity to present to the Environmental Quality Council (Council) its comments regarding the proposed Crumpley, et al. Citizen Petition for Air Quality Rulemaking (Petition) entitled "Petition to Establish Primary and Secondary Wyoming Ambient Air Quality Standards for Ozone that are more stringent than the National Ambient Air Quality Standards" (Petition). The Petition was filed with the Council by Elaine Crumpley, Mary Lynn Word, Tina Rock, Citizens United for Responsible Energy Development and Upper Green River Valley Coalition (Petitioners).

PAW is Wyoming's largest oil and gas trade association, members of which account for over 90% of the natural gas and 80% of the crude oil produced in the state. PAW and its members have a strong and direct interest in the Petition because if it is granted, the Petition could potentially result in the adoption of regulations that would impose on the members very rigorous and burdensome requirements for control of emissions from their operations--requirements that would not apply to their competitors operating in other locations and that would not be measured against the fundamental benchmark for the protection of air quality and public health under the Clean Air Act – a National Ambient Air Quality Standard (NAAQS).

Procedural Background

The Petitioners ask the Council to establish primary and secondary state ambient air quality standards (WAAQS) for ozone in Sublette County, Wyoming that are more stringent than the 8-hour national ambient air quality standard for ozone. The ozone NAAQS is set at 0.075 parts per million (ppm), and was recently lowered by EPA from 0.08 ppm after extensive study and debate, described briefly below. Petitioners ask the Council to set the ozone WAAQS at 0.065 ppm, a level which was considered and rejected by the United States Environmental Protection Agency (EPA or the Agency) when it lowered the NAAQS to 0.075 ppm less than 2 years ago.

On June 3, 2009 the Council held a public meeting to discuss the Petition. The Council scheduled further discussion of the Petition for its meeting on August 18, 2009, to consider whether to grant the Petition and commence a rulemaking proceeding. PAW submits the following comments opposing a decision to grant the Petition, and will attend the August 18, 2009, meeting.

I. PAW's Record of Cooperative Action to Protect Air Quality

Before addressing the numerous legal and practical barriers to the establishment of a state-only, lower ozone standard for Sublette County, PAW members wish to remind the EQC that they have aggressively and consistently reduced ozone precursor emissions of volatile organic compounds (VOCs) and nitrogen oxides (NOx) by voluntarily working with the Wyoming Department of Environmental Quality – Air Quality Division (WYDEQ-AQD). And PAW members remain committed to continuing efforts to reduce emissions and protect air quality, while continuing to serve an economically critical role of responsibly developing our domestic energy resources from within the state of Wyoming.

Examples of PAW member company participation include:

- PAW members have voluntarily reduced ozone precursor emissions from production facilities and drilling rigs.
- Members of PAW have voluntarily submitted and complied with ozone response plans to reduce ozone precursor emissions in the event of a forecasted ozone exceedance.
- PAW members continue to comply with the interim policy to provide ozone precursor emissions offsets for all emissions increases.
- PAW members have been working with and will continue to work with the WYDEQ on new best available control technology requirements for oil and gas production facilities.
- PAW has contributed financially to, and participated in, the WYDEQ's 2006, 2007, and 2009 winter ozone studies and financially supported the addition of air quality monitors beginning in 2004/2005.

It is against this background of oil and gas industry engagement and focused attention to the issue of protecting air quality in Wyoming, including in Sublette County, that the Petition should be evaluated by the Council.

II. Standard for Rulemaking Petitions

Under the Wyoming Administrative Procedure Act (APA), Wyo. Stat. 16-3-106, the decision as to whether to accept the Petition is in the discretion of the Council and is not subject to judicial review. Nothing in the Wyoming Administrative Procedure Act obligates the Council to move forward to provide a forum for further discussion.

Although the EQC does not have any specific procedures in place for rulemaking petitions, it seems only logical that the Council should not move forward with a rulemaking petition that ignores the rulemaking requirements of the Wyoming Environmental Quality Act. In this case, the Petitioners rely almost exclusively on information generated in EPA's ozone rulemaking with near total disregard of Wyoming procedures for rulemaking. Primarily, their petition asks the Council to revisit EPA's ozone decision and adopt a standard that was rejected by EPA, while relying entirely on the administrative record developed by EPA under the federal APA and Clean Air Act (CAA). The rulemaking criteria for air provisions are stated at Wyo. Stat. 35-11-202. These are factors that the AQD administrator (Administrator) must specifically consider in proposing air quality standards. If the Administrator must consider these factors in suggesting modifications to standards, then it is reasonable to require a petitioner who is stepping into the shoes of the Administrator to meet the same obligation, in PAW's view.

Instead of justifying their proposal under the relevant Wyoming rulemaking authority, the Petitioners argue that the Council is not bound by those factors; however, that is not entirely true. Petitioners cite the case of Tri-State Generation and Transmission Ass'n v. Environmental Quality Council, 590 P.2d 1324, 1332 (Wyo. 1979) for the proposition that there is no express statutory requirement that the Council's decision conform to the statutory requirements applicable the Administrator's consideration of new or revised air quality standards. Petition at 53. The Petitioners fail to also acknowledge that the Wyoming Supreme Court in Tri-State specifically recognized that the Council's reference to those standards could be quite helpful, noting as follows:

In carrying out this legal obligation, the Council may find it advantageous to refer to the factors listed in § 35-502.17, supra. These factors may also be of assistance to the courts in determining whether the Council has considered the relevant factors in coming to a decision on a particular pollution standard.

590 P.2d at 1332. Moreover, the Tri-State holding concerns the explanation of the basis for the Council's decision to revise or adopt a new air quality standard, or choose not to do so, in a contested case. The issue before the Council now is different: whether to, in its unreviewable discretion, grant or deny the Petition. The Council's reference to the noted factors at this stage is actually endorsed by the Supreme Court, as evidenced by the quote above. Indeed, there would seem to be no reasonable

argument for not considering the factors in evaluating the Petition, and the Petitioners have certainly not advanced one.

Thus, whether the Council is bound to explain a decision by reference to the factors or not, we believe the Petitioner has an obligation to address those factors in their Petition, and they plainly have not. This flawed approach simply does not provide an adequate legal basis for proceeding to adopt a more stringent state standard under Wyoming law for a specific portion of Wyoming (Sublette County) and arguably renders the Petition procedurally and substantively defective.

Even if not legally defective on its face, there are a number of important practical and policy reasons for the Council to use its discretion to deny the Petition. PAW has reviewed the Petition and maintains that the Council should not consider the requested ozone WAAQS at this time because: 1) acceptance of the Petition would create a cumbersome and potentially unworkable regulatory scheme that could have a substantial impact on PAW members' ability to permit operations in Southwest Wyoming, and is not reasonably calculated to improve ozone conditions beyond the steps already taken and being taken by WYDEQ-AQD, with PAW member support, as noted above; 2) EPA is currently considering the identical issue raised in the Petition—whether to reconsider adopting an ozone NAAQS that would be more stringent than the 0.075 ppm standard; and 3) the consideration and adoption by EPA of the ozone NAAQS took six years, involved thousands of hours of EPA staff and advisory committee time, thousands of pages of analysis and deliberation, and consideration of hundreds or perhaps thousands of scientific studies, and duplicating that effort would be a waste of the resources of the Council and the WYDEQ. Therefore, PAW requests that the Council deny the Petition.

III. The Council Should Defer to EPA on Whether to Lower the 8-Hour Ozone Ambient Air Quality Standard

One reason the Council should not grant the Petition is the national litigation currently pending in the D.C. Circuit Court of Appeals challenging the recently lowered 0.075 ppm ozone NAAQS. The court in that litigation is holding the matter in abeyance at the request of EPA while the Agency determines whether the ozone NAAQS should be maintained, modified or reconsidered. EPA must notify the court by September 16th what action it has taken or will be taking. If EPA decides to reconsider the existing NAAQS, it would be wasteful and redundant for the Council to conduct a parallel proceeding on the identical issue before the EPA. On the other hand, if EPA under the new administration decides to retain the existing NAAQS, it will strongly affirm that the recently lowered NAAQS is adequately protective of public health and welfare. In either case, a decision by the Council that is at odds with EPA's decision, and without benefit of a comparable scientific inquiry on the record, could very easily come to pass if the Council were to grant the Petition.

Additionally, the Clean Air Act requires that EPA review all NAAQS every five years. In addition to reconsidering the lowered ozone NAAQS adopted less than two years ago,

EPA has already begun the process for the next five-year review of the ozone NAAQS. A decision by the Council to also “weigh in” on a WAAQS for Sublette County at this time would just add to the regulatory uncertainty created by the national litigation and EPA’s pending reevaluation of the ozone NAAQS.

Finally, it cannot be overemphasized that setting a NAAQS (or WAAQS) is an incredibly complex scientific undertaking. Adoption of the current ozone NAAQS required EPA to consider huge volumes of scientific data regarding health effects¹, involved a huge amount of time devoted by EPA staff and the Clean Air Science Advisory Committee (CASAC - a panel of national experts)², and required EPA to consider hundreds of comments³.

Establishing an even lower ozone WAAQS for Sublette County would require a similar amount of resources and effort. The EQC has no scientific staff and must rely on Wyoming Department of Environmental Quality (WYDEQ) staff for scientific input. Unlike EPA, the WYDEQ does not have sufficient additional staff resources available to dedicate to such a technically rigorous effort. Thus, granting the Petition would clearly draw considerable resources away from WYDEQ, including from its ongoing work to develop the State Implementation Plan (SIP) for ozone nonattainment, and other priorities.

IV. Wyoming Has Recommended Nonattainment Status in Sublette County and Will be Undertaking an Intensive Effort to Develop a State Implementation Plan to Comply with the Ozone NAAQS

As you are aware, in March 2009 the Governor of Wyoming submitted a recommendation pursuant to Section 107 of the Clean Air Act, 42 U.S.C. §7407, to EPA

¹ The EPA uses a rigorous and detailed health effects review as part of the process for reviewing NAAQS that is established as part of the Clean Air Act. The EPA begins with the development of a criteria document by the Office of Research and Development that includes an “evaluation of the latest scientific knowledge useful in assessing the health and welfare effects of the air pollutant” that must consider the advice of the CASAC. The members of CASAC include leading health care professionals that review the health effects from various air pollutants. Then, using the criteria document, EPA’s Office of Air Quality Planning and Standards develops a staff paper “that helps translate the science into terms that can be used for making policy decisions.” The staff paper includes “recommendations to the EPA Administrator about any revisions to the standards needed to ensure that they protect public health with an adequate margin of safety, and that they protect the environment and the public welfare.” The criteria document and the staff paper undergo review by the scientific community, industry, public interest groups, the general public, and CASAC before being used for making policy decision. Based on the criteria document and the staff paper, “the EPA Administrator determines whether it is appropriate to propose revisions to the standards.” (<http://www.epa.gov/ttn/naaqs/standards/basic.html>)

² EPA’s Criteria Document, an extensive technical review of the scientific literature, was “mammoth” in size, exceeding 2,000 pages, went through two drafts before the final, and cited more than 1000 scientific references. EPA’s Staff Paper, intended to analyze the scientific data in the Criteria Document and help facilitate the decision on the ozone NAAQS, was “also a kind of magnum opus” at 855 pages in length, and went through two prior drafts. (<http://www.epa.gov/ttn/naaqs/standards/basic.html>).

³ EPA’s responses to the hundreds of public comments on its proposed ozone NAAQS was more than 200 pages long.

to designate as nonattainment parts of Lincoln, Sweetwater and all of Sublette counties for not meeting the new primary and secondary ozone NAAQS. The Governor's recommendation was based on extensive scientific study. The WYDEQ has been at the forefront of developing control strategies with the industries that provide state revenues and have responsibility in addressing the issues that led to the nonattainment designation. The WYDEQ is now working to further develop those control strategies and start the State Implementation Plan (SIP) process to bring these areas back into attainment with the ozone NAAQS. The SIP process is extremely comprehensive and allows for extensive public participation. Because the lowered ozone NAAQS is far more stringent than the previous NAAQS, development of a SIP to meet the new NAAQS will be very challenging and require a huge effort on the part of the WYDEQ staff as well as industry and the public. The ongoing SIP process the state is coordinating, combined with industry partnership and proactive measures, is the best way to solve our state's ozone issues. That should be the priority for use of WYDEQ resources. Shifting resources to the rulemaking requested by the Petition, on an issue already being addressed by the EPA, would be detrimental to pursuit of that priority.

V. There is no Basis for Adopting a Special and Separate WAAQS for Sublette County

One of Petitioners' key arguments for urging the Council to adopt an ambient standard for Sublette County that is lower than the NAAQS is that monitored ozone levels in Sublette County exceeded the NAAQS for the period 2006-08. The argument is a *non sequitur*. It's like deciding to lower the speed limit on a busy and accident-prone roadway without trying to enforce the existing speed limit, which if complied with, would adequately ensure the public's safety. Likewise, ambient levels of ozone in Sublette County or elsewhere have nothing to do with discerning the ambient levels necessary to protect public health. If decisions about the level of the NAAQS were dependent on monitored levels of ozone, the NAAQS would vary from place to place, and in nonattainment areas the standard would be higher than in attainment areas. But NAAQS are based on health protection, not on measured ozone levels. Sublette County is no different from numerous other areas in the U.S. that have exceeded the new ozone NAAQS, that will be designated nonattainment, and that will have to develop SIPs to achieve attainment, and there is no reason to treat Sublette County any different than these other nonattainment areas.

More importantly, if Wyoming adopts a separate state standard, it will be creating a dual standard that will be difficult to implement. The federally-enforceable SIP will contain one standard, while the state will have a separate obligation under Wyoming law to require sources in Sublette County to show their facilities will not interfere with the maintenance of the lower state standard applicable there. This is simply not a workable regulatory scenario for the agency or the industries it regulates.

Conclusion

In summary, PAW believes that the Petition is procedurally and substantively defective under the Wyoming APA, Wyo. Stat. 16-3-106, and the Wyoming Environmental Quality Act, Wyo. Stat. 35-11-202, for failure to address the factors required by Administrator's decisions on revised air quality standards; and the EPA is the correct regulatory agency to evaluate and revise the ozone NAAQS (and does so regularly). Furthermore, the fact that Sublette County has experienced exceedances of the lowered ozone NAAQS and been nominated by Wyoming for designation as a nonattainment area for ozone is no reason to consider a special ozone standard for Sublette County; rather, it is merely evidence that the Clean Air Act is effective in the way it focuses the development of required control strategies for areas that exceed national ambient air quality standards. Accordingly, the EQC should deny the Petition and take appropriate future actions as necessary to comply with applicable federal regulations and support WYDEQ's efforts to do the same.

PAW appreciates this opportunity to provide comments related to the Crumpley et al Citizen Petition for Air Quality Rulemaking.

Sincerely,



John Robitaille
Vice President