Attorneys General of New York, California, Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia, and the Acting Secretary of the Pennsylvania Department of Environmental Protection

April 26, 2017

The Honorable John Barrasso, Chairman
The Honorable Tom Carper, Ranking Member
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510-6175

Re: Opposition to S. 263, *Ozone Standards Implementation Act of 2017*

Dear Senator Barrasso and Senator Carper:

We write in opposition to S. 263, *Ozone Standards Implementation Act of 2017*. This bill would not only delay implementation of more protective ozone air quality standards, but, more broadly, would undermine the mandate in the Clean Air Act (Act) that the national ambient air quality standards for ozone and other criteria pollutants be based on up-to-date scientific evidence and focus *solely* on protecting public health and welfare. As explained below, these measures would be a significant step backward in combatting the dangers of ozone and other criteria pollutants.

Many of our states have struggled for decades with the pervasive problem of ozone pollution. The scientific evidence of harm to public health from ozone pollution is well established, as are the economic consequences. At certain concentration levels, ozone irritates the respiratory system, causing coughing, wheezing, chest tightness and headaches. People exposed to elevated levels of ozone suffer from lung tissue damage, and aggravation of asthma, bronchitis, heart disease, and emphysema. Children, older adults, people with asthma or other lung diseases, and people who are active outdoors are particularly susceptible to the harmful health effects of ozone. Public health harms also exact an economic toll. For example, increased hospital admissions on bad ozone days increase health care costs borne by states and local governments. Ozone pollution also harms public welfare by damaging trees and reducing crop yields by interfering with the ability of plants to produce and store food and making them more susceptible to disease, insect pests, and other stressors. Ozone can also inhibit the ability of plants and trees to mitigate harms from climate change.

To protect against these and other adverse impacts and "to promote the public health and welfare and the productive capacity of its population," the Act aims "to protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). To achieve this goal, the Act requires EPA to adopt primary standards for certain criteria pollutants, such as ozone, at a level that protects public health with an "adequate margin

of safety." 42 U.S.C. § 7409(b)(1). The Act also requires EPA to adopt secondary standards at a level that protects the public welfare from "any known or anticipated adverse effects." 42 U.S.C. § 7409(b)(2). The Act mandates that EPA review the air quality standards for each criteria pollutant every five years and revise the standards as advances in science warrant. As Justice Scalia explained for a unanimous Supreme Court, EPA's review must set the primary and secondary standards based on the scientific evidence, and may not consider implementation costs or other economic consequences. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001). Rather, implementation decisions are a matter for states, which are empowered to evaluate the costs and co-benefits of potential implementation strategies and determine, in light of those costs and co-benefits, which strategies are most suitable for them. *See Union Elec. Corp. v. EPA*, 427 U.S. 246, 266 (1976).

To ensure that our residents and natural resources enjoy the benefits of the clean air that the statute demands, our offices have advocated in rulemakings and litigation that EPA set standards that protect public health and welfare with an adequate margin of safety, as the Act requires. *E.g.*, *Mississippi v. EPA*, 744 F.3d 1334 (D.C. Cir. 2013) (State petitioners, including New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, and the District of Columbia, successfully argued for remand of secondary ozone standards); *American Farm Bureau Fed. v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) (State petitioners and amici, including New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Mexico, Oregon, Pennsylvania Department of Environmental Protection, Rhode Island, and the District of Columbia, successfully argued for remand of primary fine particulate matter standards); *Murray Energy v. EPA* (D.C. Cir. 15-1385) (State amici, including California Air Resources Board, Delaware Department of Natural Resources, Massachusetts, New York, Rhode Island, Vermont, and the District of Columbia, filed a brief supporting the 2015 primary ozone standard against attempts to weaken it).

The ozone rule promulgated by EPA in 2015 strengthened the primary standard of 75 parts per billion (ppb) to 70 ppb. 80 Fed. Reg. 65,292 (Oct. 26, 2015). This level was at the high end (i.e., less stringent) of the 65-70 ppb range that EPA proposed in 2014. EPA's independent science advisors, the Clean Air Scientific Advisory Committee, cautioned that this level may offer little margin of safety, particularly for sensitive subpopulations. Therefore, in comments on the proposal, several of our states urged EPA to adopt a primary standard lower than 70 ppb to protect public health with an adequate margin of safety. However, even tightening the standard from 75 ppb to 70 ppb will result in important public health benefits. For example, EPA conservatively estimated that meeting the 70 ppb standard nationally (not including California) will result in net annual public health benefits of up to $4.5 billion starting in 2025. These national benefits include preventing approximately:

- 316 to 660 premature deaths;
- 230,000 asthma attacks in children;
- 160,000 missed school days;

- 28,000 missed work days;
- 630 asthma-related emergency room visits; and
- 340 cases of acute bronchitis in children.

Under current law, states will develop and submit their own plans to attain the 2015 standard by 2020 or 2021. But S. 263 would delay this deadline until October 2026 and delay other similarly related deadlines, postponing even further the life-saving benefits of attaining clean air. The bill should be rejected on these grounds alone.

In addition, S. 263 would undermine the protection of health and welfare from the dangers of all criteria air pollutants by weakening the national ambient air quality standards process for updating standards based on the most recent scientific evidence. Instead of requiring that standards be reviewed—and as necessary, revised—every five years based on the latest scientific evidence on the harms to public health and welfare from exposure to criteria pollutants, S. 263 would require updates only once a decade.

The bill would also eliminate the Act's requirement that air quality standards be set *solely* based on adequate protection of public health and welfare. Specifically, the bill would authorize the EPA Administrator to also consider "likely technological feasibility" in establishing primary and secondary standards. This provision appears designed to allow EPA to weaken standards nationwide if it thinks a single area might be incapable of meeting them. But if that were ever the case, the Act already provides relief mechanisms for the affected area. In addition, the bill undermines the Act's existing protections by creating a loophole that allows EPA to treat hot or dry weather as an "exceptional event" excusing an area's nonattainment.

Finally, the bill appears to be based on a misunderstanding of the Act's balance between federal and state authority. The bill directs EPA to cherry-pick hypothetical state implementation strategies and only evaluate their adverse side-effects, and, potentially, use that evaluation to weaken ambient air quality standards. But EPA cannot know at the time it sets standards what strategies states will choose, or how individual states will value their *beneficial* side-effects. Those considerations should remain separate from the standard-setting process.

In summary, ozone pollution remains a serious and persistent problem for our nation, posing a particular risk to the health of children, the elderly and the sick, as well as individuals who spend time outdoors. Because S. 263 would represent a significant step backward in combatting ozone and other dangerous criteria pollutants, we urge you to oppose the bill. Thank you for your attention to this critical matter.

Sincerely,

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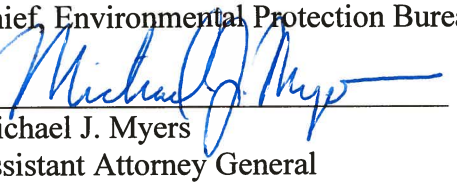
By: 

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