

# Greenhouse Gas Emissions/Clean Air Act: Eight State Attorney Generals Request that EPA Establish a National Ambient Air Quality Standard



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

08/01/2022

A group of state and territorial attorneys general sent a July 28th letter to United States Environmental Protection Agency (“EPA”) Administrator Michael Regan asking that a Clean Air Act National Ambient Air Quality Standard (“NAAQS”) be established for greenhouse gases.

The Attorneys General from the following states were signatories to the letter:

- Oregon
- Minnesota
- Delaware
- Iowa
- Maine
- Michigan
- New Mexico

The Attorney General for the Territory of Guam also executed the letter.

The Attorneys General argue that EPA’s establishment of a NAAQS would allow the agency to:

... comprehensively address the issue of greenhouse gas emissions and, we believe, would likely withstand court challenges.

Section 108 of the Clean Air Act requires that EPA identify air pollutants “which may reasonably be anticipated to endanger public health and welfare” and issue air quality criteria for them. These air quality criteria must accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of a pollutant in the ambient air.

Clean Air Act Section 109 subsequently requires that EPA promulgate “primary” and “secondary” NAAQS for the pollutants identified under Section 108. Section 109(b)(1) defines a primary standard as one “the attainment and maintenance which, in the judgment of the Administrator, based on the criteria allowing an adequate margin of safety, or requisite to protect the public health.”

Once the NAAQS is established, the states are required to formulate, subject to EPA approval, an implementation plan (“SIP”) designed to achieve each NAAQS. The SIPs are required to contain the measures and actions the state proposes to undertake to attain each NAAQS. These measures or actions

must be enforceable through state regulations and may include emission limits applicable to certain types of stationary sources.

The Attorneys General note that the United States Supreme Court case in *West Virginia v. EPA* limited the use of Section 111(d) of the Clean Air Act to address greenhouse gas emissions from power plants. The case is stated to have held that Congress could not have intended this provision to “bestow broad powers on the EPA.” Consequently, the Attorney Generals ask that EPA Administrator Regan consider:

. . . a different section of the Act and approach – NAAQS – to protect our air, and thus, our planet.

The July 28th letter argues that utilizing Section 108 of the Clean Air Act to address greenhouse gas emissions could withstand judicial challenge and has certain benefits which are argued to include:

- *West Virginia v. EPA* distinguished the NAAQS provisions from Section 111(d), noting the following statement:
- It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion, such as the NAAQS. It is quite another to simply authorize EPA to set the cap itself however the Agency sees fit” (as the Court concluded EPA was doing in the Clean Power Plan under Section 111(d)).
- The United States Supreme Court application of the “major questions doctrine” would not apply to NAAQS
- Greenhouse gases can cross state and national boundaries which is a reason for the Clean Air Act to contain a good-neighbor provision addressing interstate pollution

A copy of the letter can be downloaded [here](#).