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Bill Johnson, Chair
Subcommittee on Environment,
Manufacturing, and Critical Materials
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Chair Johnson,

Please find below my response to the Additional Questions for Record for the Subcommittee on Environment, Manufacturing, and Critical Materials on Tuesday, September 19, 2023, to testify at the hearing entitled “Protecting American Manufacturing: Examining EPA’s Proposed PM2.5 Rule.”

The Honorable Bill Johnson

1. Based on comments to EPA from USDA, the Department of the Interior, and Prescribed Forest Councils across the United States, a tighter PM2.5 standard could have the perverse effect of severely limiting the use of prescribed burns – the consensus best tool in the toolbox to reduce the frequency and severity of wildfires.

a. In fact, the Association of Retired Foresters states that preliminary research shows that EPA’s proposed rule may reduce the number of eligible days for prescribed burns by 70 to 80 percent. If true, what impact would that have on your state?

Response:

Mr. Ranotta McNair, a retired Forest Service employee provided testimony to the House Natural Resource Subcommittee in which he commented on EPA’s proposal to tighten the PM2.5 standard stating, “preliminary research suggests that some areas could see a reduction in available burn days of 70-80 percent.” Mr. McNair did not provide a reference

to that assessment nor have we been able to acquire that preliminary assessment. In the absence of our ability to review that preliminary assessment, Utah is unable to provide a response directly to that claim. However, it is our understanding that EPA would consider prescribed burning as a regulated activity that should be curtailed through state planning efforts to meet a health standard under the Clean Air Act.

Tightening the PM_{2.5} standard may unnecessarily create nonattainment areas due to uncontrollable emissions from regional transport, such as wildfires. Utah does not possess data to support the premise that our smoke management program, described below, would be adversely affected. Utah has operated a robust prescribed burning program for 25 years in partnership with our federal partners.

The potential impact would be realized if the State Implementation Planning process resulted in the identification of prescribed burning causing or contributing to the annual monitored PM_{2.5} values in excess of the National Ambient Air Quality Standard. If so, the current burning rules would need to be adjusted in order to meet the standard and avoid the prescriptive requirements of the Clean Air Act and potential EPA imposed sanctions for continued nonattainment.

2. Several commenters on EPA's proposed rule suggest that EPA has authority under the CAA to classify and exempt prescribed burns as an Exceptional Event. However, Section 319 of the statute states that to qualify for an exceptional event, any event must not be "reasonably controllable or preventable" and it if is a human activity – not reoccurring.
 - a. Given this text, would you worry that EPA would lose a lawsuit challenging exceptional event determinations for prescribed burns?

Response:

As described below, EPA has issued a policy document. Utah is unaware if this policy has been litigated or if this policy would withstand a legal review.

EPA issued prescribed burns guidance explaining how the "not reasonably controllable or preventable" and "not reoccurring" elements could be met to qualify a prescribed burn for an exceptional event.¹ To demonstrate "not reasonably controllable or preventable," a state must show that "the prescribed fire was conducted under an adopted and implemented certified" Smoke Management Plan, or with appropriate Basic Smoke Management Practices.² A state must also analyze "the benefits that would have been foregone if the fire had not been conducted."³

¹ Exceptional Events Guidance: Prescribed Fire on Wildland that May Influence Ozone and Particulate Matter Concentrations, EPA-457/B-19-004 (Aug. 2019) available at https://www.epa.gov/sites/default/files/2019-08/documents/ee_prescribed_fire_final_guidance_-_august_2019.pdf

² *Id.* at 28.

³ *Id.*

To demonstrate that prescribed fire is “a human activity unlikely to recur,” a state must compare “the actual frequency with which a burn was conducted with an assessment of the natural fire return interval or the prescribed fire frequency needed to establish, restore and/or maintain a sustainable and resilient wildland ecosystem contained in a multi-year land or resource management plan.”⁴ A state must also clearly demonstrate an objective “to establish, restore, and/or maintain a sustainable and resilient wildland ecosystem and/or to preserve endangered or threatened species through a program of prescribed fire.”⁵

In other words, there is a regulatory path for the states to qualify prescribed fires for exceptional events. However, to approve a prescribed burn as an exceptional event, EPA must rely on its own guidance in interpreting the statutory language. There are no judicial cases dealing with EPA’s approval of prescribed burns as exceptional events but there are several cases regarding other events qualifying for exceptional events. The review of those cases shows that the EPA’s guidance on exceptional events and its determinations under the guidance will be upheld by the courts if the EPA’s decision is not arbitrary and capricious. However, the courts disagree on whether the underlying statute (Section 319 of the CAA) is clear and unambiguous.

In *Ukeiley v. EPA*,⁶ the 10th Circuit found the CAA, Section 319 to be clear and unambiguous and EPA’s implementing regulations and guidance to comport with the plain meaning of the statute and thus, not arbitrary or capricious in qualifying high winds for exceptional events. A similar earlier ruling from the 9th Circuit in *Bahr v. EPA*,⁷ upheld EPA’s application of its guidance to high wind exceptional events in Arizona. However, the DC Circuit Court reasoned differently finding that the CAA “provides little guidance beyond establishing that the distinction [between human-caused and natural-caused events] exists” and that the EPA must draw that line.⁸ Further, “[t]he statutory language is far from unambiguous and is, instead, a classic example of Congress leaving a gap for EPA to fill with reasonable regulations.”⁹ The DC Circuit then applied *Chevron*’s two-step test finding that EPA’s actions passed muster and were upheld.

The potential application of *Chevron* to exceptional events’ decisions may cause issues in the future. Under the current state of the law, EPA receives deference from the courts when interpreting the language of the statutes it administers if the interpretation is reasonable. (See the DC Circuit case discussed in the previous paragraph.) This is known as the *Chevron*¹⁰ doctrine.

⁴ *Id.*

⁵ *Id.*

⁶ 896 F.3d 1158, 1165 (10th Cir. 2018).

⁷ 836 F.3d 1218, 1234 (9th Cir. 2016).

⁸ *Nat. Res. Def. Council v. EPA*, 896 F.3d 459, 464 (D.C. Cir.), judgment entered, 735 F. App’x 737 (D.C. Cir. 2018).

⁹ *Id.*

¹⁰ *Chevron v. NRDC*, 467 U.S. 837 (1984).

This principle of deference to federal agencies' reasonable interpretations has been viable since 1984. However, in recent years, the U.S. Supreme Court began distancing itself from the doctrine by ignoring it in several decisions¹¹ and ultimately taking up two cases that may overturn *Chevron* in 2024.¹² With eroding *Chevron* and especially if *Chevron* is overruled, it will become significantly more difficult for EPA to defend its decisions that involve statutory interpretations as is the case with qualifying prescribed burns as exceptional events. Having clear language in the statute for specific exceptions would be helpful to avoid litigation (and circuit split) and make it easier for the states to qualify prescribed burns as exceptional events. At this point, the states hope that EPA's deference will be upheld by the courts, which may not be the case given the weakening of *Chevron*.

- b. Do you think this explains why only one exceptional event petition for prescribed burns have been submitted and none approved to our knowledge?
- c. Would you agree that removing barriers to prescribed burns under the Clean Air Act may require a legislative fix to address the limits built into the law?

Response:

Current EPA policy documents address how the “human activities that are unlikely to recur” are treated in its *Exceptional Events Guidance: Prescribed Fire on Wildland that May Influence Ozone and Particulate Matter Concentrations*, EPA-457/B-19-004, August 2019. EPA stated that the recurrence benchmark does not apply to prescribed fires citing the Federal Register 81 FR 68216,68255. EPA has replaced the recurrence benchmark with:

“the natural fire return interval or the prescribed fire frequency needed to establish, restore and/or maintain a sustainable and resilient wildland ecosystem contained in a multi-year land or resource management plan with a stated objective to establish, restore and/or maintain a sustainable and resilient wildland ecosystem and/or to preserve endangered or threatened species through a program of prescribed fire.”
(40 CFR 50.14(b)(3)(iii).

As such, EPA recognizes the “natural fire return interval.” EPA further acknowledged that prescribed burns may be conducted on multiple and consecutive days so that an event demonstration may be assessed on the whole event rather than a recurrence.

Since the revision of the Rule to include prescribed fire, 1 prescribed fire exceptional event documentation for a prescribed burn located in California has been submitted to EPA. EPA has yet to post a Federal Register action on that event but has indicated to the states that it

¹¹ See e.g., *Am. Hosp. Ass'n v. Becerra*, 596 U.S. 724 (2022), *Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr.*, 597 U.S. 424 (2022).

¹² *Loper Bright Enterprises v. Raimondo*, Docket No. 22-451 (will be heard during January 2024 oral argument session); *Relentless, Inc. v. Department of Commerce*, Docket No. 22-1219 (consolidated with *Loper* and will be heard together).

intends on concurring on that documentation, as well as providing states with further guidance on submitting a prescribed fire exceptional event documentation.

The Clean Air Act does not regulate wildfire smoke, except for prescribed burns. The State of Utah recognized in the 1990's the value of partnering with federal agencies who conduct prescribed burning in Utah. A statewide master agreement for wildland fire that includes an annual operating plan was established. The major goals of the Utah Smoke Management Plan (SMP) are to balance the need to minimize smoke impact on air quality, public safety, and in doing so, allow prescribed fires to accomplish land management objectives, including catastrophic wildfire risk reduction, hazardous fuel reduction, wildland habitat improvement and other ecological functions. The SMP guidance was codified by rulemaking (administrative rule R307-204). On November 8, 1999, EPA approved the SMP under the regional haze state implementation plan.

The member agencies jointly fund the SMP program that is managed by a full-time smoke coordinator who processes prescribed burn filings for approval by the Director of the Division of Air Quality and supporting staff at the Utah Division of Air Quality. On average, 300 prescribed burns are implemented annually under this program. Utah and its federal partners have successfully operated this program for 25 years without a major mishap. We believe that our success is due to the member dedication to fully fund the program with a professional staff who evaluate every prescribed burn filing, are key members of our air quality planning staff in tune with Clean Air Act compliance and are actively communicating with the burning community leading to approvals of safe prescribed burn prescriptions.

This is an example of how a state can better manage the local sources of air pollution than is often allowed under EPA mandated programs.

3. You noted at the end of the hearing that there is a disconnect in addressing harmful PM emissions. The largest source of PM emissions is from wildfires, and that is used for setting health standards. But under the Act states are not able to effectively address that source of wildfire emissions, so the current law forces ever more stringent controls on the smaller sources that can be regulated.

a. Does this suggest we should rethink the structure of the Clean Air Act that causes this Disconnect?

Response:

Yes, EPA clearly uses air monitoring data influenced by natural or exceptional events in the correlation studies that provide the basis for setting National Ambient Air Quality Standards. The evaluation of necessary standards should include a path to attaining those standards under the regulatory framework of the Clean Air Act. If the monitored air pollutant concentrations that were used in health correlation studies included emissions from sources that cannot be regulated locally under a State Implementation Plan then those studies should be excluded from consideration when setting the standard.

This could be addressed through an amendment to the exceptional events rule that would exclude exceptional events and natural sources of emissions from use in the health correlation studies. For the purpose of identifying nonattainment areas, EPA should only set standards that can be attained through reasonable and available local control strategies that are under control of the locality required to develop standards to attain the standard. This is not however how the Clean Air Act is currently structured.

4. Given the time frames involved in setting, reviewing, and implementing NAAQS standards, and given the levels of criteria pollution in the atmosphere as the result of the Clean Air Act and state policies to date, would you share your views on the value of revisiting these statutory timelines?
 - a. What would be a benefit of extending the NAAQS review period to ten years instead of the current five-year period?

Response:

PM2.5 NAAQS were reviewed in: 1997, 2006, 2012, 2020, and now 2023. The average span between reviews in this time period is 6.5 years, high being 9 years, low being 3 years between reviews. Ozone was reviewed in: 1997, 2008, 2015, and 2020 with an average of 7.5 years.

The benefit of extending to 10 years include:

1. Allow states time to reduce emissions enough to actually attain a standard instead of quickly being out of compliance for the same pollutant with a new standard with the same goal of reducing that pollutant. This becomes an excessive paperwork burden writing SIPs for two NAAQS with no real world improvement.
2. Staggering the relevant pollutant reviews would also be helpful to states for planning and workload purposes. For example, if there is a 10-year period between NAAQS reviews, it could be staggered every five years for ozone and PM2.5.
3. More time between standards could result in the full benefit of past emissions reduction efforts to be realized. Many emissions reductions require time to construct or implement and the reductions will continue to provide benefits.
4. Allowing 10 years between NAAQS reviews allows time for more health studies to be published and reviewed and connected to reasonable strategies to attain the standards. Five years is a short time frame for enough new research to be published and beneficial for a full health impact review.

5. In reflecting on the issues addressed at the hearing, are there any points you would like the Committee to also consider?

Response:

Only to reiterate that especially for areas with a long history of implementing the nonattainment provisions of the Clean Air Act, that making the standards more restrictive does not always result in meaningful improvements in air quality and the cost of compliance borne by the few source categories that the state can regulate is very high for the benefits that are realized.

The Honorable Russ Fulcher

1. In the answer to my question on the lack of a bang for the buck with the EPA's proposed PM_{2.5} rule on new NAAQS standards to address reductions in particulate matter by focusing so heavily on the small source of particulates (16% from industrial sources and power plants) versus addressing the source of 84% of the particulates – wildfires and dust from unpaved roads – you noted that very challenge from states like Utah, Idaho, and many other Western states where the federal government controls a significant portion of the land.

a. What is the impact on the state's DEQ from this proposed rule by the EPA, given its failure to provide an implementation plan?

Response:

The Clean Air Act requirement for EPA to set a National Ambient Air Quality Standard should include a path to attaining the standard as a part of determining the appropriate level of the standard. This may be different in one region than other throughout the nation. When setting the standard, local meteorological and natural background concentrations should be taken into account as well as more detailed health information that is tied to that area. It is likely that the next iteration of the ozone standard will be below background concentrations in the intermountain west where ozone levels are influenced by elevation and natural sources of ozone precursors.

The Clean Air Act requirements for State Implementation Plans are heavily focused on regulating emissions from large industrial sources which now play a very minor role in the air quality of most urban areas. The federal primacy retained for onroad and nonroad mobile source emissions results in meaningful improvement but takes decades to realize the benefits as fleets turn over.

As population grows in urban areas the emissions from consumer and commercial activities such as comfort and water heating, cooking emissions and emissions from consumer products are projected to become the primary contributors to exceeding the federal standards but without any reasonable strategy to reduce their contribution.

Finally, warmer and drier summers in the west are producing more wildfire smoke, windblown dust and more days where conditions are optimal for the photochemical formation of ground level ozone.

The current regulatory structure leads to years of regulatory actions by states that produce marginal improvements to local air quality with increased cost. The Clean Air Act mandate to remove all harmful impacts of air pollution are conflicting with the technical and political will to achieve them while meeting the other demands for quality of life and an economy that supports the basic needs of the community.

b. What rulemaking process changes around collaboration with state environmental agencies would be helpful for you in your collaboration efforts?

Response:

The State-EPA coregulator relationship should be recognized.

More upfront collaboration between EPA and states on the purpose, methods, and impacts of new rules or standards should be required.

Assurance that EPA won't "move the goalposts" by the time they get around to reviewing states' plans.

All related guidance should be provided at the time a standard is issued. Not years later, sometimes after the statutory deadline for the states to submit a plan.

c. Are there areas of related air quality management where you should be given more leadership? I am thinking of things like state management plans when it comes to Environmental Species Act listing determinations.

Response:

Some of the Clean Air requirements and implementing regulations are extremely prescriptive and the requirements do not always reflect what is needed to improve air quality and public health. For example in Salt Lake County the monitor that reports the highest annual average PM2.5 level is located adjacent to a major freeway that connects Mexico to Canada. Under the Clean Air Act and interstate commerce requirements the state is preempted from regulating interstate trucks and other onroad mobile sources. As mentioned above, the Clean Air Act structure requires additional controls on industrial sources to meet the standard.

States could be more successful in attaining health standards if they had the ability to demonstrate to EPA that there may be more effective pathways to attainment than some of the rigid requirements that are directed to a small portion of the inventory of air pollutant emissions.

Finally, EPA should use their extensive research funding to better address the air quality issues that impact nonattainment in the west. This would include background ozone, wildfire smoke, and international transport of precursor emissions.

Thank you for the opportunity to provide additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Bryce C. Bird". The signature is fluid and cursive, with a large initial "B" and "C".

Bryce C. Bird, Director
Utah Division of Air Quality