



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

Nitrogen Oxides/Clean Air Act: Center for Biological Diversity and U.S. Environmental Protection Agency Enter into Consent Decree to Address National Ambient Air Quality Standards Review

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The United States Environmental Protection Agency ("EPA") and the Center for Biological Diversity ("CBD") entered into an October 28th Consent Decree addressing an issue arising out of Section 108 and 109 of the Clean Air Act related to nitrogen oxides ("NOx"). See Case No. 3:23-cv-04979-RFL.

CBD had alleged that EPA failed to undertake a required periodic review of the National Ambient Air Quality Standards ("NAAQS") for NOx.

NOx is a brownish, highly reactive gas which is formed in the ambient air through oxidation of nitric oxide. "Nitrogen oxides" is a term used to describe NO2 and other oxides of nitrogen. They play a role in the formation of ozone in the atmosphere through a series of reactions with volatile organic compounds.

Pursuant to Sections 108 and 109 of the Clean Air Act, Ambient Air Quality Standards (i.e., NAAQS) are established for a number of air pollutants. The ambient standards are denominated NAAQS. Section 108 of the Clean Air Act requires that EPA identify air pollutants which may be reasonably anticipated to endanger the public health and welfare and to issue air quality criteria.

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

The Clean Air Act requires that EPA periodically review both the air quality criteria and the NAAQS.

CBD filed a Clean Air Act citizen suit against EPA stating that Section 109 requires that at five-year intervals, the agency complete a thorough review of the NAAQS promulgated under this Section and make revisions and such standards and promulgate such new standards as may be appropriate. The organization further alleged that it had been more than five years since EPA last completed such a review of the primary NAAQS for NOx. Consequently, it stated that EPA should have completed a review of the primary NOx NAAQS not later than May 18, 2023. This was alleged to be a failure of a non-discretionary duty by EPA.

The Consent Decree sets up a series of deadlines for EPA addressing:

- Final Integrated Science Assessment (September 30, 2026).
- Notice of proposed rulemaking concerning review of the primary NAAQS for NO_x (January 17, 2028).
- Final rulemaking setting forth the final decision concerning the review of primary NAAQS for NO_x (November 10, 2028).

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