AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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ELECTRONIC SUBMISSION: www.regulation.gov

March 16, 2015

U.S. Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mailcode 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Attention Docket ID No. EPA-HQ-OAR-2008-0699

RE: AGC's Comments on EPA's National Ambient Air Quality Standards for Ozone

Dear Sir or Madam:

The Associated General Contractors of America (AGC) provides the following comments on the U.S. Environmental Protection Agency's (EPA) proposed rule that would reduce the level of the National Ambient Air Quality Standards (NAAQS) for ground-level ozone. The proposal would greatly increase the stringency of the ozone NAAQS at a time when implementation of the current 2008 NAAQS is still underway and despite key uncertainties in the underlying science. There is strong data that casts doubt on whether lowering ozone levels beyond the current standards will have any significant health benefit. AGC is interested in this rulemaking because a "nonattainment" designation under the Clean Air Act (CAA) may result in construction bans in geographic areas so designated by EPA, which would have a negative effect on employment, gross domestic product, manufacturing shipments, the completion of critical infrastructure projects, and the delivery of important public services. AGC's membership is deeply concerned about the harmful impact that EPA's proposal to make the ozone NAAQS more stringent could have on the still struggling economy.

AGC recommends that EPA retain the currently protective primary and secondary NAAQS for ozone, which are set at 75 parts per billion (ppb). There are no compelling data to warrant stricter standards. AGC appreciates that EPA heeded the call from citizens, lawmakers and the businesses community alike to accept comment on maintaining the current ozone NAAQS. Through ongoing efforts across many industry sectors, including the construction industry, air quality continues to improve across the country. Many AGC members have proactively supported voluntary measures for reducing emissions of ozone precursors (and other NAAQS pollutants) from their diesel equipment.[1] Since 1980, emissions of ozone precursors have been cut in half and the ozone concentrations are down by 33 percent.

[1] AGC has worked side-by-side with EPA in advancing every major federal, voluntary "clean diesel" initiative intended to improve air quality and simultaneously protect the construction industry from serious disruption. These initiatives have sought (1) to identify appropriate incentives for the retrofit of diesel equipment, (2) to secure federal funding for diesel retrofit, (3) to inform AGC Chapters and fleet owners that they may qualify for government grants to retrofit existing fleets of construction equipment, and (4) to enact a federal tax incentive for diesel retrofit.

AGC is the leading association for the construction industry. AGC represents more than 26,500 firms, including more than 6,500 general contractors, approximately 8,800 specialty-contracting firms and more than 10,800 suppliers of equipment, materials and services. Members belong to AGC through 94 state and local chapters that blanket the country from Alaska to Puerto Rico and Maine to San Diego. AGC's members build highways, bridges, tunnels, airport runways and terminals, buildings, factories, warehouses, shopping centers, and both water and wastewater treatment facilities.

A large portion of the U.S. will not meet EPA's proposed range, resulting in non-compliance or nonattainment. If EPA lowers the current 75 ppb NAAQS to the most restrictive end of the proposed range of 60 ppb, the number of counties being designated in nonattainment would almost triple. EPA maps[2] show that 358 counties would violate a 70 ppb standard, based on 2011-2013 monitoring data. An additional 200 counties would violate a 65 ppb standard, raising the total to 558 counties.

In the fall of 2011, the Obama Administration halted a similar EPA proposal to tighten the ozone NAAQS, stating the need to minimize regulatory costs and burdens on the economy. At that time, the Obama Administration affirmed that the current standards issued in 2008 were adequately protective of human health and the environment and that EPA's proposal was going too far with too little benefit. AGC believes that remains the case today. Unfortunately, the current standards are behind schedule due to EPA effectively suspending their implementation from 2010-2012 while the agency unsuccessfully pursued reconsideration. This country can expect to see even greater reductions in ground-level ozone as states make up lost ground in putting the current standards into effect.

AGC is concerned that EPA's continual push over recent decades to reset the ozone NAAQS at lower and lower levels is approaching a point where the gap between EPA's allowable concentrations of ozone and irreducible background levels will be dramatically narrowed. In fact, the lower ozone concentration ranges being considered in EPA's proposal would be at or below the naturally occurring ozone levels in many rural areas — particularly in the Western part of the country.

Consequences of Nonattainment Designation

AGC contractors will be impacted by the agency's proposed rule in many direct and indirect ways. New nonattainment area designations will hurt both large and small businesses and prevent expansion and growth in many urban, suburban, and rural counties.

There are significant adverse consequences in a state that has areas designated as nonattainment. Businesses and industries would incur increased costs, permitting delays and restrictions on expansion, forcing to them to either impose higher prices on their customers or relocate out of the nonattainment area, taking much-needed revenue from the state. In the case of construction, equipment owners may face restrictions on the use and/or operation of their off-road diesels. Other serious repercussions include *potential* federal sanctions, including emissions caps

[2] *See* http://www.epa.gov/groundlevelozone/maps.html.

limiting economic development and the loss of federal highway transportation dollars, for any state that fails to develop a suitable State Implementation Plan (SIP) (or to meet EPA's CAA deadlines). In addition, federally-supported highway and transit projects may be halted in a nonattainment area if the state cannot demonstrate that the project will conform to a SIP. States are struggling to balance existing priorities with limited and ever tightening budgets and cannot afford to divert finite resources from job creation and economic development. The lack of readily accessible funding to implement a new, tighter ozone standard would divert funds from other programs.

AGC maintains that restrictions on the use and operation of diesel equipment and the loss of highway funds are, in essence, construction bans. Leaving projects incomplete has consequences far beyond the impacts to the project itself, as the owner and users are deprived of the direct benefits of that project. In addition, because construction is a major contributor to employment, Gross Domestic Product (GDP) and manufacturing, the effects reverberate through the larger economy. Construction also is vital to restoring our nation's aging infrastructure and delivering important public services.

These are just a few examples of how the implementation of more stringent ozone NAAQS could impact AGC contractors. The following comments outline some of AGC's specific concerns related to the proposed rule.

EPA Proposal

EPA has proposed setting a more stringent primary and secondary NAAQS for ozone to somewhere within the range of 65 ppb to 70 ppb.[3] EPA is also accepting comments on either retaining the current standard or setting an even lower standard of 60 ppb, which was suggested by the Clean Air Scientific Advisory Committee.

EPA, which is required to review its NAAQS once every five years, is under an Oct. 1, 2015, court-ordered deadline to decide whether to revise or retain the current ozone standards.

Currently, all or portions of more than 200 counties across the country[4] are in nonattainment with EPA's 75 ppb NAAQS, and those areas include more than one-third of the total U.S. population. EPA has evaluated[5] which counties with air monitoring equipment in place would violate this new proposal, and it projects that 358 counties would violate a 70 ppb standard, and 558 counties would violate a 65 ppb standard.

[3] 79 *Fed. Reg.* 75234, Dec. 17, 2014. There are two ozone NAAQS addressed in the proposed rule: a primary NAAQS, meant to protect "public health," and a secondary NAAQS, meant to protect "public welfare," and the NAAQS must be set with an "adequate margin of safety." EPA's proposed standard of between 65 ppb and 70 ppb would apply to both the primary and secondary standards.
[4] *See* http://www.epa.gov/airquality/greenbook/hnsum.html.
[5] *See* http://www.epa.gov/groundlevelozone/pdfs/20141126-20112013datatable.pdf.

Implementation of 2008 Standards Still Underway

EPA should not move ahead with new ozone standards before the country has met the current ones. AGC strongly urges EPA to help counties currently in nonattainment with the existing 75 ppb NAAQS meet the primary and secondary standards before tightening them even further. Further, reducing the ozone NAAQS at this time would force states back to the drawing board to develop new SIPs to implement an even more stringent standard.

EPA last revised the ozone NAAQS in March 2008 when it lowered both the primary and secondary standards from 80 ppb to 75 ppb. Due to litigation- and administrative-based delays, states are still struggling with implementation of the 2008 standards. On Oct. 6, 2014, the U.S. Supreme Court denied an industry group's petition that sought to declare EPA's 2008 ozone rule too strict.[6] Under a different court ruling, EPA must decide by October 2015, whether to revise or retain the current 2008 NAAQS.

Although EPA revised the ozone standards seven years ago, the agency just signed a final rule on Feb. 13, 2015, to aid states in implementing the 2008 ozone NAAQS.[7] The rule includes various requirements for nonattainment area SIPs, including new attainment deadlines and requirements for how states must demonstrate attainment with the NAAQS. It also provides states with guidance on New Source Review permitting, revokes the 1997 ozone standards for all purposes and sets anti-backsliding measures for areas that still do not meet the 1997 ozone standards. EPA has been criticized over the past year by members of Congress, state regulators and industry groups for how long it has taken the agency to develop an implementation rule for the ozone standards.

Additionally, environmental groups (joined by several states) are pursuing legal action[8] because EPA has failed to meet deadlines laid out under the CAA to approve or disapprove 21 states' plans to meet the 2008 ozone NAAQS. In a proposed partial consent decree[9] filed with the U.S. District Court for the Northern District of California on Jan. 21, EPA has agreed with the Sierra Club on a set of proposed deadlines in 2015 and 2016 for acting on 24 SIPs for controlling ozone. The states are Alabama, Arizona, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah and West Virginia. The Sierra Club's lawsuit also alleges the EPA failed to find that another state, Tennessee, has not submitted a SIP for the 2008 ozone NAAQS. The court is currently considering that issue.

A newly revised standard will hamper states' ongoing efforts to comply with the existing ozone standards. The lack of an implementation rule for the 2008 ozone standards has been cited by many industry groups that are urging the EPA to give states and businesses more time to implement the current standards before revising them.

If EPA issues a final revision, states will have the primary responsibility for implementing the revisions. States will have one year to propose designation of areas as attainment, unclassifiable, or nonattainment — based on

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[6] The case is *Utility Air Regulatory Group v. U.S. Environmental Protection Agency* et al., case number 13-1235, in the U.S. Supreme Court.
[7] A pre-publication version is on EPA's website at http://www.epa.gov/air/ozonepollution/pdfs/20150213fr.pdf.
[8] *Sierra Club v. McCarthy,* N.D. Cal., No. 4:14-cv-03198, *consent decree filed* Jan. 21, 2015.
[9] 80 *Fed. Reg.* 6513, Feb. 5, 2015.

2013-2015 air data. States must then prepare SIPs that explain how they will attain the NAAQS in nonattainment areas.

Adverse Impacts of the Proposal on Construction and the Economy

AGC strongly disagrees with EPA's findings that the proposed action has no significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, that it does not contain unfunded mandates or federalism implications, and that it will have no effect on energy production.

AGC maintains that EPA has not adequately accounted for the real-world economic impacts and burdens the ozone NAAQS proposal would impose on state and local governments, businesses and American consumers. While the U.S. Supreme Court has held that EPA does not consider costs in setting the appropriate level for the NAAQS, this does not absolve EPA from all consideration of adverse impacts.[10] EPA's Regulatory Impact Analysis[11] of the proposed rule estimates the costs of a 70 ppb standard to be $3.9 billion, the costs of a 65 ppb standard to be $15 billion, and the costs of a 60 ppb standard to be $39 billion. Industry experts say the costs would be far higher than $15 billion annually. A February 2015 NERA Economic Consulting study commissioned by the National Association of Manufacturers[12] finds that a new ozone standard of 65 ppb could cost the economy $140 billion per year and place over one million jobs at risk. This would be the most expensive regulation ever imposed on the American public.

These costs are critical. Three years after the rule is promulgated, states must submit their SIPs to EPA detailing how they will comply with the new regulation. States can only succeed by adopting legally-enforceable emission control measures: Those measures will impose real costs and burdens on all entities, large and small — as explained more fully below.[13] Per EPA's proposal: "States are to develop and maintain an air quality management infrastructure that includes enforceable emission limitations, a permitting program, an ambient monitoring program, an enforcement program, air quality modeling capabilities, and adequate personnel, resources, and legal authority."[14]

AGC disagrees with EPA's finding that this action does not contain an unfunded mandate as described in the Unfunded Mandates Reform Act (UMRA)[15] and does not significantly or uniquely affect small governments.

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[10] *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 471 (2001). As Justice Breyer explained, EPA may take into account contextual factors when determining the levels that are requisite to protect public health with an adequate margin of safety. *Id.* at 495 (Breyer, J. concurring) (The Clean Air Act allows EPA "to take account of context when determining the acceptability of small risks to health.").

[11] *See* http://www.epa.gov/airquality/ozonepollution/pdfs/20141125ria.pdf. EPA writes in its proposed regulation at page 75238 that its "task is to establish standards that are neither more nor less stringent than necessary for these purposes. In so doing, the EPA *may not consider* the costs of implementing the standards" (italics added). EPA all but discredits its 575-page Regulatory Impact Analysis, stating on page 543: "Accordingly, although an RIA has been prepared, the results of the RIA have not been considered in issuing this proposed rule."

[12] *See* http://www.nam.org/Special/Media-Campaign/EPA-Overregulation/Ozone-Regulations.aspx.

[13] CAA Section 110(a)(2)(C) requires SIPs to include enforcement and regulation programs "as necessary ***to assure that [NAAQS] are achieved***" (emphasis added).

[14] 79 *Fed. Reg.* 75373 (Dec. 14, 2014).

[15] *See* 2 U. S. C. 1531–1538.

The requirements are certainly mandates, and states will not be given funding to put them into place. Similarly, EPA has incorrectly determined that this action does not have federalism implications (*i.e.*, it will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government). AGC maintains that the proposal affects federalism because states are not free to opt out.

EPA also finds that this action is not a "significant energy action" because "it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. ... Such strategies will be developed by states on a case-by-case basis, and the EPA cannot predict whether the control options selected by states will include regulations on energy suppliers, distributors, or users." But the only way that states will succeed is by reducing production of fossil fuels, which produces most of their energy, and/or restricting energy users (*i.e.*, limiting growth).

AGC strongly maintains that EPA must consider the adverse impacts that would result from its proposal in order to assess what level in the continuum of exposures/effects is "requisite" to protect public health and welfare.[16] In proposing to revise the ozone standard level, EPA has not analyzed or accounted for the significant adverse social, economic, and energy effects that may occur if EPA's proposed revisions to the ozone NAAQS were adopted. Below are some of the likely impacts on the construction industry. These effects would ripple through the entire economy as construction creates jobs not only for construction workers but also *indirectly* from supplying construction materials and services and *induces* an even greater number of jobs when workers and owners in construction and supplier businesses spend their additional wages and profits, locally and nationwide.

Restrictions on Equipment Use

As EPA continues to tighten the ozone NAAQS, states are challenged to find ways to further reduce ozone, and related precursor, emissions from mobile sources. In geographic areas that do not meet EPA's ozone standards, states may attempt to directly impose requirements through their SIPs on the users of diesel engines to reduce emissions from the existing fleet of construction equipment. Although the CAA generally reserves for the federal government the authority to set emissions standards for either <u>new or old</u> engines in off-road construction equipment (a concept called federal preemption), some states have attempted (or currently are attempting) to include provisions in their SIPs that appear to violate this statutory prohibition—such as operating restrictions on the use of construction equipment; requirements to retire or replace older diesel equipment; or mandates (via contract specifications or bid preferences) to retrofit older off-road engines. Restrictions on the use and operation of diesel equipment are, in essence, construction bans.

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[16] As the National Association of Manufacturers and other commenters have pointed out, NAAQS are not intended to eliminate all risk. As the U.S. Supreme Court has explained, "requisite to protect" means "not lower or higher than is necessary." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 476 (2001). Thus, in setting NAAQS, EPA must determine the levels of a pollutant that are "sufficient, but not more than necessary" to protect the public health and welfare. *Id.* at 473 (internal quotation marks omitted). As noted by Justice Breyer in *Whitman*, Section 109 "does not require the EPA to eliminate every health risk, however slight, at any economic cost, however great." *Id.* at 494 (Breyer, J., concurring). The D.C. Circuit recently confirmed that setting primary NAAQS may require a contextual assessment such as described by Justice Breyer. *Mississippi v. EPA*, 744 F. 3d 1334, 1343 (D.C. Cir. 2013).

Loss of Federal Highway Funding

It also becomes even more difficult to build new roads or other transportation projects in areas that are designated as nonattainment. Nonattainment areas are subject to "Transportation Conformity."[17] This conformity analysis requires extensive transportation and air quality coordination and computer modeling to ensure transportation projects do not affect the area's ability to regain and/or maintain attainment. Transportation conformity requirements are time-consuming, costly and include establishing a mobile emissions "budget" from which to determine the impact transportation projects, once implemented, would have on regional air quality. In nonattainment areas, transportation projects can proceed only if it can be demonstrated that they will not result in increased emissions. Such construction bans would delay the renovation and improvement of public infrastructure, including highway and transit construction projects, and bridge construction and repairs.

What is more, states that fail to develop suitable SIPs (or to meet EPA's CAA deadlines) could be subject to numerous federal sanctions, including the statewide loss of federal highway transportation dollars and emissions caps limiting economic development.

The United States currently faces "a significant backlog of overdue maintenance across [its] infrastructure system" and "a pressing need for modernization."[18] The suspension or restriction for these projects could result in intolerable delays to the renovation and improvement of public infrastructure, including highway and transit construction projects, bridge construction and repairs, and dam repairs. The Federal Highway Administration estimates that $170 billion in capital investment per year is needed to significantly improve conditions and performance; the current level of investment is approximately half of that number. One in nine of the nation's bridges are rated as structurally deficient[19] — and 15 states have had their number of structurally deficient bridges increase since 2011. In addition, there are 14,000 high-hazard dams, and 4,000 deficient dams, in the U.S. Even a temporary freeze on new highway construction could prevent states from "obligating" their federal highway funds, which could, in turn, result in a loss of those federal dollars. The long-term impacts of losing federal funding would have substantial impacts on the states' ability to keep highways safe, prevent accidental deaths and injuries, and reduce traffic-related congestion.

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[17] Under the CAA transportation conformity provisions, federal departments and agencies may not approve, permit or provide financial support to most highway and transit projects in areas that have not attained air quality standards, unless such projects conform with the state's SIP. "Conformity" means transportation activities will not cause new air quality violations, worsen existing violations or delay timely attainment of air quality standards in polluted areas. Failure to demonstrate conformity results in a "conformity lapse," which renders the area's transportation program and plans invalid. Only certain types of projects can advance during a conformity lapse (*e.g.*, safety projects and transportation control measures).

[18] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013). The report thoroughly documents the condition of the nation's water, transportation, energy and public infrastructure. Cumulatively, ASCE's 2013 report gave the nation's infrastructure a "D+"— signaling a need to substantially increase public investment in a wide range of infrastructure.

[19] "Structurally deficient" – Bridges require significant maintenance, rehabilitation, or replacement.

Disruptions that delay highway construction projects could delay numerous safety-related projects, resulting in increased potential for injuries and fatalities to the traveling public.[20] Although fatalities have been decreasing, one-third of traffic deaths each year can be attributed to road conditions, *i.e.*, inadequate road infrastructure where reducing obstructions, adding medians, widened lanes and shoulders would improve conditions.[21]

The delay of much needed repairs and investments to our roadways and transportation infrastructure will only exasperate air quality concerns. Highway improvement projects improve traffic flows and reduce congestion, which decreases air pollution associated with idling. These efforts can be successful, although still a serious problem, traffic congestion is down slightly. Forty-two percent of America's major urban highways remain congested (down from 45 percent in 2008).[22] Congestion wasted 2.8 billion gallons of fuel in 2007—approximately three week's worth of gas for every traveler[23]—and 1.9 billion gallons in 2010.[24]

Public Health and Welfare Impacts

Any tightening of the ozone NAAQS could result in construction bans that would impede projects that are vital to improving municipal water supplies and wastewater treatment facilities located throughout the nation. While drinking water quality remains good, the water infrastructure is aging rapidly. Leaking pipes alone are responsible for billions of gallons of lost water every day.[25] There are an estimated 240,000 water main breaks each year, and 75 percent of drinking water capital needs are to repair pipes.[26] According to one source, "Investment needs for buried drinking water infrastructure total more than $1 trillion nationwide over the next 25 years."[27] In addition, the nation's nearly 15,000 wastewater systems face enormous needs. Wastewater and stormwater infrastructure systems require roughly $298 billion of investment over the next twenty years.[28] Some sewer systems are 100 years old and many treatment facilities are past their recommended life expectancy. In many parts of the country, wet weather events regularly lead to overflowing systems that release waste and chemicals into the environment—damaging aquatic ecosystems and causing human illness. Threats to the nation's water resources investments caused by construction bans would only work against EPA's complementary goals of improving water quality.

Approximately 14 million people live or work behind the 14,700 miles of levees in the National Levee Database; however, the reliability of the nation's massive levee system, which increasingly protects developed communities, is essentially unknown. It is also not clear how much investment is needed to maintain these important systems;

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[20] *See Traffic Safety Facts*, U.S. Department of Transportation ("DOT"), National Highway Traffic Safety Administration, 2000 and 2001.
[21] *Id. See also* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013).
[22] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013).
[23] Texas Transportation Institute, Texas A&M University, 2009 Urban Mobility Report, July 2009.
[24] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013).
[25] The 2009 Report Card for America's Infrastructure estimates 7 billion gallons of water lost per day due to leaking pipes. http://www.infrastructurereportcard.org/fact-sheet/drinking-water.
[26] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013).
[27] *See* American Water Works Association, Buried No Longer, February 2012; report available at http://www.awwa.org/Portals/0/files/legreg/documents/BuriedNoLonger.pdf.
[28] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013).

although one estimate comes in at approximately $100 billion. Reports attribute levees to preventing "more than $141 billion in flood damages in 2011."[29]

Restrictions on New 'Major' Stationary Sources & Major Modifications to Existing Ones

Once an area is designated as nonattainment, there is essentially a ban on the construction of new industrial or manufacturing facilities in this area, and it becomes very difficult even to expand existing facilities. This happens immediately because of restrictive permitting requirements under the CAA New Source Review (NSR) Program that are applied in nonattainment areas.

Companies interested in building a major manufacturing plant, for example, will likely not build in a nonattainment area due to the increased costs, delays, and uncertainties associated with the restrictive permit requirements.[30] Specifically, nonattainment areas face mandatory emissions offsetting; prior to permitting the construction of new facilities, a state must offset any emissions increases by achieving reductions at existing facilities. If no party is willing to provide offsets, then the project cannot go forward. In addition, new and upgraded facilities in, or near, nonattainment areas are required to install the most effective emissions reduction controls, without consideration of cost. (Less stringent controls may be installed in attainment areas.) Since operators of existing facilities may be required to install more restrictive control technologies than are otherwise required for similar units in areas that are in attainment, businesses may opt to build elsewhere or not at all.

These restrictions do not disappear when an area finally comes into attainment. Instead, former nonattainment areas face a legacy of EPA regulatory oversight. Before a nonattainment area can be redesignated to attainment, EPA must receive and approve an enforceable maintenance plan for the area that specifies measures providing continued maintenance of ozone standards and contingency measures to be implemented promptly if an ozone standard is violated.

New Source Review Permit Applications

As explained above, the proposed rule would increase costs and create new regulatory hurdles for businesses that require new or modified air permits to expand their facilities. EPA is accepting comments on a potential grandfathering provision for sources with pending NSR permit applications.

The issue of how EPA treats NSR review permit applications that are being considered during implementation of a final standard is critical to AGC. It has direct bearing on the construction of new industrial or manufacturing facilities in nonattainment areas and the update or expansion of existing facilities. AGC strongly urges EPA to

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[29] *Id.*

[30] If an area is in attainment for a given NAAQS, a major source that commences construction or undergoes a major modification must obtain a Prevention of Significant Deterioration (PSD) permit based on Best Available Control Technology (BACT) and must demonstrate that its emissions will not cause any area to exceed the NAAQS. In contrast, if an area is in nonattainment, a major source must obtain a nonattainment New Source Review permit based on a more stringent Lowest Achievable Emission Rate (LAER). In addition, a source in a nonattainment area must obtain emissions reductions "offsets" from other sources.

add a provision to its regulations that would grandfather certain NSR permit applications that are pending on the effective date of the revised ozone NAAQS, which would allow those applications to be evaluated under the current 75 ppb standard.

As a general rule, EPA requires sources to demonstrate that they will not contribute to nonattainment of any NAAQS in effect at the time the PSD permit is issued. EPA's proposed grandfathering provision would allow sources to make the PSD demonstration based on the ozone standard that was in effect (1) when the reviewing authority deemed the PSD permit application complete or (2) when public notice of the draft PSD permit was first published. AGC supports this approach.

AGC also supports EPA's plan to propose a new rulemaking in the spring of 2015 wherein EPA would consider whether to update existing regulations that describe how a source seeking a PSD permit must demonstrate that it will not cause or contribute to a violation of any NAAQS or PSD increment. Such a proposal could provide additional guidance to sources in the PSD permitting process that are impacted by the revised NAAQS.

The Economic Impact of Construction in the United States[31]

The construction industry plays a powerful role in sustaining economic growth and helping the current economic recovery.

Any tightening of the ozone NAAQS could result in construction bans that would have a negative impact on Gross Domestic Product (GDP), as well as a significant loss of jobs by construction workers and of workers who supply a multitude of materials, equipment and services to construction. In addition, construction bans would cut deeply into manufacturing shipments and return that sector into recession.

Construction is a major contributor to employment, GDP and manufacturing. Nonresidential construction spending in the United States totaled an estimated $606 billion in 2014. An extra $1 billion in nonresidential construction spending adds about $3.4 billion to GDP, about $1.1 billion to personal earnings and creates or sustains 28,500 jobs.[32] Two-thirds of those jobs occur outside of construction—in industries ranging from mining and manufacturing to a host of services, locally and across the country.

Overall employment in the construction industry peaked at 7.7 million in April 2006, fell to 5.4 million (down 30 percent) by January 2011 and has recovered only about one-third of the losses since then, reaching 6.3 million in June 2014. This gradual and still-fragile recovery would be severely threatened if EPA chooses to lower the ozone standard.

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[31] Economic data compiled by Ken Simonson, Chief Economist, AGC of America, from Prof. Stephen Fuller, George Mason University, and U.S. government sources.

[32] This breaks down as follows: 9,700 jobs direct construction jobs; 4,600 jobs indirect jobs from supplying construction materials and services; and 14,300 jobs induced when workers and owners in construction and supplier businesses spend their additional wages and profits. The majority of these jobs would be located within the state of investment but there would be some out-of-state jobs supported.

In spite of the recession, construction jobs remain good-paying jobs. In 2013, annual pay of all construction workers in the United States averaged $53,200, which is 7 percent more than the average for all private-sector employees.

Construction also is an important source of orders for U.S. manufacturing. In 2014 U.S. manufacturers shipped $545 billion in construction materials and supplies (9 percent of total factory shipments) and $55 billion in new construction equipment (13 percent of total machinery shipments). A precipitous drop in investment would cut deeply into these shipments and potentially end the recovery that has occurred in recent years in manufacturing employment. Similarly, a loss of federal funding for highway projects would result in significant job losses in industries that supply raw materials, design and other professional services to construction, as well as businesses that depend on purchases by the workers and owners of construction companies and their suppliers.

The United States had more than 600,000 firms in 2012.[33] In that same year, 92 percent of those firms were small businesses employing employed fewer than 20 workers.

Questionable Health Benefits

Against the aforementioned economic consequences, scientific uncertainties regarding the benefits of more stringent ozone standards have increased. EPA's methodology for estimating the economic costs versus benefits of tighter ozone NAAQS is questionable. AGC takes issue with the fact that much of EPA's claimed health benefits under the proposal are derived from "co-benefits" of reducing particulate matter emissions, not from the reduction of ozone (or ozone precursors) itself. AGC also is concerned about the reports that a stricter ozone standard could have a negative impact on public health. More study is needed in this area.

According to an EPA fact sheet,[34] lowering the ozone NAAQS to 70 ppb — down from the current 75 ppb — would deliver benefits valued at between $6.3 billion and $13 billion, but would cost $3.9 billion, creating "net benefits" of between $2.4 billion and $9.1 billion. If the NAAQS were set at 65 ppb, EPA estimates that the costs would jump to $15 billion, but the benefits would also increase to between $19 billion and $38 billion. However, as explained in EPA's Regulatory Impact Analysis (RIA),[35] this gain is not from a reduction in ozone, but from the associated decline in fine particulate matter ($PM_{2.5}$) that will occur due to the ozone regulation. The RIA states that "$PM_{2.5}$ co-benefits account for approximately two-thirds to three-quarters of the estimated benefits, depending on the standard analyzed and on the choice of ozone and PM mortality functions used."

In Table 5-1 of the RIA, EPA divides the benefits into those from ozone reduction and those from particulate matter reduction. The ozone-only benefits are $8.6 billion in 2025, compared with $15 billion in costs. The proposed regulation fails a basic cost-benefit analysis on ozone alone.

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[33] *See* http://censtats.census.gov/cbpnaic/cbpnaic.shtml.
[34] *See* http://www.epa.gov/groundlevelozone/pdfs/20141125fs-numbers.pdf.
[35] *See* ES.2 Results of Benefit-Cost Analysis and Table ES-6.

Currently, EPA thoroughly regulates PM emissions under the 1997 and 2006 fine particulate standards.[36] In December 2012, EPA finalized a rule to require a 20 percent reduction in the amount of $PM_{2.5}$ allowed in outdoor air through the entire country; implementation of that rule remains underway. If the EPA seeks to further regulate PM, it should propose additional standards, and perform a cost-benefit analysis to demonstrate that a tighter standard is necessary to protect the public. Conversely, if it seeks to further regulate ozone, it should clearly depict the associated benefits derived from reducing emissions of that criteria air pollutant. EPA cannot throw in extra benefits from reductions in other substances as a way of convincing the public that the benefits of regulating ozone trump the costs.

EPA should not be double and triple counting these benefits and instead, should recalculate the cost and benefit of the proposed ozone NAAQS based solely on the reduction in ambient ozone concentrations.

EPA claims that the health benefits of lowering the ozone NAAQS are as high as $23 billion. AGC has taken note that this amounts to *a 3,100 percent increase in net benefits EPA claimed in 2011 when it proposed the exact same standard*. In 2011, when the EPA proposed a 70 ppb standard, its median "net benefits" estimate for a 65 ppb standard was only $700 million, with a high possibility that the costs could outweigh any benefits. (Those also included "co-benefits" of reducing particulate matter, or $PM_{2.5}$, meaning the benefits of the ozone reductions alone would be less than what EPA presented.)[37] AGC questions this dramatic change and the health data behind EPA's costly new proposal.

AGC also is concerned about the reports that more stringent NAAQS for ozone could have a negative impact on public health. The EPA cites "asthma attacks" as one of its key health indicators, suggesting that imposing a stricter ozone standard would reduce asthma attacks, and thereby delivering health benefits.[38] But as noted by the Center for Regulatory Solutions,[39] EPA's own documents show that asthma-related mortality could increase in certain areas if ozone levels decrease.

To this end, Dr. Michael Honeycutt, director of the Texas Commission on Environmental Quality (TCEQ) Toxicology Division, observed last year[40] that EPA's own data sets[41] indicate the net result of a tighter ozone standard will be *increased* mortality in some areas, including Houston and Los Angeles.[42] In Houston, adjusting the ozone standard to 70 ppb or 65 ppb would result in 48 or 44 *more* premature deaths, respectively.

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[36] On Apr. 25, 2014, EPA classified as "moderate" nonattainment areas for the 1997 and 2006 fine particle pollution standards and set Dec. 31, 2014 as the deadline for states to submit remaining implementation plan requirements.
[37] The chart that accompanied EPA's 2011 proposal, as part of its final RIA, is online at http://www.epa.gov/groundlevelozone/pdfs/201107_OMBdraft-OzoneRIA.pdf.
[38] Another problem with this association is that **asthma diagnoses** are increasing in the U.S., yet nationwide, air quality is improving - http://www.epa.gov/airtrends/ozone.html.
[39] *See* http://centerforregulatorysolutions.org/fact-of-the-day-asthma-rates-have-increased-while-ozone-levels-have-fallen/.
[40] *See* http://www.tceq.state.tx.us/publications/pd/020/2014/will-epas-proposed-new-ozone-standards-provide-measurable-health-benefits.
[41] *See* http://www.epa.gov/ttn/naaqs/standards/ozone/data/20140829healthrea79app.pdf.
[42] The EPA's own modeling in its Health Risk and Exposure Assessment (HREA) online at http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_2008_rea.html indicates that lowering ozone concentrations would actually result in more deaths in some cities (Appendix 7, page 7B-2 of the HREA).

Honeycutt's analysis also includes a chart[43] showing the relative health impacts from a variety of outside factors and lifestyle choices. Notably, the health impact from lost employment was far larger than what could potentially be associated with higher ozone levels.

A thorough evaluation of the proposed ozone NAAQS was performed by the TCEQ Toxicology Division, which consists of 10 Ph.D. and 5 master's level scientists. TCEQ has pointed out that only 1 out of 12 studies considered by the EPA showed an association between long-term exposure to ozone and early death (after considering other pollutants). This single study is used by the EPA as evidence that long-term exposure to ozone causes mortality. Interestingly, this study did not show higher mortality in Southern California, where some of the highest ozone levels in the country are measured.

Science Is Lacking

The science developed since the last revision to the ozone standard does not support another revision at this time. Although EPA includes some new studies and analyses in the record, the agency does not appear to incorporate any major new substantive information on the health effects of ozone since its prior decision in 2008 to set the standards at 75 ppb; the difference is largely in interpretation.

The National Association of Manufacturers and other commenters have pointed out that the new scientific information that has become available since the adoption of the current standards is relatively limited and does not provide any fundamental alteration in the understanding of the effects of ozone on public health and welfare. EPA must provide a reasoned explanation for a change in judgment.

New Standard Is Unachievable

If the EPA decides on a stricter standard, many counties, even those with few sources of emissions within their boundaries, will face compliance problems. Some places in the U.S. have background levels of ozone that account for up to 80 percent of total ozone. Background ozone occurs naturally, or is transported from other countries. EPA did not take this into account when drafting its proposal.[44]

Many states, including "clean" Western states, have high "background" levels of naturally-occurring ozone from vegetation, wildfires, and other sources as well as the transport of ozone and ozone precursors from other countries. These states may be unable to meet EPA's proposal even with costly controls. In fact, the proposal is so stringent that the Grand Canyon would fail the proposed 70 ppb standard, and Yellowstone National Park would fail the proposed 65 ppb standard.

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[43] *See* http://www.tceq.state.tx.us/publications/pd/020/2014/will-epas-proposed-new-ozone-standards-provide-measurable-health-benefits.

[44] During the reviews of the EPA staff documents, several commenters pointed out that EPA had still not adequately determined U.S. background (USB), was underestimating USB concentrations, and was still not properly taking into account the impact of USB on projected attainment of the ozone NAAQS.

Revising the ozone NAAQS without appropriately taking these issues into account would ignore a key factor for setting the NAAQS at the requisite level, rendering the NAAQS revision arbitrary and capricious.

Air Quality Is Getting Cleaner

Further reductions in ozone will continue to occur over the next several years as a result of national U.S. EPA requirements that are already on the books but have yet to realize their full environmental benefits. Ambient air quality is getting significantly better even as our economy grows.

According to the EPA's own data, concentrations of ozone already have declined by 33 percent (annual average) between 1980 and 2013.[45] This decline in emissions becomes more remarkable when compared to additional EPA data showing that since 1980, gross domestic product increased by 145 percent, vehicle miles travelled increased by 95 percent, population increased by 39 percent and energy consumption increased by 25 percent.[46]

This continuing improvement indicates that current regulations are having their desired and continued effect.[47]

EPA has also designed and developed national programs that, when fully implemented, will achieve significant reductions in air emissions. Specifically, EPA will continue to implement its rule to make heavy-duty trucks and buses run cleaner. Since model year 2007, pollution from heavy-duty highway vehicles has been cut by more than 90 percent, which EPA projects will reduce nitrogen oxide (NO_x) emissions by 2.6 million tons by 2030.[48] In addition, EPA will continue to implement its rule to reduce emissions from off-road diesel equipment, wherein engine manufacturers must reduce diesel exhaust (*e.g.*, NO_x) from such machines by more than 90 percent by 2014.[49] EPA estimates this rule will result in an additional reduction of 738,000 tons of NO_x per year, when the fleet of older off-road engines has fully turned over.

The EPA Administrator herself recently pointed to a "long-term trend" of ozone reductions, "as additional emissions reductions are achieved through existing [federal] regulations" already in place. This statement was made in a recent letter and enclosure wherein Administrator McCarthy denied an environmental group's petition that asked EPA to redesignate 57 areas that allegedly do not meet the ozone NAAQS of 75 ppb, based on the most recent air monitoring data (designations were based on 2008-10 monitoring data, the most recent data available at the time). EPA found it "appropriate" to allow more time for the affected areas to address air quality issues. EPA states that nationwide emissions of the ozone precursors are expected to decline significantly: NO_x is expected to decline by 29 percent from 2011 through 2018; and volatile organic compounds (VOCs) are expected to decline by 10 percent from 2011 through 2018.

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[45] *See* http://www.epa.gov/airtrends/pm.html#pmnat and http://www.epa.gov/airtrends/ozone.html.
[46] *See* U.S. EPA, Comparison of Growth Areas and Emissions, 1980-2013, available at: http://www.epa.gov/airtrends/aqtrends.html#comparison.
[47] *See* U.S. EPA, Our Nation's Air, Status and Trends through 2010, p. 12, available at: http://www.epa.gov/airtrends/2011/index.html.
[48] See http://www.epa.gov/otaq/highway-diesel/index.htm.
[49] *See* http://www.epa.gov/nonroad-diesel/2004fr.htm.

Conclusion

AGC is concerned that a significant increase in the number of ozone nonattainment areas as proposed by this rulemaking would put at risk important highway and transit construction projects needed to move goods and people and provide employment. Further, potential restrictions on the use and operation of diesel equipment would leave other important construction projects unbuilt, including bridge construction and repairs, as well as projects that are vital to providing safe drinking water, wastewater and stormwater management, flood control and navigation, health care, and education.

If a rule of this magnitude is to be imposed, then the EPA should have to provide a far more scientifically robust "public health" basis — one that does not rely on what appears to be a dubious inflation of health benefits and a lack of attention to the quantitative and qualitative costs.

Air quality is clean and getting significantly cleaner even as our economy continues to grow. Any tightening of the ozone NAAQS will have significant consequences for many states and localities and will impact their ability to provide for economic growth and opportunity as well as for public health and welfare. AGC urges EPA to retain the existing ozone NAAQS and allow EPA rules currently in place and future actions and voluntary initiatives to achieve ozone attainment.

AGC appreciates the opportunity to comment. Thank you for taking our concerns into account. If you have any questions, please contact me at pilconisl@agc.org or (703) 837-5332.

Sincerely,

Leah F. Pilconis
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