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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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September 4, 2012

Air Docket
Attention Docket ID No. EPA-HQ-OAR-2011-0887
U.S. Environmental Protection Agency
Mail Code: 6102T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Comments on EPA's Draft Guidance to Implement Requirements for the Treatment of Air Quality Monitoring Data Influenced by Exceptional Events; Docket ID No. EPA-HQ-OAR-2011-0887

Dear Sir or Madam:

The Associated General Contractors of America (AGC) appreciates this opportunity to provide comments on the *Draft Guidance to Implement Requirements for the Treatment of Air Quality Monitoring Data Influenced by Exceptional Events* (Draft Guidance) published in the *Federal Register* on July 6, 2012.¹

EPA's Exceptional Events Rule (EER) allows the Agency to exclude certain air-quality monitoring data when determining whether or not an area violates a National Ambient Air Quality Standard(s) (NAAQS). Under the EER, EPA may flag certain air monitoring readings as "exceptional" and exclude data from nonattainment determinations if a local air agency demonstrates that an exceptional event, such as a wildfire or dust storm, caused an air quality violation.

AGC chapters and members in arid western states face significant air quality challenges brought on by chronic wildfires, dust storms and high winds; they report that EPA has not consistently applied its Exceptional Events Rule. Many of the concerns and criticism over the EER center around the lack of clarity on what a state should include in its demonstration package, a lack of consistency between the preamble and the rule itself, as well as delays in processing and approving exceptional event submissions.

AGC is concerned that the Draft Guidance does little to reduce the overall burden required in producing and approving exceptional event documentation and – in some cases – may actually increase the effort and documentation required.

¹ AGC support the comments of its Arizona Chapter and incorporates those comments herein by reference.

About AGC

AGC is the leading trade association in the construction industry. It dates back to 1918, and it currently represents 33,000 firms in nearly 100 chapters across the United States. AGC's members include 7,500 of the nation's leading general contractors, nearly 12,500 specialty contractors and more than 13,000 material suppliers and service providers to the construction industry. These members engage in the construction of commercial buildings, hospitals and laboratories, schools, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, levees, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

AGC members are directly impacted by the implementation of the EER and EPA's Draft Guidance. If an event is ruled an exceptional event, then a NAAQS exceedance caused by high winds, for example, would not be counted in determining whether to reclassify the attainment area as nonattainment. Additional nonattainment areas would result in additional requirements and restrictions on the business of construction. AGC is most concerned about the potential restriction on the use and operation of construction equipment that is currently out in the field, the loss of federal highway funding and the loss of economic development opportunities in urban areas. AGC and its members therefore have a great interest in the outcome of this proposed rulemaking.

The active phase of construction and the equipment used to perform this work is heavily regulated by both federal and state agencies to reduce particulate matter emissions. States with PM₁₀ non-attainment areas have fugitive dust regulations in place that apply directly to the construction industry. In many cases, construction firms must obtain permits and submit dust management plans for each active construction site, and the permits are reviewed and approved by local air pollution control officers.

As discussed above, failure by any state to prove compliance with federal air standards can have serious repercussions for construction in the area(s) so designated – including potential restriction on the use and operation of equipment, the loss of federal highway funding and the loss of economic development opportunities.

The Draft Guidance would leave several well-documented concerns unresolved—

- It would set a “wind threshold” for what constitutes high wind events for all arid areas and anything below the threshold would require extensive information and data to show that the event was not reasonably controllable or preventable. But depending on local circumstances and conditions, the actual wind speed required to cause dust exceedances from undisturbed and reasonably controlled surfaces will vary greatly.
- A lack of precipitation would be excluded from the definition of exceptional events.

- To establish an exceptional event, a state would need to show that the event caused a specific concentration, at a specific place. Doing so is difficult, for example, given the lack of particulate matter (PM) monitors and the high spatial variability of PM.
- Furthermore, in many rural areas, insufficient monitoring is available to demonstrate the “clear causal” relationships between an exceptional event and a measured exceedance even when simple visual observations would establish such a relationship.

EPA Should Implement “Specific, Broadly Applicable, Streamlining Mechanisms”

States face strict deadlines to make attainment determinations that could hinge on whether or not data affected by exceptional events are included or excluded. However, EPA is under no pressure to review this paperwork in a timely manner. The EPA review process as outlined in the Draft Guidance would provide for a total of 667 days of Agency review time once a demonstration package was submitted (presuming that such a package was considered to be “complete” by the Agency).² This timeline is far too long. AGC urges EPA to work with states and local air agencies to accelerate the review and approval process for exceptional events.

AGC urges EPA to take more meaningful steps to streamline the process for producing and reviewing exceptional event demonstrations. A state must submit costly and complicated demonstration projects to EPA for its review (and for public comment) before it may exclude any exceedance(s) of any air quality standard(s) caused by naturally-occurring events such as dust storms. AGC understands that many states do not have the resources or the time required to meet the demonstration requirements for an exceptional event.

EPA Should Give Greater Deference to State and Local Determinations

AGC recommends that EPA adopt additional measures (using forms, check-off lists and other straightforward mechanisms) to rely on to the judgment of air pollution officials who are responsible for the day-to-day implementation of CAA measures.

Section 319 of the CAA (42 U.S.C. § 7619) requires the Administrator to determine that an event is an exceptional event. While the Administrator is required under this section to promulgate

² EPA is allowing itself 120 days from the initial submission of a package for responding via letter on a completeness determination and whether there is a need for additional information to be submitted. Following this process, the Draft Guidance allows EPA 547 days in order for the Agency to actually make a decision regarding an exceptional event.

regulations to “govern[] the review and handling of air monitoring data influenced by an exceptional event,”³ the requirement for such regulations does not constrain the degree of deference that the Administrator may afford to state or local determinations regarding exceptional events. EPA is also not prevented under current regulations from providing much greater latitude to state submissions on exceptional events than is contained in the Draft Guidance. Current regulations provide only that various demonstrations to justify data exclusion be “to EPA’s satisfaction” with regard to whether air pollution concentrations in excess of a NAAQS were directly due and caused by an exceptional event.⁴

Dispute Resolution

The current regulations governing exceptional events demonstrations leave the decision entirely at the discretion of the EPA, and the decisions are not subject to appeal.⁵

Neither the EER nor the Draft Guidance provides for a mechanism to challenge an EPA non-concurrence determination on a submission by an air regulatory agency. There is no opportunity or clear direction for a state or locality to challenge an EPA denial. This can lead to inconsistency in how EPA regional offices evaluate and act upon similar events and circumstances. AGC recommends a path for a formal appeal process to address non-action or denial by EPA.

In light of likely adoption of a more stringent federal particulate matter and ozone standards expected to drastically increase the number of non-attainment areas across the nation, it is critical that EPA streamline the information required for demonstration submittals, the processing of requests and the underlying ambiguities in the rule. But moving ahead with guidance rather than a formal revision to the rule would mean less regulatory certainty and could violate federal rulemaking procedures under the Administrative Procedures Act.

While EPA “is deferring a decision on whether to revise the Exceptional Events Rule,” AGC urges the agency to carefully consider the key concept included in legislation that Rep. Jeff Flake (R-Ariz.) recently introduced a bill in the U.S. House of Representatives intended to help states prove more efficiently and effectively that their violations of dust-pollution (i.e., particulate matter) standards qualify as “exceptional events.” AGC and its Arizona Chapter have expressed support for the Commonsense Legislative Exceptional Events Reform Act of 2012, or CLEER Act, which proposes certain changes to the federal Clean Air Act’s requirements for demonstrating exceptional events. Specifically, the bill would (1) require EPA to work with states to develop criteria for proving exceptional events; (2) create a deadline for EPA to approve

³ CAA section 319(b)(2)(B).

⁴ See 40 C.F.R. § 50.14(a)-(b) generally and 40 C.F.R. § 50.14(b)(2) and (b)(3) with respect to fireworks and prescribed fires.

⁵ See 42 U.S.C. § 7619(b)(A)(iv) and 40 C.F.R. § 50.149.

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a state's exceptional-events documentation; (3) make EPA's decisions on exceptional events appealable; and (4) require EPA to make its decisions based on the evidence that states provide.

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,

A handwritten signature in cursive script that reads "Leah Pilconis".

Leah F. Pilconis
Senior Environmental Advisor to AGC of America