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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



VIA E-MAIL: a-and-r-docket@epa.gov

March 22, 2010

EPA Docket Center
U.S. Environmental Protection Agency
Mail Code 6102T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Subject: Reconsideration of the Primary and Secondary National Ambient Air Quality Standards for Ozone; Proposed Rule (75 Fed. Reg. 2938, Jan. 19, 2010)

ATTENTION: Docket ID No. EPA-HQ-OAR-2005-0172

Dear Sir or Madam:

The Associated General Contractors of America (AGC) provides the following comments on issues associated with the U.S. Environmental Protection Agency's (EPA) proposed rule to strengthen 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 standard is still underway and despite key uncertainties in the underlying science. 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.

Founded in 1918, AGC is a full-service national trade association with a nationwide network of chapters. AGC represents more than 33,000 firms including 7,500 of America's leading general contractors, nearly 12,500 specialty contractors and more than 13,000 service providers and suppliers. AGC is the leading association for the construction industry. AGC's members build highways, bridges, tunnels, airport runways and terminals, buildings, factories, warehouses, shopping centers, and both water and wastewater treatment facilities. AGC contractors will be impacted by today's proposed rule in many direct and indirect ways.

Directly, AGC contractors purchase and use heavy equipment that may be impacted by federal, state, and/or local emissions control strategies selected to achieve the ozone NAAQS. Indirectly, AGC contractors are impacted by transportation conformity and general conformity decisions that impact growth, development, and infrastructure improvement. These are just a few examples of how the implementation of a 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

Under the Clean Air Act, EPA must update its assessment of the latest science and consider whether any changes are needed to its NAAQS at least every five years. In March 2008, EPA replaced the 1997 standard of 0.08 parts-per-million (ppm) with a new, more stringent standard of 0.075 ppm. On September 16, 2009, Administrator Lisa Jackson announced she would reconsider the 2008 ozone standard, and in a stark departure from the normal five-year review cycle, and without considering any of the newer science, EPA proposed a range of 0.070-0.060 ppm in January 2010. EPA is also proposing a separate secondary NAAQS unrelated to the health effects of ozone and focused on the protection of trees and plants.

Any change in an ambient concentration set by a NAAQS standard must be "requisite" to protect human health or welfare, based on a review of updated scientific information. The range under consideration is controversial because there is no new scientific evidence to justify strengthening the standard from 0.075 ppm. In this proposed rule, EPA is essentially attempting a "do-over" of the 2008 ozone NAAQS, based on a four-year-old scientific analysis and a long-closed administrative record. **EPA has based its proposed decision not on new scientific evidence, but on a "reconsideration" of the evidence the Agency already considered in 2008 and on which the Agency reached final judgment.** AGC believes it is bad policy for EPA to hurt local economies that are already struggling in the recession by selecting a different numeric standard that is based merely on a different "judgment" derived from the same science that was considered when the last Administration set the 2008 ozone NAAQS.

States have yet to fully implement the 1997 and 2008 standards. Nonetheless, EPA's proposed range would greatly increase the stringency of the ozone NAAQS again when current implementation steps are just beginning, including new emission restrictions and controls significantly affecting a broad variety of businesses and consumers. Now, states face the possibility of imposing a new and more costly standard on local businesses at a time of recession and historic unemployment nationwide. These new costs would close businesses and

manufacturing, send U.S. jobs overseas, and discourage new development, thereby hindering our ability to recover from the existing recession.

Consequences of Nonattainment Designation

EPA's proposed range would likely result in a large portion of the U.S. being in nonattainment. Lowering the 0.075 ppm standard to the lower end of the proposed range of 0.060 ppm would result in almost tripling the number of counties being designated in nonattainment. Moreover, establishing a separate secondary standard would only add to the number of nonattainment areas and extend nonattainment status into rural and unpopulated areas.

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 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 recover from the crippling effects of the recession and cannot afford to divert finite resources from job creation and economic development. States are also facing extreme budget crises and confront shortages of readily accessible funding to implement a new standard without diverting 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.

EPA should not tighten the 2008 ozone NAAQS for these reasons:

- **A newly revised standard will hamper states' ongoing efforts to comply with the existing ozone standards.** The 1997 standard is still not fully implemented and states are being asked to continue their plans for implementing this standard. EPA has yet to resolve issues concerning implementing the standard. Questions about which provisions of the Clean Air Act will govern implementation of this standard awaits resolution by EPA. EPA has

deferred designating areas as nonattainment for the 2008 ozone NAAQS while it reconsiders that standard.

A still-more stringent ozone standard will burden states with a new and more difficult target even before they finish their work to attain the 1997 standard. This process is delaying the planning for attainment of the 2008 standard. There will be insufficient time to evaluate the health and environmental benefits from the 1997 standard and from the implementation of the 2008 NAAQS before feeling the detrimental economic impacts of a tighter standard.

- **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 to being designated a nonattainment area, making it significantly harder for a community to attract new businesses or expand existing facilities, etc. When an area (usually a county or metropolitan area) is designated as a “nonattainment” (NA) area under the Clean Air Act, serious repercussions result immediately. These come in the form of increased costs to industry, permitting delays, restrictions on industry expansion (e.g., construction bans) within the area, as well as impacts to transportation planning. There are also increased costs to businesses and consumers due to the need for state and local requirements designed to bring areas into attainment and to control emissions from other areas which may contribute to nonattainment. Being designated nonattainment can also hinder economic development and industrial growth causing businesses to defer expansion, resulting in adverse consequences in an already struggling economy.
- **Loss of industry and economic development in and around the nonattainment area.** Companies interested in building a major manufacturing plant will likely not build in a nonattainment area due to the increased costs, delays, and uncertainties associated with the restrictive permit requirements.
- **Additional restrictive permitting requirements that are not applied in attainment areas.** Companies that plan to build a new facility or construct a major modification to an existing facility in, or near, a NA area will be required to install the most effective emission reduction technology *without consideration of cost*. Less stringent controls may be installed in attainment areas. The permitting process can be expected to last a year or longer as the company demonstrates that its proposal will meet all of the applicable NA requirements. The resulting delay and uncertainty can discourage new business investments in NA areas.
- **Restrictions on equipment use and operation, which are – in essence – construction bans.** As EPA continues to tighten the federal NAAQS, states are challenged to find ways (within their existing legal authority) to further reduce pollution from mobile sources. In geographic areas that do not meet NAAQS, 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. (The CAA generally reserves for the federal

government the authority to set emissions standards for either new or old engines in off-road (also called "nonroad") construction equipment, a concept called federal preemption. Nonetheless, some states have attempted (or currently are attempting) to include provisions in their SIPs that appear to violate this statutory prohibition.) AGC generally opposes equipment use/operation restrictions, including the application of contract language (bid specifications) to require contractors to retrofit their equipment for a given project because it has the potential to threaten the integrity of the competitive bidding process and unfairly discriminate against contractors on the basis of their equipment. As an alternative to this practice, recently, AGC of America and the Clean Air Task Force (CATF) have agreed on "principles" to require reductions in diesel emissions from federally-funded transportation projects via contract change orders that cover 100 percent of the costs to retrofit equipment. CATF represents leading environmental groups and targets diesel emissions reductions nationwide. We have been working to get broad-based support for our "principles" as a part of the congressional deliberations on the Surface Transportation Authorization Act of 2009.

- **Loss of federal highway and transit funding, which is – in essence – a construction ban.** States that fail to develop suitable SIPs (or to meet EPA's CAA deadlines) could be subject to numerous federal sanctions, including emissions caps limiting economic development and the loss of federal highway transportation dollars. In addition, EPA's "transportation conformity" provisions can bring federal funding for road and transit projects to a grinding halt. 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).

In summary, any tightening of federal ozone NAAQS could result in construction bans that would:

- ✓ **Lead to a massive layoff of construction workers and of workers who supply a multitude of materials, equipment and services to construction.**
- ✓ **Delay the renovation and improvement of public infrastructure, including highway and transit construction projects, bridge construction and repairs, dam repairs and school renovation.**
- ✓ **Impede projects that are vital to improving municipal water supplies and wastewater treatment facilities located throughout the nation.**

The Economic Impact of Construction in the United States

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 service providers. The construction industry stands to play a powerful role in sustaining economic growth and helping the current economic recovery.

- **The Impact of Nonresidential Construction on GDP, Earnings and Jobs:** An additional \$1 billion in nonresidential construction spending would add about \$3.4 billion to the Gross Domestic Product (GDP), about \$1.1 billion to personal earnings and create or sustain 28,500 jobs.
 - 9,700 jobs would be *direct* construction jobs located in the state of investment.
 - 4,600 jobs would be *indirect* jobs from supplying construction materials and services. The majority of these jobs would be located within the state of investment but there would be some out of state jobs supported.
 - 14,300 jobs would be *induced* when workers and owners in construction and supplier businesses spend their incomes locally and nationwide.
- **Construction Employment:** In 2007, a total of 17.9 million jobs were supported by the direct and indirect outlays associated with nonresidential construction spending. The construction industry (residential plus nonresidential) employed 6,148,000 workers in July 2009, a decrease of 1,589,000 (21%) from January 2007 when construction employment in the United States peaked. The construction unemployment rate jumped to 27.1 percent (and construction employment dropped to a 14-year low) as another 64,000 construction workers lost jobs in February, according to federal employment figures released earlier this month. Currently, construction unemployment is at the highest level recorded since the federal government began making the data available in 1976.
- **Nonresidential Construction Spending:** Nonresidential construction spending in the United States totaled an estimated \$715 billion in 2008. This direct construction spending contributed a total of \$1.5 trillion (10%) to the GDP of \$14.4 trillion.
- **Construction Materials, Supplies and Machinery:** In 2008 U.S. manufacturers shipped \$520 billion in construction materials and supplies and \$30 billion in new equipment.
- **Construction Industry Pay:** In 2008 annual pay of all construction workers in the United States averaged \$49,000, 8% more than the average for all private sector employees.
- **Small Business:** The United States had 811,500 construction firms in 2007, of which 91% were small businesses employing fewer than 20 workers.

Science Is Lacking

The science developed since the last revision to the ozone standard does not support another revision at this time. EPA admits it is not relying on any new scientific studies as a reason for reconsidering the 2008 standard. Instead, the Agency is effectively attempting to second guess its previous decision. In the absence of innovative scientific evidence, no particular numeric change to the current standard is justified at this time.

Air Quality Is Getting Cleaner

Ambient air quality is getting significantly better *even as our economy grows.* Moreover, current and scheduled EPA rules will continue to achieve significant improvements. Between 1980 and 2008, total emissions of the six principal air pollutants dropped by 54 percent. (See <http://www.epa.gov/airtrends/aqtrends.html>) Measured ambient concentrations of ozone have dropped 25 percent since 1980. (See <http://www.epa.gov/airtrends/aqtrends.html>) During the same time period, gross domestic product increased 126 percent, vehicle miles traveled increased 91 percent, energy consumption increased 29 percent, and U.S. population grew by 34 percent. 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. (See <http://www.epa.gov/otaq/highway-diesel/index.htm>) 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. (See <http://www.epa.gov/nonroad-diesel/2004fr.htm>) 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.

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 transportation 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 those to provide for safe drinking water, wastewater and stormwater management, flood control and navigation, health care, and education.

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 reconsider its proposed revisions to the existing ozone NAAQS that would tighten them and allow EPA rules currently in place and future actions and voluntary initiatives to achieve ozone attainment.

Sincerely,

A handwritten signature in black ink that reads "Leah Pilconis". The signature is written in a cursive, flowing style.

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