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TO: U.S. Environmental Protection Agency

FROM: Andrew Stasiowski, President and CEO,  
American Highway Users Alliance *Andrew Stasiowski*

RE: Reconsideration of the National Ambient Air Quality Standards for Particulate Matter;  
Proposed Rule; Docket No. EPA-HQ-OAR-2015-0072

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The American Highway Users Alliance (the “Highway Users” or “we” or “our”) respectfully submits these comments on the proposed rule issued in this docket by the Environmental Protection Agency (EPA) upon its “reconsideration” of the National Ambient Air Quality Standards for Particulate Matter (PM). See 88 Fed. Reg. 5558 (January 27, 2023) (“NPRM”).

As set forth more fully below, the Highway Users considers that EPA should not have subjected the PM standards currently in effect to reconsideration in advance of the regular five-year statutory interval for review of the current PM standards.<sup>1</sup> We are very concerned about the costs and restrictions that could burden the public under the proposed rule, which would tighten the annual PM-2.5 (fine particulates) standard – costs that appear to be considerably underestimated by EPA, at least for highway related elements. That, in turn, creates the prospect of “transportation conformity” regulation, and its restrictions on highway and transportation infrastructure investment, in additional counties, cities and states. That outcome would be particularly frustrating at this time, when improved highway and transportation infrastructure is a prominent Administration goal. Accordingly, we oppose the proposed rule and recommend that it be withdrawn.

### **Brief Overview: The Highway Users and its Concerns with the Proposed Rule**

The Highway Users is the united voice of the motoring public, promoting the strong public interest in safe, uncongested highways and enhanced mobility and related benefits for people and business.

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<sup>1</sup> See 42 USC 7409.

The Highway Users, a 300-member coalition, includes companies, trade associations, safety advocacy groups, and motoring clubs. Our members represent or support millions of road users from the truck, bus, auto, RV, and motorcycling modes. Such users pay the bulk of the fees deposited into the Federal Highway Trust Fund, funds which the public wants to see turned into highway, bridge, and highway safety investments that help grow the economy, improve supply chains, enhance safety, and improve the quality of life.

Our membership includes companies (and associations of companies that, in turn, include many member companies) that not only use the roads, but comprise large portions of the economy. They manufacture and/or sell cars, trucks, automotive equipment, fuel, asphalt, concrete, aggregates, safety equipment, signage, and other products that improve highway safety and mobility for people and business.

We support prompt and efficient use of Federal highway funds in order to achieve the benefits of a highway system that has adequate capacity, is safe, and is in good or better condition. That will enhance the economy and quality of life in this country.

The Highway Users also supports the goal of an improved environment, which can be achieved consistent with economic growth and improved highway mobility for people and businesses. But we oppose the proposed rule in this docket, seeing it as an obstacle to needed highway investment and economic growth that is frustrating, given that a 2020 review by EPA found that the current PM standards protect the public health and welfare as required.

### **The Proposed Rule**

In this docket EPA proposes to lower the primary annual PM-2.5 standard from 12 micrograms per cubic meter of air down to 9-10 micrograms per cubic meter, while also inviting comment on alternate levels of 8 and 11 micrograms per cubic meter.

The proposal would not change the current primary 24-hour standard for PM-2.5 of 35 micrograms per cubic meter, while also inviting comment on an alternate level of 25 micrograms per cubic meter. Those are the principal features of the proposal, but there are others.

Specifically, for the secondary annual PM-2.5 standard, the proposal would retain the existing standard of 15 micrograms per cubic meter. For the secondary 24-hour PM-2.5 standard, the proposal would retain the existing standard of 35 micrograms per cubic meter – while also inviting comment on revising that level to as low as 25 micrograms per cubic meter.<sup>2</sup>

### **Consideration of Costs**

EPA has titled this proceeding as “reconsideration” of the PM air quality standards that it reviewed in 2020. In the NPRM at 5563 EPA notes that it “may not consider the costs of implementing the standards.”

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<sup>2</sup> We do not comment here on the more technical aspects of the changes proposed by EPA in this docket, such as the proposed change of daily reporting requirements from 5 days per week to 7. See NPRM at 5563 for description of smaller and relatively technical proposed changes.

Of course, for most people, businesses, and government agencies, the costs (as well as the benefits) of an action are something to consider before taking an action. The provision of the Clean Air Act relevant to setting NAAQS, including for PM, has been interpreted as not permitting EPA to consider costs in setting the standards. But that provision, 42 USC 7409, concerns authority for the EPA to “review and revise criteria or promulgate new standards.”

The “reconsideration” of a standard is not referenced in the provision. We suggest that the exclusion of consideration of costs from an action is so extraordinary that any such authority should be extremely narrowly construed. A “reconsideration” is a distinct step from a revision. In this case, it is the process during which the decisionmaker determines whether to take a step and, logically, involves considering the pros and cons. We consider that at that point of reconsideration EPA should have considered the costs as well as the benefits of going forward with a revision before doing so, even if the revision itself may be limited to consideration of public health and welfare benefits without considering costs.

We also emphasize that the statute calls for review of NAAQS at five-year intervals, though the EPA is permitted to review and revise them more frequently. Clearly, the Congress did not expect more frequent reviews as a regular practice – the general rule laid out by Congress is review of a NAAQS every five years. Accordingly, “reconsideration,” a step not referenced in the statute, that is discretionary for EPA, and that could lead to revision more frequently than the general rule of review at five-year intervals, should be treated as a distinct action and outside of any protection from consideration of costs that might apply to “review,” “revision” or “promulgation” of a NAAQS. EPA did not consider costs as it reconsidered what to do in this matter regarding PM-2.5 standards, an omission that warrants withdrawal of the proposal.

Further, EPA notes that it prepared a Regulatory Impact Analysis (RIA) on this proposal “to provide the public with information on the potential costs and benefits of attaining several alternative PM-2.5 standard levels.” NPRM at 5563. Such information, even if excluded from consideration in some types of NAAQS standard setting actions by EPA, could prove useful to a state in taking actions, through a state implementation plan (SIP), to achieve attainment of a PM-2.5 standard in those areas of a state not in attainment with the standard though, as explained below, cost estimates in the RIA, at least as to highway related pollution control measures, appear to be considerably underestimated.

### **Concerns Regarding Regulatory Costs**

Under EPA’s own RIA for this proposal, implementation of an annual PM-2.5 standard at 10 micrograms per cubic meter, with no other change, would result in 24 counties in nonattainment with that standard in 2032 (six more than at the current standard). See RIA at ES-7, ES-10. Lowering that annual PM-2.5 standard to 9 micrograms per cubic meter with no other change would more than double that, resulting in 51 counties in nonattainment with that standard in 2032. See RIA at ES-10. Setting that standard at 8 micrograms with no other change would add 90 more counties to that 51, for a total of 141 nationwide in need of further PM-2.5 emissions reduction to achieve attainment. Id.

Assuming for purposes of argument that EPA were to go forward and promulgate an annual PM-2.5 standard with a lower level of micrograms per cubic meter of air than under the current rule, and a significant number of counties become nonattainment areas for that pollutant, the consequences would be considerable and could have impact early on after promulgation of a final rule in this docket.

Moreover, there is no certainty that the EPA's estimates of impacted counties will prove accurate – there could be a wider and more numerous range of counties and cities impacted and that end up as nonattainment for PM-2.5. EPA explains that its illustrative PM-2.5 control strategies in some cases rely on PM-2.5 control actions not only within projected nonattainment counties but also in “adjacent” counties.<sup>3</sup> So, additional counties or areas could well be burdened, and could end up in nonattainment status, suggesting higher costs than currently reflected in the RIA.

We note that EPA chose to use the year 2032 as the reference year for its discussion of benefits and costs of the proposed rule and alternatives in the RIA. See RIA at ES-3.

But we are concerned that prompt reactions by business and people to any new rule developed in this docket could result in costs that are not well reflected in the RIA analysis.

Of particular concern to the Highway Users is that transportation conformity requirements would newly apply in areas that newly become nonattainment areas for PM-2.5 (as well as continue to apply in areas already in nonattainment for this pollutant). At a time when the nation is trying to upgrade transportation infrastructure, counties in nonattainment for PM-2.5 would face restrictions on highway investment (one year after designation as nonattainment). At that point highway investments could not be made in that nonattainment area (whether by a state or local authority) if they are considered as increasing the nonattainment pollutant. This restriction on choice of highway investments certainly would be a step in the opposite direction of improving our nation's highway and transportation infrastructure. It would also hurt the economy, as otherwise optimal programming of highway funds would be adjusted due to regulatory requirements that would follow from a lowered PM-2.5 level requirement being adopted in this docket.

Further, restraint on meritorious highway investments can impact a local economy more generally. With restraint on highway investment, business could perceive a trend toward increased congestion, longer commutes, difficulty finding local business partners and customers, difficulty attracting employees and other adverse impacts. The businesses could relocate, or not expand, or even choose to build a facility overseas rather than locally or even elsewhere in a state. And they can make those decisions quickly, long before the 2032 year chosen by EPA as a sample year for cost-benefit analysis. Workers could similarly be discouraged, with economic impact if they lose jobs in the community or vote with their feet by moving away.

Notwithstanding the clear potential for increased regulation (by means of tightened PM-2.5 standards) to impact transportation and, in turn, business and the economy more broadly, a word search of the Regulatory Impact Analysis for this proposed rule does not reveal any reference to or discussion of “transportation conformity,” much less of its potential for direct and indirect

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<sup>3</sup> See RIA at ES-3, ES-4, and ES-11 (table ES-3).

economic impact. The NPRM does mention transportation conformity but, again, does not develop the implications of transportation conformity requirements (SIPs) for costs and other burdens.

We are also concerned that the RIA appears to underestimate costs at least in part by not reflecting recent inflation in its estimated costs of highway related pollution control investments. As illustrated at various points in the RIA, including in tables 4-4 and 4-5 (RIA at pages 4-9 and 4-10), steps to control PM-2.5 include paving shoulders and unpaved roads to reduce the spread of PM from the road (and shoulder) surface to the air.

Those estimates are stated, in the caption of those two tables, as 2032 costs in 2017 dollars.

Yet the Federal Highway Administration's (FHWA's) National Highway Construction Cost Index (NHCCI) shows significant inflation from 2017 through the third quarter of 2022 – approximately 72%, repeat 72%.<sup>4</sup> And further inflation between late 2022 and EPA's 2032 reference year would represent a further dollar difference from 2017 dollars.<sup>5</sup>

Each of those two tables add up highway related control costs with costs for other, non-highway related control strategies that undoubtedly have experienced different cost developments since 2017. For that and other reasons, we do not assume these cost charts reflect inflation, or are reasonably adjusted for inflation, much less to 2032. Further, in a word search of the RIA “inflation” appears only once – regarding adjusted income levels (RIA at 5-18). As inflation is mentioned explicitly as an adjustment to only that one data set, its absence in reference to other data is suggestive that the data is not inflation adjusted.

Even if a reader were to interpret that an inflation adjustment is to be applied – **outside** of the two tables – to the cost totals in 2017 dollars set forth therein, that reader would not likely assume that the costs were 72% up from 2017 as to highway paving from the moment the RIA was completed. Thus, the tables become at best confusing and misleading if not inaccurate.

Also, given this apparent large disparity as to highway costs, it is understandable that we have also become concerned that the estimated 2017 costs of highway related PM-2.5 control strategies involving paving unpaved roads or paving shoulders are also underestimated even before applying inflation.

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<sup>4</sup> For the NHCCI see –

[https://explore.dot.gov/views/NHInflationDashboard/NHCCI?%3Aiid=1&%3Aembed=y&%3AisGuestRedirectFromVizportal=y&%3Adisplay\\_count=n&%3AshowVizHome=n&%3Aorigin=viz\\_share\\_link](https://explore.dot.gov/views/NHInflationDashboard/NHCCI?%3Aiid=1&%3Aembed=y&%3AisGuestRedirectFromVizportal=y&%3Adisplay_count=n&%3AshowVizHome=n&%3Aorigin=viz_share_link)

The last entry for 2022 is an index reading of 2.786 (with 2003 as 1.000), while the index was at 1.62 at the start of 2017 (thus, an increase of 72% since the start of 2017).

<sup>5</sup> EPA may consider that, under those two tables, an inflation adjustment since 2017 is to be applied separately and later to the 2017 dollars in the chart (these are 2017 dollars, the reader has to adjust it to 2032 dollars), an approach that is at best highly confusing and misleading as to estimated 2032 costs in dollars, particularly as to highway costs – where FHWA cost index data to 2022 was available before the publication date of December 2022 stated in the RIA. Given a number of fairly recent years with relatively low inflation, readers would be unlikely to appreciate that, already, at this point in time, there would be such a large dollar gap (72% as of late 2022) between current dollar costs per the FHWA index and 2017 costs.

For such reasons, the table entries referenced above (and any other similar tables in the RIA) as to highway related pollution control costs appear to us to be flawed and confusing and, at a minimum, should be restated to clearly present the impact of FHWA's 2022 NHCCI index increase over 2017 – plus any upward adjustment from any underestimate of 2017 costs. Beyond restatement, at least the highway related cost data is so confusing that it should be revisited from the foundation and subjected to further comment before any other action is taken in this docket.

Beyond transportation-focused costs and adverse impacts, state implementation plans developed to bring PM-2.5 nonattainment areas into attainment can result in restrictions impacting new business investments or on permits for business, limiting economic and job growth and potentially driving business offshore – to nations with weaker environmental and safety laws.

Even when permitting is not an issue in a neighborhood, increased compliance costs that could follow from a SIP's provisions to address a new PM-2.5 standard could increase the costs of goods and services, making it harder for families and businesses to make ends meet, particularly during a time of high inflation.

Another difficulty with the proposed tightening of PM-2.5 standards is that the sources of PM-2.5 are so dispersed. Some PM results from precursors – ozone and NOX – interacting with the existing environment. Natural dust, cooking, wildfires, and road dust contribute to PM-2.5 pollution. With so many widespread sources, focusing on the proverbial “low hanging fruit” of any particular PM-2.5 emitters is unlikely to rapidly help achieve attainment in a PM-2.5 nonattainment area. With such a wide range of low volume contributors to PM-2.5 pollution in an area, all of the other costs and adverse economic impacts referenced above could continue over time, even with excellent efforts to reduce PM-2.5 pollution pursuant to a thoughtful SIP.

We are highly concerned that the adverse impact of the proposed rule will be greater and more significant than EPA apparently thinks – into the billions of dollars annually. Further, we see that the adverse impacts could very well follow quickly upon issuance of any such final rule. Businesses and families can react promptly to the emerging threat of a significant increase in regulation and move before a state SIP even has a chance to pursue mitigating solutions.

### **Conclusion and Recommendations**

For at least all of the above reasons, we recommend that EPA withdraw the proposed rule.

Should EPA go forward and promulgate a rule, we recommend that it include a significantly delayed effective date (at least 2 years) to bring the promulgation of the rule into a time frame consistent with the statutory general rule of a five-year review schedule.

As to the substance of any rule if, contrary to our recommendation, EPA should proceed to promulgate a rule, EPA should use the options put out for comment that represent the least reduction in PM-2.5 levels of the options put out for comment. That would mean –

lowering the primary annual PM-2.5 standard to 11 micrograms per cubic meter of air; and

making no other reductions to levels in other primary and secondary standards.

The Highway Users thanks EPA for its consideration and recommends that any further action in this docket or on the issues addressed in this docket be in accord with these comments.

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