



February 13, 2017

Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Comments on Proposed Regulations on Implementation of the 2015 National Ambient Air Quality Standards for Ozone (Docket No. EPA-HQ-OAR-2016-0202)

To the Environmental Protection Agency:

The American Association of State Highway and Transportation Officials (AASHTO) and the Association of Metropolitan Planning Organizations (AMPO) welcome the opportunity to submit these comments regarding the proposed regulations on implementation of the 2015 Ozone National Ambient Air Quality Standards (2015 Ozone NAAQS). The notice of proposed rulemaking (NPRM) was published in the Federal Register on November 17, 2016. (81 Fed. Reg. 81276).

AASHTO is a nonprofit, nonpartisan association representing the State transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents the departments with respect to all five transportation modes: air, highways, public transportation, rail, and water. Its primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our members work closely with USDOT agencies to operate, maintain, and improve the nation's transportation system.

AMPO is a nonprofit, membership organization established in 1994 to serve the needs and interests of "metropolitan planning organizations (MPOs)" nationwide. Federal highway and transit statutes require, as a condition for spending federal highway or transit funds in urbanized areas, the designation of MPOs, which have responsibility for planning, programming and coordination of federal highway and transit investments. AMPO offers its member MPOs technical assistance and

training, conferences and workshops, frequent print and electronic communications, research, a forum for transportation policy development and coalition building, and a variety of other services.

AASHTO and AMPO members have an interest in the proposed rule because the implementation of a new NAAQS has practical implications for the planning, development, and implementation of surface transportation projects. In particular, the adoption of a stricter NAAQS results in the designation of additional areas as nonattainment, causing those areas to become subject to transportation conformity requirements. In addition, some areas that were previously designated as nonattainment or maintenance for the old standard will become designated nonattainment for the new standard, potentially extending the time that they will remain subject to conformity requirements. The transition from the old to the new standard also creates the potential for increased regulatory burdens and uncertainty during the transition period.

To avoid undue delays and increased costs, AASHTO and AMPO members seek to ensure that transportation conformity requirements – for plans, programs, and projects – can be met as efficiently as possible. To that end, we offer the following comments and recommendations regarding the NPRM for implementation of the 2015 ozone standard.

1. Revocation of the 2008 Ozone Standard – Option 1 vs. Option 2.

The NPRM proposes two options for revoking the 2008 ozone standard.¹ Under Option 1, the 2008 ozone standard would be revoked in each area one year after the effective date of the designation for the 2015 ozone standard. Under Option 2, the 2008 ozone standard would be revoked in an area only when that area is designated attainment for the 2008 standard, and no sooner than one year after the effective date of the designations for the 2015 ozone standard.

AASHTO and AMPO support Option 1 because, as EPA recognizes in the NPRM, this option will ensure that only one ozone NAAQS – the 2008 standard or the 2015 standard – would apply in an area, rather than having some locations where both standards are in effect. As stated in the NPRM:

The EPA believes it would be appropriate to revoke, rather than retain, the 2008 ozone NAAQS for all purposes because it would ensure that only one ozone NAAQS – in this case the more protective 2015 ozone NAAQS – would directly apply in an area, rather than having a situation in which two standards would apply concurrently. The EPA believes that the permanent retention of two standards, differing only in the ozone concentrations they allow, could result in unnecessarily complex implementation procedures and is not necessary to provide for timely attainment of the more stringent NAAQS.... Revoking (with appropriate anti-backsliding measures) rather than retaining the 2008 ozone NAAQS would facilitate a more seamless transition to ... [the] 2015 ozone NAAQS, and would ensure an efficient use of state and local resources in working toward attainment of that standard.²

¹ 81 Fed. Reg. 81286.

² Id.

We endorse EPA's assessment of these options, and we therefore support Option 1 for substantially the same reasons set forth in the NPRM. We also support EPA's proposed approach to anti-backsliding requirements for Option 1, which would allow emissions budgets adopted for the 2008 standard to be used in transportation conformity determinations for the 2015 standard until new emissions budgets are developed for the 2015 standard.³ We prefer this approach because it avoids unnecessary complexity in the transition to the new standard.

It is our understanding that, under Option 1, the transition in transportation conformity requirements would unfold as follows:

- Prior to effective date of 2015 standard: The 2008 standard remains in effect, and transportation conformity determinations are required for 2008 standard.
- During the one-year grace period following the effective date of the 2015 standard: The 2008 standard remains in effect, and transportation conformity determinations still are required for 2008 standard. In metropolitan areas, regional conformity determinations for plans and transportation improvement programs (TIPs) would need to be made for the 2015 standard before the end of this one-year period.⁴
- After the one-year grace period has ended: The 2008 standard is revoked upon conclusion of the one-year grace period (i.e., one year after the effective date of the 2015 standard). From that time onward, transportation conformity determinations for the 2008 standard are no longer required, and instead transportation conformity determinations *are* required for the 2015 ozone standard. During this period, conformity determinations would be made based on the emissions budget for the 2008 ozone standard until such time as emissions budgets are adopted for the 2015 ozone standard. Where areas do not have or are not required to develop motor vehicle emissions budgets, the appropriate interim emissions reduction tests would be required.

In supporting Option 1, we are cognizant of the complexities involved in the transition from one standard to another. We would not necessarily object to modifications to Option 1, as long as the same result is achieved as with Option 1 – namely, transportation conformity determinations are not required for the 2008 and 2015 ozone standards at the same time.

2. Transportation Conformity Guidance.

The NPRM states that EPA intends to issue an update to existing transportation conformity guidance to address the transition to the 2015 ozone standard.⁵ AASHTO and AMPO strongly

³ 81 Fed. Reg. 81288.

⁴ In isolated rural nonattainment areas, plans and TIPs are not required. In those areas, conformity determinations for the 2015 ozone standard would need to be made, after the end of the one-year grace period, whenever the Federal Highway Administration or Federal Transit Administration approves a non-exempt project.

⁵ 81 Fed. Reg. 81300.

encourage EPA to reach out to the transportation community – including State DOTs and MPOs – for input on the development of this guidance.

Providing an opportunity for comment on this guidance would be consistent with longstanding guidance to federal agencies on the development of significant guidance documents. The Office of Management and Budget (OMB) has recognized that “providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.”⁶ In addition, Executive Orders 12866 and 135633 encourage federal agencies, wherever feasible, to seek views of governmental entities prior to proposing requirements and to consider the most flexible, least-cost options for governmental entities consistent with regulatory objectives.⁷

In addition, providing an opportunity for comment will facilitate the development of the guidance and allow for greater efficiency in implementation. State DOTs and MPOs have extensive experience implementing the transportation conformity requirements for plans, programs, and projects. Their experience gives them invaluable knowledge about the practical difficulties that may arise in transitioning to a new standard. That experience shows that there are sometimes unintended consequences of new guidance. By consulting with states and MPOs prior to finalizing any guidance, EPA will be in a better position to anticipate the types of practical issues and concerns that may arise in implementation of the new standard.

Finally, we also encourage EPA to release the draft guidance for public review and comment as soon as possible. Under the timelines for implementation the 2015 standard, the nonattainment designations would take effect in October 2017, and all plans, programs, and projects in nonattainment areas would be subject to transportation conformity requirements within one year thereafter. Given the long lead time needed to make conformity determinations, it is important for the final guidance to be available by fall 2017.

3. Programmatic Conformity Determinations

As EPA has recognized in the final rule adopting the 2015 ozone standard, some areas designated as “marginal” nonattainment for this standard will come into compliance without any additional actions being taken by the State.⁸ As a result, Enhanced Monitoring Plans (EMPs) are not required in marginal nonattainment areas for the 2015 ozone standard.⁹ Similarly, there is little value-added in requiring transportation conformity determinations to be made for the 2015 ozone standard in newly designated marginal nonattainment areas where EPA modeling shows the area will attain the

⁶ Office of Management and Budget, “Final Bulletin for Agency Good Guidance Practices,” 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).

⁷ Executive Order 12866, “Regulatory Planning and Review,” 58 Fed. Reg. 51735 (Oct. 4, 1993) and Executive Order, “Improving Regulation and Regulatory Review,” 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁸ 80 Fed. Reg. 65292, at 65423 (Oct. 26, 2015).

⁹ *Id.* (“The EPA agrees that based on current trends in O₃ concentrations and the EPA’s own projections, states in Marginal nonattainment areas likely will comply with the revised NAAQS without additional state-directed controls, and as such, an EMP is not necessary in Marginal O₃ attainment areas.”). Furthermore, motor vehicle emissions budgets and SIPs may not be required in marginal ozone nonattainment areas.

2015 ozone standard without further actions beyond those already in place. Compliance with transportation conformity is a substantial cost and administrative burden for those areas, especially for areas that have not previously been subject to conformity requirements for ozone.

In the interest of avoiding undue regulatory burdens, we urge EPA to provide a streamlined process for satisfying conformity requirements in areas that are in attainment for the 2008 standard and are designated as marginal nonattainment areas for the 2015 standard (i.e., newly designated nonattainment areas). One possible approach would be for EPA to establish a process under which the Federal Highway Administration (FHWA) can make a programmatic or categorical conformity determination for areas newly designated as nonattainment areas for ozone under the 2015 standard. Such a mechanism could include appropriate safeguards, such as monitoring and reporting to ensure that the area remains on track to achieve the 2015 standard. With appropriate safeguards, this approach would allow the goals of conformity to be achieved with much lower administrative burden on State DOTs, MPOs, the FHWA, and the EPA itself.

On a broader level, we note that reductions in transportation emissions are increasingly achieved by federal emissions standards and by technological changes such as the increasing use of electric vehicles. As a result, the transportation conformity process has increasingly become an exercise in tracking progress caused by decisions beyond the control of State DOTs, MPOs, and FHWA. We urge EPA to consider ways to revise the transportation conformity regulations to allow for increased use of programmatic and/or categorical conformity determinations for both regional and project-level conformity determinations. For example, projects are often delayed by the requirement to ensure ‘consistency in design concept and scope’ between the project as approved in the NEPA process and the project as defined in the regional air quality analysis that previously was completed for the MPO’s transportation plan and TIP. The need to update that regional analysis to reflect minor changes in the project – e.g., ramp location changes, or changes in project implementation year – can add months of delay to the NEPA schedule. We recommend consideration of programmatic approaches that could streamline the process for amending plans and TIPs to reflect minor changes in project design and implementation dates.

4. ‘Exceptional Event’ Data – Consideration in Nonattainment Designations

In the final rule establishing the 2015 ozone standard, EPA recognized that, as part of the process for making nonattainment designations, States may request to exclude monitoring data associated with “exceptional events” such as wildfires.¹⁰ In that rule, EPA established an expedited schedule for States to submit such requests to EPA prior to EPA’s designation of nonattainment areas for the 2015 ozone standard. In doing so, EPA explained that its intent was to give States sufficient time to prepare and submit exceptional event demonstrations while still allowing the EPA sufficient time to consider those demonstrations before making nonattainment designations. EPA also acknowledged that “the schedule promulgated in this action is compressed, particularly for the third year of data to be used in a 3-year design value.”¹¹

¹⁰ 80 Fed. Reg. 65,292 at 65,412 (Oct. 26, 2015).

¹¹ 80 Fed. Reg. at 65,413.

In February 2016, EPA issued guidance outlining the process for making nonattainment designations for the 2015 ozone standard.¹² This guidance included, among other things, the States' deadlines for submitting their proposed nonattainment designations and for submitting any exceptional event demonstrations. It also provided the date by which EPA would provide the required 120-day notice to a State if EPA intended to modify (rather than accept) the States' proposed nonattainment designations. The timeline is indeed extremely compressed, especially for 2016 air quality monitoring data:

- For 2014 and 2015 air quality data, the States' deadline for submitting the exceptional event documentation is **October 1, 2016**. For 2016 data, the States' deadline for submitting the exceptional event documentation is **May 31, 2017**.¹³
- EPA's deadline to provide 120-day notice to the States – indicating EPA's disagreement with the States' proposed nonattainment designations – is **June 2, 2017** (just two days after the exceptional event packages for 2016 data are submitted).¹⁴

Given this extremely compressed schedule, we expect that there will be unresolved requests for exceptional-event determinations at the time EPA issues the 120-day letters (June 2, 2017) and, potentially, at the time EPA makes its designations (October 1, 2017).

To ensure that areas are not incorrectly designated as nonattainment, we request that EPA exclude any data that is the subject of an unresolved request for an exceptional-determination at the time EPA makes its nonattainment designations in October 2017. In such cases, the proper course would be to designate an area as “unclassifiable” due to incomplete data, as permitted under EPA guidance.¹⁵ After the exceptional event determination is made, EPA could then designate the area as either attainment or nonattainment, as appropriate.

5. Exceptional Event Data – Use in Transportation Conformity Determinations.

On October 3, 2016, EPA issued a final rule on Treatment of Data Influenced by Exceptional Events (“Exceptional Events Rule”).¹⁶ In announcing the final rule, EPA stated that it intends to issue guidance confirming, among other things, that air quality data excluded under the Exceptional Events Rule will also be excluded when selecting appropriate background concentrations for use in transportation conformity hot spot analyses.¹⁷ The guidance also will identify “potential pathways” for excluding data from exceptional events when determining the potential for future NAAQS exceedances in the context of a transportation conformity analysis.¹⁸

¹² Memorandum from Janet McCabe, Acting Assistant Administrator, to EPA Regional Administrators, “Area Designations for the 2015 Ozone National Ambient Air Quality Standards” (Feb. 25, 2016) (“McCabe Memo”).

¹³ McCabe Memo, Attachment 2.

¹⁴ McCabe Memo, Attachment 1.

¹⁵ McCabe Memo, p. 9 (“In certain cases, there may be insufficient information to support a designation of nonattainment or attainment for an area.”).

¹⁶ 81 Fed. Reg. 68216, 68229 (Oct. 3, 2016).

¹⁷ Id.

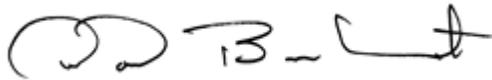
¹⁸ Id.

AASHTO and AMPO agree that data associated with exceptional events should be excluded for purposes of transportation conformity determinations. We are concerned, however, that the timeframe for EPA to approve an exceptional event determination may be very lengthy, so the results of that determination may not be available at the time a transportation conformity needs to be made for a transportation plan or program or for an individual project.

In light of these concerns, we urge EPA to consider developing an expedited process for making exceptional event determinations specifically for purposes of the data used in a transportation conformity determination (for any pollutant for which that data may be relevant). One suggestion would be for EPA to make a finding that, while an exceptional event determination is under review, the transportation agencies may use the assumptions and data in the exceptional event determination request, as needed, in their conformity determinations. This would help ensure that EPA reviews of exceptional events determinations do not impact conformity schedules and thus do not impact the implementation of transportation plans, programs, and projects. This process for handling exceptional-event data should, if possible, be made available along with the transportation conformity guidance by fall 2017.

Thank you for the opportunity to comment on EPA's proposed NAAQS for Ozone. Should you have any questions, please contact: Shannon Eggleston from AASHTO at 202-624-3649, or Bill Keyrouze from AMPO at 202-624-3680.

Sincerely,



David Bernhardt
President
AASHTO



Honorable Elaine Clegg
President
AMPO