December 6, 2016

**Via First-Class Mail, E-Mail and Filing in**
**E-Docket EPA-HQ-OAR-2010-0706**

Hon. Janet McCabe
Acting Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code 6101A
Washington, DC 20460

Hon. Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Reopening the Public Comment Period for EPA's Proposed Rule Revising Its New Source Performance Standards (NSPS) for Grain Elevators (40 CFR Part 60, Subpart DD), 79 Fed. Reg. 39242 (July 14, 2014)

Dear Ms. McCabe and Mr. Shelanski:

I am writing on behalf of a coalition of six national trade associations in the agricultural sector, *i.e.,* the NSPS Subpart DD Coalition,[1] to raise a procedural issue relating to an EPA final action package currently undergoing OMB review as a "significant" rulemaking under EO 12866.

[1] The Coalition includes the Corn Refiners Association, the National Council of Farmer Cooperatives, the National Grain and Feed Association, the National Oilseed Processors Association, the North American Millers' Association, and the USA Rice Federation.

The package contains notice of final action on EPA's proposal at 79 Fed. Reg. 39242 (July 14, 2016) to update its New Source Performance Standards (NSPS) for grain elevators, 40 CFR Part 60,Subpart DD, pursuant to section 111(b) of the Clean Air Act (CAA), 42 U.S.C. 7411(b).[2] Presumably, the package also contains a final Information Collection Request (ICR) for the updated version of the grain elevator NSPS, which was proposed to take the form of a Subpart DDa.[3] The procedural issue is whether EPA is obliged by the CAA and EO 12866 to reopen the comment period, with an attendant shift of rule applicability from July 14, 2014, to the date of the reopening.

The Coalition sees good reason to suppose that (1) the final action package now under OMB review contains, or references, data and analyses that came into existence after the close of the comment period (December 22, 2014), and (2) such materials are of central importance to some of EPA's key final decisions, in the sense that those decisions are a "logical outgrowth" of those materials, not the July 2014 proposal.

The Coalition, however, has not examined, nor would it be allowed to examine, the final action package to determine whether it contains or references such post-comment period materials. Consequently, the Coalition respectfully petitions you to examine the package and determine whether reopening the comment period is required. If you conclude that it is required, the Coalition further asks that EPA provide at least 60 days for review and comment and that it change the rule applicability date from July 14, 2014, to the date notice of the reopening is published in the *Federal Register.*

**Relevant Procedural History**

The Coalition's comments on EPA's original proposal[4] raised several fundamental issues. Most prominent among them was whether EPA had substantiated adequately its jurisdictional claim that the grain elevator segment of the economy presents a significant risk to human health and welfare in the future. The Coalition argued, in part using its own data and analysis, that EPA had failed in that task and urged that EPA repeal the grain elevator NSPS prospectively, pursuant not only to CAA section 111(b), but also EO 13563.[5] Another fundamental issue was whether EPA had built an adequate scientific basis to support its use of opacity standards, coupled with Method 9, to regulate emissions of particulates that, at grain elevators, typically consist of grain dust and pass into the ambient air "fugitively." The Coalition argued that EPA had failed at that task as well and urged that EPA rely on design standards instead.

In late February 2016, about 14 months after the close of the comment period, EPA submitted to OMB for approval a final ICR for Subpart DD, separately from the still ongoing grain elevator rulemaking process. Despite EPA's claim in the July 2014 proposal that the future incidence of new or modified "affected facilities" would be great enough to justify the continued existence of a grain-elevator NSPS, the *Supporting Statement* for the ICR stated: "[N]o additional respondents per year will become subject to these standard [*sic*]." The Coalition submitted a comment on the ICR, spotlighting especially that statement and observing: "In other words, EPA predicts that there will be zero incidence during 2015-2019 of a grain elevator

[2] The RIN for the package is 2060-AP06.
[3] The OMB control number for an ICR for Subpart DDa is 2060-0699. EPA's tracking number is 2497.1.
[4] A hard copy of the Coalition's comment letter, which runs 84 pages (plus attachments), is available from the Coalition upon request. The letter also appears at regulations.gov as EPA-HQ-OAR-2010-0706-0122.
[5] EPA was then and still is evaluating the grain elevator NSPS as a candidate for repeal under EO 13563. *See Progress Report, July 2016 — Final Plan for Periodic Retrospective Reviews of Existing Regulations,* http://www.epa.gov/regdarrt/retrospective/history.html.

'affected facility' undergoing construction, modification or reconstruction. But, if there will be zero incidence of such events, then there must be zero risk to human health and welfare as well."[6] In the Coalition's view, such zero risk means that EPA lacks authority to keep a grain elevator NSPS in effect prospectively. Further, it means that EPA, apart from the authority issue, should discontinue Subpart DD at least prospectively in order to fulfill EO 13563's directive to weed out obsolete rules.

In May 2016, OMB approved the ICR for Subpart DD. But, contemporaneously and apparently in response to the Coalition's comments, OMB elevated the status of the grain elevator rulemaking to "significant" under EO 12866. OMB's webpage describing the rulemaking and its status at **reginfo.gov** expressly flags EPA's separate, ongoing evaluation of the grain elevator NSPS as a candidate for repeal under EO 13563.

In early September, at the Coalition's request for a status update, EPA staff reported that a final action package had been drafted and was slated for submission to OMB. EPA further indicated in general terms that the package would reject prospective repeal and put the new Subpart DDa into effect, with some changes from the proposed version.

OMB received EPA's final action package for the rulemaking proposal and presumably for the ICR for Subpart DDa on or about October 24, 2016. OIRA has agreed to meet with Coalition representatives to discuss the package on December 14.

**Reasons for Thinking EPA May Have Generated New Data and Analyses**

There are several reasons for thinking that EPA may have generated a significant amount of new data and analyses since the close of the comment period on December 22, 2014.

First, when OMB elevated the status of the rulemaking to "significant" under EO 12866, it triggered requirements to supply OMB with assessments that would most likely have to be far more extensive than the ones EPA included in the July 2014 proposal package. The requirements for those assessments appear in sections 6(a)(3)(B)-(C) of the executive order. Those provisions call, among other things, for an examination of legal authority, an in-depth analysis of the benefits and costs of the rule, an in-depth analysis of reasonably available alternatives, and an explanation of why the planned final action is preferably to those alternatives. By way of example, one of the prongs of the Coalition's comments was that state and local air pollution control programs had grown sufficiently robust over the years so as to be able handle adequately any incidence of growth in the grain elevator industry, making a grain elevator NSPS superfluous. Possibly, EPA has newly generated data and analysis on that particular point, among others.

Second, on the critical question of likely future growth in the grain elevator industry, EPA staff handling the rulemaking probably felt, in the wake of EPA's February 2016 ICR for Subpart DD, a strong need to put into the record as robust a factual and analytical rebuttal as possible so as to counter that ICR's no-growth finding, as well as the Coalition's forceful comments on the proposed rule. This is especially because, as detailed in those comments (see page 13), the ICRs for Subpart DD that were submitted in 2009 and 2012 contained the same no-growth finding. Moreover, the eight prior ICRs variously predicted between 1 and 4 incidents nationally of new Subpart DD applicability over the relevant three-year periods, surely a frequency of no

[6] A copy of the Coalition's letter commenting on the Subpart DD ICR is attached, in part because it contains useful back ground information.

practical health and welfare significance at the national level. Given this strong need for robust rebuttal, it is highly likely that the staff was not willing to rest EPA's case on the record behind the proposal. Instead, odds are high they worked, after the close of the comment period, to generate new, more persuasive data and analysis.

Third, although EPA staff in September reported the status of the final action package in general terms, they did indicate that the package included some adjustments to the requirements for determining compliance with opacity standards, in response to the Coalition's comments. In order to decide whether to make such adjustments and then how best to craft them, the staff likely prepared a technical analysis of the adequacy of the existing scientific support for using opacity standards for fugitive grain dust. They may even have gathered or developed new scientific data. It is difficult to see how they could have arrived at a decision to make adjustments, and then shaped the adjustments, without some sort of technical analysis and the exercise of engineering and legal judgment.

Fourth, the Coalition's comments addressed a wide range of technical issues, in addition to those relating to opacity standards. In the Coalition's view, those comments were so forceful and well-substantiated, and EPA's support in the record so thin or underdeveloped, that EPA staff may well have felt the need to generate new data and analysis on many issues after the close of the comment period.

Finally, it took EPA about 22 months after the close of the comment period to generate a final action package, even though section 111(b) directs the Agency to complete the rulemaking within one year after proposal, *i.e.,* in this case within about seven months after the close of the comment period. In relation to the statute, EPA is 15 months late. These delays open the possibility that EPA actually needed those 22 months, including the 15-month delinquency, in order to generate enough new data and analyses to rebut the Coalition's comments, counteract the finding in the February 2016 ICR, and fulfill the newly-applicable requirements of EO 128666.

**Standards for Deciding Whether to Reopen a Comment Period**

The standards for deciding whether to reopen a comment period, while well-established and relatively clear, nonetheless require an examination of the circumstances and an exercise of judgment.

Section 307(d) of the CAA, 42 U.S.C. 7607(d), which exclusively governs the procedural aspects of CAA rulemakings, expressly states: "All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability." *Id.* 7607(d)(4)(B)(i). Not only does that provision direct EPA to docket centrally-relevant material promptly, it implies along with section 307(d)'s provisions governing agency reconsideration and judicial review that EPA must reopen the comment period in timely fashion to allow comment on the newly-docketed materials. The D.C. Circuit in a seminal decision long ago upheld that reading of section 307(d), saying: "If, however, documents of central importance upon which EPA intended to rely had been entered on the docket too late for any meaningful public comment prior to promulgation, then both the structure and spirit of section 307 would have been violated." *Sierra Club v. Costle,* 657 F.2d 298, 398 (1981), *rev'd on other grounds,* 463 U.S. 680 (1983).

Section 307(d), however, addresses only when EPA ***must*** reopen a comment period. It does not limit when EPA ***may*** reopen. EPA has broad discretion to reopen, even when the new materials in question are not clearly of central importance. Section 6(a)(1) of EO 128666 in effect addresses that situation, providing: "Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process." Thus, as a matter of prudence and fair play, EPA may resolve doubts in favor of reopening a comment period in debatable situations. Further, the spirit of section 6(a)(1) strongly encourages reopening in such situations.

**Conclusion**

Given the history of the instant rulemaking, the odds are high that EPA generated new data and analyses after the close of the comment period. Further, it is quite possible that those materials are of central importance to the final action package, thereby triggering the statutory obligation to reopen the comment period. Unfortunately, the Coalition has no access to that package, or the full underlying record, in order to resolve whether EPA must or should reopen the comment period. Therefore, the Coalition respectfully petitions you to examine the package and its underlying record and to resolve that issue. If you conclude that EPA must or should reopen the comment period, we ask that you reopen it promptly for 60 days, along with a declaration that the reopening re-sets the applicability date to the date of the reopening.

Thank you for your time and attention. If you have any questions, please contact the undersigned at <**jmccluer@ngfa.org**>.

Sincerely,

Jess McCluer
National Grain and Feed Association
Coalition Chair

Attachment

cc (via email): William Schrock (EPA)
Peter Wyckoff (Coalition counsel)