March 30, 2016

Via First-Class Mail, E-Mail and Filing in
E-Docket EPA-HQ-OECA-2011-0239

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Re: EPA's Latest Information Collection Request (ICR) for Its New Source Performance Standard (NSPS) for Grain Elevators, 40 CFR Part 60, Subpart DD, Notice of Which ICR Appears at 81 Fed. Reg. 10241 (Feb. 29, 2016) (EPA Docket No. EPA-HQ-OECA-2011-0239) (OMB Control No. 2060-0082)

Dear Officials:

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 comment on the Information Collection Request

[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.

(ICR) that EPA submitted to OMB pursuant to the Paperwork Reduction Act (PRA) on or about February 29, 2016, for the New Source Performance Standard (NSPS) for Grain Elevators, 40 CFR Part 60, Subpart DD. EPA gave notice of that submission at 81 Fed. Reg. 10241 (Feb. 29, 2016). The Coalition very much appreciates this opportunity to comment.

The regulation pursuant to the Clean Air Act (CAA) of emissions of grain dust from grain elevators is at present the subject of three federal proceedings: (1) the instant ICR, (2) a pending EPA rulemaking to update the grain elevator NSPS, and (3) EPA's evaluation of that NSPS as a candidate for repeal under E.O. 13563.

In each of those proceedings, EPA faces the threshold question of whether it has statutory authority to apply the current NSPS (or an updated NSPS) to new, newly modified or newly reconstructed "affected facilities" at grain elevators. The Coalition has argued to EPA and OMB repeatedly that EPA lacks that authority. The Coalition now re-asserts that view as to the instant ICR and urges OMB to withhold approval.[2] But, more broadly, the Coalition is frustrated by EPA's delay in reaching a final decision on that authority issue in all three proceedings. The Coalition asks OMB not only to withhold approval of the ICR, but also to otherwise encourage EPA to reach a final decision on the authority issue in the near term.

Background

The most immediate from OMB's standpoint of the three proceedings is the instant ICR, which appears on the surface to present merely a routine renewal of a string of OMB approvals stretching back to the early 1980s. EPA promulgated the grain elevator NSPS under section 111(b) of the CAA, 42 U.S.C. 7411(b), in 1978, almost 40 years ago. In the Coalition's view, however, the instant ICR is far from routine because it squarely presents the issue, raised repeatedly by the Coalition over the past four years, of whether and to what extent EPA has authority any longer to regulate emissions of grain dust from grain elevators under CAA section 111(b).[3]

In addition, EPA is in the middle of a rulemaking to update that NSPS. EPA's proposal appeared in the *Federal Register* on July 9, 2014, at 79 Fed. Reg. 39243. The Coalition timely submitted comments, dated December 22, 2014 (copy attached). EPA, however, has yet to take final action, contrary to three provisions of section 111(b) of the CAA.

- One of those provisions requires EPA to reconsider "from time to time" its threshold jurisdictional determination that the source category in question, here grain elevators, presents a risk to human health and welfare that is significant at the national level. The last time EPA reconsidered the national significance of grain elevators was in 1984. Since then, the circumstances bearing on the national significance of grain dust from grain elevators have changed materially. Of central importance is the CAA-funded development over the intervening 30-plus years of robust air pollution control

[2] For the sake of clarity, the Coalition wishes to emphasize that it does not challenge the continued application of the grain elevator NSPS to "affected facilities" on which construction, modification or reconstruction commenced before July 9, 2014 (the date of EPA's start of the pending rulemaking to update that NSPS). Rather, the Coalition is challenging the application of the present NSPs or a revised version to "affected facilities" on which construction, modification or reconstruction commenced on or after that date.

[3] For instance, the Coalition in 2012 challenged EPA's immediately prior ICR on the ground that it failed to contain such a demonstration. A copy of the Coalition's comment letter is also attached herewith.

programs at the state and local level, including regulations that focus specifically on such grain dust. In its December 2014 comments, the Coalition argued that EPA had failed in the proposal to demonstrate that grain elevators are nationally "significant" on a going-forward basis, largely because EPA had failed to take the robust regulatory capacities of state and local agencies sufficiently into account. (See especially pages 14-20 of the attached comment letter.)

- Another provision of CAA section 111(b) requires EPA to "review and, if appropriate, revise" the substantive requirements of a particular NSPS "at least every 8 years". At present, EPA is almost 25 years late in complying with that statutory directive, yet the circumstances surrounding grain elevators have changed materially. Of particular importance are (i) the relationships of cost of control to benefit gained and (ii) the scientific rationality of the opacity standards fashioned in 1978 but still ensconced in the grain elevator NSPS.

- The third statutory provision requires EPA to take final action on an NSPS rulemaking proposal within one year after promulgation. Here, EPA's deadline was mid-July 2015. While a delay of about eight months (so far!) may seem inconsequential on the surface, in fact it matters. The Coalition has been pressing its central point (*i.e.,* that EPA no longer has authority to regulate new, newly modified or newly reconstructed "affected facilities" at grain elevators) to EPA and OMB since 2011, in the wake of the President's issuance of E.O. 13563. Despite the passage of those four-plus years and then EPA's concerted effort in 2014 to rebut that point in its rulemaking proposal, EPA has been unable to make the necessary demonstration of authority. Meanwhile, though, sections 111(a)-(b) of the CAA require EPA, when it takes final action on the proposal, to apply any new applicability and substantive requirements retrospectively to the date of the proposal, *i.e.,* July 9, 2014. This means as a practical matter that grain elevator companies must take into account the potential for such new requirements to spring into effect retrospectively when they undertake new grain storage construction projects during the period between proposal and final action. EPA's ongoing delay in taking final action thus continues, contrary to the will of Congress, a substantial burden on investment in the grain elevator industry.

Finally, the third federal proceeding is EPA's implementation of E.O. 13563, which requires federal agencies to review their rules to weed out or amend those provisions that are "outmoded, ineffective, insufficient, or excessively burdensome." 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011). Due in part to a petition by the Coalition, EPA placed the grain elevator NSPS among a relatively small group of regulations it is targeting for such review on a priority basis. EPA incorporated its review under E.O. 13563 of that NSPS into its July 2014 rulemaking proposal. Thus, despite the passage of about four years since that priority designation, EPA has yet to take final action on the grain elevator NSPS for purposes of E.O. 13563.[4] In its comments on the July 2014 proposal, the Coalition has argued that EPA should implement E.O. 13563 by discontinuing the NSPS on a going-forward basis. The grain elevator NSPS has been rendered obsolete by EPA's success in helping to build robust air pollution control programs at the state and local level. The NSPS is a prime example of the sort of federal regulation that President Obama wanted federal agencies to jettison.

[4] For confirmation of the priority designation and current status, see EPA's *EO 13563 Progress Report, January 2016*, which can be found at <www.epa.gov/laws-regulations/documents-retrospective-review#file-262265>. EPA's reference number is RIN 2060 AP06.

In sum, the signs are that EPA has long assigned the grain elevator NSPS a low priority in its budget allocations. The result as to the pivotal issue of authority is that the Agency is long overdue in complying through final action with section 111(b)'s requirement for periodic review and E.O. 13563's command to weed out obsolete regulations in timely fashion. Moreover, EPA has failed to comply with the CAA's explicit command to take final action on the 2014 proposal within one year, without providing any assurance that it will take such action in the near term. Meanwhile, despite the Coalition's repeated requests over the last four years for final action on the authority issue, the grain elevator industry remains burdened by a federal regulation that the Coalition sees as illegitimate. That view is especially acute because EPA was unable in its 2014 rulemaking proposal to provide a rational basis for concluding that emissions of grain dust from new or newly modified grain elevator equipment present a significant risk to human health and welfare in the context of robust state and local programs aimed at such emissions.

Coalition's Comments on the Instant ICR

When a federal agency, here EPA, submits a final ICR to OMB, it must supply "a record supporting such" ICR. 5 CFR 1320.9 (preface). The only material that the Coalition has been able to find in the relevant e-dockets that supports EPA's final ICR is a *Supporting Statement* which was uploaded in mid-February of this year into the e-docket for the grain elevator NSPS that OMB maintains at <**www.reginfo.gov**>. The Coalition presumes that that *Supporting Statement* constitutes, in EPA's view, the full extent of the record for the instant ICR.

This 2016 *Supporting Statement* addresses the authority issue on page 3 as follows: "In the Administrator's judgment, particulate matter emissions from grain elevators [*sic*] facilities either cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare." The *Statement* contains no elaboration, nor factual support, of any kind. Thus EPA's position on authority is entirely conclusory.

The Coalition has elected not to challenge that position with respect to "affected facilities" on which construction, modification or reconstruction was commenced before July 9, 2014. The Coalition believes that EPA's 2014 rulemaking proposal makes an adequate showing of authority for keeping the NSPS alive as to such past construction projects, as an enforcement backstop.

The Coalition, however, strongly opposes that position with respect to post-July 2014 construction projects at grain elevators. First, contrary to the PRA and OMB's implementing regulations, EPA has failed to supply a rational basis for its position in that respect. The ICR is incomplete, warranting summary rejection by OMB.

Second, EPA cannot rely on the analysis that it offered in the 2014 rulemaking proposal. This is because, as the Coalition showed in its December 2014 comments (pages 14-20), that that analysis failed even to address whether state and local air pollution control programs would operate so as to reduce any health and welfare impacts arising from post-July 2014 construction projects to insignificance levels. The Coalition, in contrast, addressed that issue and provided an expert analysis indicating that those state/local programs would so reduce those impacts.

Finally, the 2016 *Supporting Statement* states on page 2 that: "[N]o additional respondents per year will become subject to these same standard [*sic*]." In other words, EPA predicts that there will be zero incidence during 2016-2019 of a grain elevator "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. In effect, EPA is saying that, whatever level of risk was presented by past construction in the grain elevator industry, the coming three years will experience no additional risk because there will be no additional construction events to which the NSPS might apply. Given that position, it is clear that EPA has

failed to show that information collections as to new construction are necessary and have practically utility for purposes of the PRA. Consequently, OMB lacks a basis for giving the ICR full approval. At a minimum, OMB should withhold approval as to new construction events.

Oddly, EPA in its 2014 rulemaking proposal adopted the opposite view as to the likely incidence of new construction in the grain elevator industry. It concluded: "While it cannot be determined how many new grain elevators will be constructed in the future, or whether capacities at existing facilities will be increased, the projections show that there will be a significant increase in the demand for grain storage. Based on activities of the previous years in the grain elevator industry, *a combination of new elevators and increased capacities for existing elevators is expected.*"[5] 79 Fed. Reg. at 39261 col. 1 (emphasis added).

The Coalition does not know exactly what to make of this discrepancy in EPA's positions. It is clear, however, that it is cause for OMB to make inquiry. And, it reinforces the view that EPA has accorded the grain elevator a low priority, to the detriment of the Coalition's members.

Coalition's Request to OMB for Relief

If OMB's proper focus were only on the instant ICR, the Coalition would request merely that OMB in some form reject the ICR, at least with respect to post-July 2014 construction projects at grain elevators, on the ground the ICR as to such projects lacks an adequate demonstration of necessity and practical utility for PRA purposes.

But there is more at stake. First, the Coalition has demonstrated that the grain elevator NSPS, or even a revised version, is illegitimate as to future construction projects, and EPA in its 2014 rulemaking proposal failed to rebut that showing. Consequently, EPA has a ripe opportunity to implement E.O. 13563 by taking final action on the rulemaking proposal in the near term and building into that final action a repeal of the grain elevator NSPS as to post-July 2014 construction projects. Implementation of E.O. 13563 is well within OMB supervisory jurisdiction, and presumably OMB is interested in finding opportunities for jettisoning truly obsolete regulatory requirements. The grain elevator NSPS to the extent it governs post-July 2014 construction projects is a prime instance of an obsolete requirement.

In addition, OMB has jurisdiction over federal rulemakings sufficient to ensure that federal agencies adhere to "good government" principles. Here, the Coalition has experienced considerable delay in securing final action by EPA on the authority issue and fears there may be more delay, to the detriment of the grain elevator industry. The Coalition respectfully suspects that EPA has assigned the grain elevator rulemaking a low priority. The Coalition does not question EPA's good faith, and understand the budget constraints under which it operates. The Coalition has asked EPA staff for a face-to-face meeting. The staff has said it is willing to meet, but only after it has completed its review of the comments, including the Coalition's comments. That review has now spanned 15 months.

[5] We hasten to add that this 2014 prediction is not the end of a proper analysis. As the Coalition observed in its comments, the next question is whether state/local programs would address adequately whatever health/welfare risks would arise from possible new construction within the industry. EPA failed to take up that question. The Coalition, for its part, supplied an analysis indicating that such programs would reduce any such risks to insignificance.

In light of the above, the Coalition asks OMB not only to reject the ICR, but also to find a way to enable or at least encourage EPA to take final action in the near term on the authority issue.

Closing

Thank you for your time and attention. If you would like to meet with the Coalition, have any questions, or would like more information, please contact me at 202-888-1102 or jmccluer@ngfa.org.

Sincerely,

Jess McCluer
National Grain and Feed Association
Coalition Chair

Enclosures (Coalition's letter to EPA's consultant ERG dated September 3, 2015, including (1) the Coalition's December 22, 2014 letter commenting on EPA's Subpart DD rulemaking proposal of July 2014 and (2) the Coalition's April 6, 2012 letter commenting on EPA's 2012 Subpart DD ICR)

cc (via email only): Patrick Yellin (OECA)
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