July 26, 2012

EPA Docket Center
Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460-0001

Attn: Docket No. EPA-HQ-OGC-2012-0474

Re: Comments of the Associations Regarding Proposed Consent Decree for National Ambient Air Quality Standards for Particulate Matter, Docket ID No. EPA-HQ-OGC-2012-0474.

To Whom It May Concern:

The National Association of Manufacturers, American Chemistry Council, American Forest & Paper Association, American Foundry Society, American Iron and Steel Institute, American Wood Council, Brick Industry Association, Corn Refiners Association, Council of Industrial Boiler Owners, Industrial Energy Consumers of America, National Federation of Independent Business, National Mining Association, National Oilseed Processors Association, North American Die Casting Association, and The Fertilizer Institute (collectively, “the Associations”) submit these comments on the proposed consent decree between state and environmental plaintiffs and the U.S. Environmental Protection Agency (“EPA” or the “Agency”), notice of which the EPA provided in the Federal Register on June 26, 2012, pursuant to section 113(g) of the Clean Air Act (“CAA or Act”), 42 U.S.C. § 7413(g). For the reasons below, the
Associations urge the EPA to withdraw and withhold its consent to the proposed consent decree.

In the proposed consent decree, the parties purport to settle consolidated United States District Court for the District of Columbia cases Nos. 12-00243 and 12-00531 in exchange for a commitment by the EPA to sign, by December 14, 2012, a final rulemaking concluding its review of the National Ambient Air Quality Standards for particulate matter (“PM NAAQS”), and promulgating revisions to the NAAQS as the EPA may determine appropriate. Notice of Proposed Consent Decree, 77 Fed. Reg. 38060 (June 26, 2012).

The consent decree would dramatically and unrealistically shorten the time allowed for the EPA to consider and evaluate public comments on the proposed PM NAAQS revisions, in comparison to the amount of time the EPA historically has taken to consider the voluminous and technically detailed public comments on NAAQS rulemakings as well as the amount of time the EPA has said is needed on this particular rule making. As a result, the consent decree saddles the EPA with an infeasible regulatory deadline, and gives it a strong incentive to provide only a passing and perfunctory review of comments that do not support the EPA’s proposed modifications to the PM NAAQS.

In addition, the EPA is required to complete extensive work and analysis for each NAAQS revision process consistent with both the Clean Air Act and the precedents of the U.S. Supreme Court and the D.C. Circuit. A schedule for the EPA to review comments and sign a final rulemaking that is both truncated and preordained even before the EPA sees the volume or type of comments it will receive, is a recipe for a rulemaking process that the U.S. Court of Appeals will find inadequate. The EPA should not agree to a consent order that sows the seeds of reversal by the U.S. Court of Appeals and which is unrealistic given the scope of this rulemaking and other regulatory obligations. The Agency should withdraw from the consent decree because consenting to it would be “inappropriate, improper, inadequate, or inconsistent” with the Clean Air Act.

A. Summary

The National Association of Manufacturers (“NAM”) is the largest industrial trade organization in the United States, representing over 13,000 small, medium, and large manufacturers in all 50 states. The NAM is the leading voice in Washington, D.C. for the manufacturing economy, which provides millions of high-wage jobs in the U.S. and generates more than $1.7 trillion in GDP. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The American Chemistry Council (“ACC”) is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. The business of chemistry is a $720 billion enterprise and a key element of the nation’s economy.

The American Forest & Paper Association (“AF&PA”) is the national trade association of the paper and wood products industry, which accounts for approximately 5 percent of the total U.S. manufacturing GDP. The industry makes products essential for everyday life from renewable and recyclable resources, producing about $190 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately $50 billion.
The **American Foundry Society** ("AFS") is the major trade and technical association for the North American metalcasting industry, with over 7,000 members, representing 2,100 metalcasters in America. U.S. foundries produce a wide range of metal castings and provide employment for over 200,000 workers and support thousands of other jobs indirectly. Ninety percent of all manufactured goods and capital equipment incorporate engineered castings into their makeup.

The **American Iron and Steel Institute** ("AISI") serves as the voice of the North American steel industry and represents member companies accounting for over three quarters of U.S. steelmaking capacity with facilities located in forty-three states.

The **American Wood Council** ("AWC") is the voice of North American traditional and engineered wood products, representing over 60% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs approximately one-third of a million men and women in well-paying jobs.

The **Brick Industry Association** ("BIA"), founded in 1934, is the recognized national authority on clay brick manufacturing and construction, representing approximately 250 manufacturers, distributors, and suppliers that historically provide jobs for 200,000 Americans in 45 states.

The **Corn Refiners Association** ("CRA") is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

The **Council of Industrial Boiler Owners** ("CIBO") is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and university affiliates with members representing 20 major industrial sectors. CIBO was formed in 1978 to promote the exchange of information within the industry and between industry and government relating to energy and environmental equipment, technology, operations, policies, law and regulations affecting industrial boilers.

The **Industrial Energy Consumers of America** ("IECA") is a nonpartisan association of leading manufacturing companies with $700 billion in annual sales and with more than 650,000 employees nationwide. It is an organization created to promote the interests of manufacturing companies through research, advocacy, and collaboration for which the availability, use and cost of energy, power or feedstock play a significant role in their ability to compete in domestic and world markets.

The **National Federation of Independent Business** ("NFIB") is the nation’s leading small-business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent-business owners who are located throughout the United States.
The National Mining Association ("NMA") is a national trade association of mining and mineral processing companies whose membership includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

The National Oilseed Processors Association ("NOPA") is a national trade association comprised of 12 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA's 12 member companies process more than 1.6 billion bushels of oilseeds annually at 61 plants located throughout the country, including 56 plants which process soybeans.

The North American Die Casting Association ("NADCA") is the sole trade and technical association of the die casting industry representing members from over 350 companies located in every geographic region of the U.S. Die casters manufacture a wide range of non-ferrous castings: from automobile engine and transmission parts to intricate components for computers and medical devices. In the U.S., die casters contribute over $7 billion to the nation's economy annually and provide over 50,000 jobs directly and indirectly.

The Fertilizer Institute ("TFI") represents the nation's fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. Its membership is served by a full-time Washington, D.C. staff in various legislative, educational and technical areas as well as with information and public relations programs.

Changes to the PM NAAQS under the Clean Air Act will directly impact the operation of the Associations' members' facilities, plans for future growth and expansions, and the ability of our members to create new American jobs.

The Associations' members and the American economy generally, are attempting to recover from the steepest economic downturn since the 1930s, and to bring back the 2.2 million high-wage jobs lost during the recent recession. Federal policy makers should seek to create conditions that will lead to economic expansion, instead of moving forward with regulatory programs that will be an enormous drag on American manufacturing, economic growth, and job creation.

The proposed consent decree should be rejected because the EPA should not seek to make up for earlier delays in completing its 5-year review of the PM NAAQS by now agreeing to a truncated and impractical time period for consideration of public comments. Agreeing to a timeline for consideration of public comments that is likely to lead to the Agency merely giving a passing glance to anticipated detailed public comments and prejudging the outcome of the notice and comment process is simply not a proper way of remedying whatever delays may have occurred in the past.

The process of reviewing and revising any NAAQS, and particularly the PM NAAQS, is a highly technical and complex scientific and policy matter. Rather than take a reasoned approach providing the needed time for proper consideration of public comments, the proposed consent decree dictates a schedule that will prevent reasoned evaluation of public comments and deliberation within the EPA and with its other colleagues in the Executive Branch on an appropriate scientific and policy outcome. Instead of agreeing to a deadline that the Agency cannot feasibly meet, the EPA should carefully consider the expected very large number of comments (likely in the thousands or tens of thousands) on the proposed PM NAAQS.
The proposed consent decree requires the EPA to sign a notice of final rulemaking by December 14, 2012. As the EPA itself repeatedly acknowledged during the ongoing litigation, such a short time frame is impracticable and unrealistic, and it is likely impossible for the EPA to fairly and adequately consider public comments, conduct its own analysis, and develop final rulemaking documents required by law on the timeline set forth in the proposed consent decree. The EPA Assistant Administrator for Air and Radiation, Regina McCarthy, provided a detailed declaration outlining how a final rulemaking on August 15, 2013 was the “most expeditious schedule” the EPA could possibly meet. Am. Lung Ass’n v. EPA, Case Nos. 1:12-cv-00243, 1:12-cv-00531, Decl. of Regina McCarthy (D.D.C. May 4, 2012) (“McCarthy Decl.”). As the lead
air official for the EPA, Assistant Administrator McCarthy clearly has every incentive to aggressively push forward with new air quality regulations and possesses the most detailed on-the-ground knowledge about the time required for the EPA to perform its Clean Air Act rulemaking activities. The consent decree thus flatly contradicts the EPA’s own considered and sworn statements about what is necessary in order to complete a fair, adequate, and legally compliant rulemaking process, demonstrating the arbitrariness of the deadlines proposed in the decree.

The EPA has provided numerous reasons why the rulemaking process needs to be more lengthy than what it reflected in the proposed consent decree. Due to increased complexity and depth, the EPA expects “more time and effort are needed to interpret and apply the science . . . compared to the last review, not less.” Id. at 14; see also Am. Lung Ass’n v. EPA, Defs.’ Memo. In Opposition to Pl. ALA’s Application for Preliminary and Permanent Injunction and in Support of Cross-Mot. for Summ. Judg. as to Remedy at 2, 17 (D.D.C. May 4, 2012) (“Defs.’ Memo”) (“complexity of the issues EPA must decide[ ] have expanded, not narrowed”); id. (“No less time or effort will be needed to address comments in this rulemaking.”). The EPA estimated that proper consideration would take “approximately one year . . . for the present PM NAAQS rulemaking.” Id. at 12.

Administrator McCarthy’s declaration emphasizes that the current review involves more standards than past PM NAAQS reviews. Unlike the past review, the EPA is proposing a “separate and distinct” PM_{2.5} secondary standard, requiring a different indicator, different form, different averaging time and different level. McCarthy Decl. at 15-16; see also Defs.’ Memo at 18 (“clearly increas[ing] the range and complexity of issues to address in the current review of the secondary standard, compared to the last review”).

Additionally, the EPA faces a “very large body of new science” that was developed since the last review. Id. And comments will cite “numerous new studies.” Id. at 15. After receiving tens of thousands of separate comments, the EPA must conduct a provisional assessment of the newly-cited studies to ensure the final rule “accurately reflect[s] the latest scientific knowledge.” 42 U.S.C. § 7408(a)(2); see also National Ambient Air Quality Standards for Particulate Matter, Final Rule, 71 Fed. Reg. 61144, 61148 (Oct. 17, 2006) (“2006 PM NAAQS Final Rule”) (finding provisional assessment “provide[d] important insights on the relationship between PM exposure and health effects of PM”). The EPA also expects to expend “more time and effort” than the last review to prepare the provisional assessment. Defs.’ Memo at 18.

Indeed, the heavy workload and time that will be required already led the EPA to push back what it called the “most expeditious schedule that EPA reasonably can meet” from an expected final rulemaking in June 2013 to August 15, 2013. Am. Lung Ass’n v. EPA, Defs.’ Statement of Undisputed Facts ¶ 4 (D.D.C. May 4, 2012); Defs.’ Memo at 2, 19; McCarthy Decl. at 17, 16.

The Office of Air and Radiation must also juggle this rulemaking with several other “major rulemakings involving air pollution requirements for a wide variety of stationary and mobile sources, many with court-ordered or settlement agreement deadlines.” McCarthy Decl. at 16. Indeed, the Office currently has seven other open rulemakings in which comment periods close in the next few months. See Air Docket Comment Period Closings, available at http://www.epa.gov/air/docket/comment.html (last visited July 26, 2012).

In short, the EPA has persuasively made the case for why the timelines in the proposed consent decree are improvident, and thus why the consent decree should not receive the EPA’s
consent and agreement. To engage in a schedule that the Agency itself has said it cannot meet in a way that gives fully and fair vetting to these complex issues is the essence of arbitrary and capricious government action.

C. The Deadline In The Proposed Consent Decree Would Deny The Public A Real Opportunity To Have Their Views And Data Fairly Considered

The consent decree assumes, unreasonably, that the EPA can perform all of its responsibilities in an improperly truncated period of time. The public comment period on the proposed final rule ends August 31, 2012, and the consent decree would give EPA only about 100 days to review and evaluate all of the comments, review all new scientific and technical data discussed in the comments, write a notice of final rulemaking explaining and justifying all its decisions in the final rulemaking, respond to relevant comments and arguments, write a response to comments document, and coordinate as appropriate with the Office of Information and Regulatory Affairs in order to obtain clearance under the appropriate Executive Orders to issue the final regulations.

Under any perspective, this is simply not enough time for the EPA to do its work fairly, adequately, and in compliance with law. This is demonstrated, first, by the fact that it is dramatically shorter than the time the EPA has taken to evaluate comments and prepare a notice of final rulemaking in any rulemaking since 1971 that has set new or revised PM or ozone NAAQS. Indeed, the mere five and a half months from proposal to final rule is “virtually unprecedented for a NAAQS rulemaking.” Am. Lung Ass’n v. EPA, Defs.’ Reply at 2 (D.D.C. May 16, 2012) (“Defs.’ Reply”). In most recent NAAQS reviews, the EPA needed 8-9 months between proposal and final rule. Id. at 7-8. During the 2006 PM NAAQS review—notably less complicated than the current one—the EPA took nine months between the proposal and final rule. Id. at 7. The EPA spent 183, 150 and 756 days just responding to public comments on the last three PM NAAQS reviews; yet here, only expects to spend about 100 days on these tasks. The Associations know of no compelling reason for the EPA to agree to a virtually unprecedented and dramatically truncated period of time for the review and evaluation of public comments, and the preparation of a final rulemaking. There is no reason to think the current rulemaking will draw fewer comments, be less complicated, or involve easier technical or policy judgments than required with the previous NAAQS processes.

Moreover, past PM NAAQS reviews have involved exceedingly large numbers of public comments. For example, during the 2006 review the EPA received more than 120,000 public comments. 2006 PM NAAQS Final Rule at 61148; McCarthy Decl. at 13. Leaving aside the time needed to actually incorporate these into the final rule, the process of merely reading and drafting the statutorily-required “response to each of the significant comments, criticisms, and

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1 The EPA took only 45 days from the close of the comment period to issuance of the final PM and ozone NAAQS rules in 1971, but the scope, complexity and content of Clean Air Act rulemaking in 1971 bears virtually no resemblance to those rulemakings today, as a result of obligations imposed on EPA by the Act itself and by judicial decisions concerning the NAAQS.


Chopping eight months off the most expeditious timetable the EPA believed was attainable, see McCarthy Decl. at 17, risks enabling erroneous decisions that do not “accurately reflect the latest scientific knowledge.” 42 U.S.C. § 7408(a)(2). The likelihood that the EPA will inadequately consider and evaluate the comments it receives is high—particularly given the Agency is likely to receive more than 100,000 public comments—if the EPA attempts to respond on this abbreviated timeline. Given barely 100 days, the EPA would be reviewing over 1,000 comments and drafting 4-5 pages of responses per day, every day, including weekends. Such a pace is patently unrealistic and defeats the very purpose of notice-and-comment rulemaking to ensure that “public comment will be considered by an agency” before it reaches its decision, and to allow “the agency [to] alter its action in light of those comments.” Hall v. U.S. EPA, 273 F.3d 1146, 1163 (9th Cir. 2001).

An expedited review also increases the likelihood that the D.C. Circuit will find the final rulemaking to be inadequate. It is a virtual certainty—regardless what standards are set forth in the final regulations issued by the EPA—that the PM NAAQS regulations will be challenged in the D.C. Circuit as has been the experience in the past. The short deadline not only increases the chance that the standards derived would not “accurately reflect the latest scientific knowledge,” 42 U.S.C. § 7408(a)(2), but also that the D.C. Circuit will find flaws in perfunctory analysis and hurried process of writing the final rule documents. Agency action will generally be found arbitrary and capricious when the Agency has: (1) relied on factors that Congress did not intend it to consider; (2) failed to consider an important aspect of the issue at hand; or (3) offered an explanation for its decision that runs counter to the evidence before it. Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962) (emphasis added). The EPA’s own sworn statements make clear the Agency cannot actually consider all comments in the proposed time table. Following the proposed schedule means rolling the dice and hoping the Agency does not miss “an important aspect of the issue” contained in an overlooked public comment.

Given the EPA anticipates “voluminous” and “detailed” public comments, heightened complexity, and an “enormous” amount of new science to be considered, the Agency cannot adequately respond and incorporate all public comments in just over 100 days. McCarthy Decl. at 18;Defs.’ Reply at 5. The shortest PM NAAQS review since 1971 still required 150 days between the close of the comment period and the final rulemaking. 62 Fed. Reg. 38652 (July 18, 1997); see infra n.2. If the EPA does not withdraw the consent decree, the Agency places itself at odds with both history and its own sworn statements concerning its ability to process, review, and respond to the multitude of public comments and new science necessary to ensure a proper rulemaking.

**D. The Proposed Decree Goes Beyond What The Law Requires And Improperly Forecloses Options For A Final PM NAAQS Rulemaking**

The proposed decree obligates the EPA to multiple commitments not required by the Clean Air Act or any other law. The EPA need not tie its hands, nor should the EPA give preferential treatment to plaintiffs in the ongoing rulemaking process to the detriment of other stakeholders.

The expedited Federal Register notice is not required by law. The consent decree commits the EPA to seeking “expedited publication in the Federal Register,” including expedited
delivery of the signed final rule. Consent Decree ¶ 4. No provision in the Clean Air Act obligates
the EPA to such a rushed process. The Act requires all air quality criteria to “be announced in
the Federal Register,” 42 U.S.C. § 7408(d), and the EPA must “by regulation promulgate”
NAAQS “after a reasonable time for interested persons to submit written comments,” 42 U.S.C.
§ 7409(a)(1)(B). But nowhere is expedited notice in the Federal Register required.

The consent decree’s mandate that the EPA provide a signed copy of the notice of final
rulemaking to plaintiffs within three days of signing also is not required by law. Consent Decree
¶ 4; see CAA, 42 U.S.C. § 7401 et seq. Providing preferential treatment to environmental and
state plaintiffs over the Associations and other stakeholders is contrary to an open and
transparent rulemaking. The plaintiffs are entitled only to the same notice of the final rulemaking
as the public generally.

The EPA need not commit itself to any provision not required by law. The underlying
lawsuit concerns the five-year review deadline. Negotiated compromises concerning how long a
good faith effort to complete the rulemaking will take cannot enable the EPA to bind itself on
other matters while avoiding the normal rulemaking process and public input.

Moreover, the fifth paragraph of the consent decree, which would obligate the EPA to
make a revised NAAQS effective as soon as is legally permissible after it is published in the
Federal Register, is inconsistent with what the EPA itself has stated is its anticipated approach
for implementing a new PM$_{2.5}$ NAAQS. The agency expects to “grandfather” air permit
applications from compliance with any new PM NAAQS. See 77 Fed. Reg. 38890, 39022 (June
29, 2012). One means of grandfathering could be a delayed NAAQS effective date. By entering
into the consent decree, the EPA would foreclose final rule options on an issue that the notice of
proposed rulemaking specifically addresses. The EPA’s commitment not to delay a Clean Air
Act rule’s effective date appears unprecedented. For example, the EPA’s consent decree
setting deadlines to designate ozone nonattainment areas had no such provision. See Consent

E. Conclusion

The proposed consent decree unreasonably commits the EPA to deadlines that are
inconsistent with history, reason, and what will be necessary to produce a fair and legally sound
final rulemaking. Moreover, it contains provisions not mandated by law and to which the
plaintiffs have no entitlement. Because the schedule in the proposed consent decree “is simply
too compressed at this stage to afford any reasonable possibility of compliance,” Sierra Club v.
Johnson, 444 F. Supp. 2d 46, 58-59 (D.D.C. 2006), the EPA must withdraw the agreement as
“improper” and “inconsistent” with the Clean Air Act’s requirement of deliberative rulemaking, 42
U.S.C. § 7413(g). Rather than commit to promulgate standards under an unworkable deadline,
the EPA instead should continue to work toward the “most expeditious schedule that EPA
reasonably can meet,” culminating with a final rulemaking on August 15, 2013. McCarthy Decl.
at 16.

The Associations thank the EPA for the opportunity to comment on the consent decree
and appreciate the consideration given to our industries.

Sincerely,

National Association of Manufacturers
American Chemistry Council
American Forest & Paper Association
American Foundry Society
American Iron and Steel Institute
American Wood Council
Brick Industry Association
Corn Refiners Association
Council of Industrial Boiler Owners
Industrial Energy Consumers of America,
National Federation of Independent Business
National Mining Association
National Oilseed Processors Association
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The Fertilizer Institute