



DEPARTMENT OF AIR QUALITY & ENVIRONMENTAL MANAGEMENT

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Lewis Wallenmeyer Director · Tina Gingras Assistant Director

June 30, 2011

Ms. Gina McCarthy, Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20760

Emailed: EEGuidanceComments@epa.gov

RE: MAY 2, 2011 DRAFT GUIDANCE ON THE PREPARATION OF DEMONSTRATIONS IN SUPPORT OF REQUEST TO EXCLUDE AMBIENT AIR QUALITY DATA AFFECTED BY HIGH WINDS

Dear Ms McCarthy:

For your review, please find enclosed comments from Clark County, Nevada, Department of Air Quality and Environmental Management (DAQEM) regarding EPA's Guidance on the Preparation of Demonstrations in Support of Requests to Exclude Ambient Air Quality Data Affected by High Winds under the Exceptional Events Rule, Draft Document, dated May 2, 2011.

DAQEM appreciates this opportunity to provide comments on this significant issue.

If you have questions or need additional information, please contact Dennis Ransel at 702-455-1660 or FAX (702) 383-9994.

Sincerely,

A handwritten signature in black ink that reads "Tina Gingras".

Tina Gingras
Assistant Director

Enclosure

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Enclosure

COMMENTS FROM CLARK COUNTY, NEVADA, DEPARTMENT OF AIR QUALITY AND ENVIRONMENTAL MANAGEMENT

Guidance on the Preparation of Demonstrations in Support of Request to Exclude Ambient Air Quality Data Affected by High Winds under the Exceptional Events Rule Draft Document Dated May 2, 2011

Comment 1: Guiding Principles

In the highlights section of *Guidance on the Preparation of Demonstrations in Support of Request to Exclude Ambient Air Quality Data Affected by High Winds under the Exceptional Events Rule* (hereinafter referenced as “draft guidance” or “draft guidance document”), EPA established guiding principles on which to base the document as set forth below:

1. States should not be held accountable for exceedances due to events that were beyond their control at the time of the event;
2. It is desirable to implement reasonable controls to protect public health; and
3. Clear expectations will enable EPA and other air agencies to better manage resources related to the exceptional events process.

Clark County believes that these guiding principles are appropriate for this draft guidance and commends EPA for its development. However, Clark County believes that guiding principles can be further strengthened by inserting a fourth principle:

It is desirable to implement a reasonable and cost-effective process for the development and EPA review of state exceptional events.

This would allow both states and EPA to efficiently use scarce resources during this period of economic austerity.

Comment 2: Control Measure Stringency to Establish an Event was Not Reasonably Controllable or Preventable

The core purpose of the Exceptional Events Rule (EER) and the first guiding principle of the draft guidance is that states should not be held accountable for exceedances due to events that were beyond their control at the time of the event. Section 50.1(j) of the rule defines an exceptional event as an event that is “not reasonably controllable or preventable.”

The EER preamble states that for recurring exceptional events, anthropogenic sources contributing to the exceptional event should be subject to “all reasonably available reasonable and appropriate measures” (sic) (72 Fed. Reg. 13560, 13566 (Mar. 22, 2007)). The language of the statute (Subpart Y-Mitigation Requirements, 40 CFR § 51.930) is also vague, but not inconsistent with the language in the preamble. 40 CFR § 51.930(a) requires states to take appropriate and reasonable action to protect public health. 40 CFR § 51.930(a)(3) requires states to provide for implementation of appropriate measures to protect public health from exceedances or violations of ambient air quality standards caused by exceptional events.

Enclosure

The second guiding principle of the draft guidance states that it is desirable to implement *reasonable controls* to protect public health (draft guidance, p 1, emphasis added). The use of the term “reasonably available” clearly suggests that for attainment, unclassifiable, or moderate nonattainment areas, a state would apply Reasonably Available Control Measures (RACM) to anthropogenic sources in areas subject to high-wind events. For serious nonattainment areas, BACM or Most Stringent Measures (MSM) is “appropriate and reasonable” where State Implementation Plans (SIP) implement those respective levels of control.

Section 3.1 et. seq. of the draft guidance, which establishes criteria for when an event is not reasonably controllable or preventable, sets forth de facto requirements which significantly exceed those set forth in the EER and which supersede the § 110 planning provisions of the Clean Air Act. In § 3.1.2 of the draft guidance EPA states:

If a set of control measures could reasonably have been in place for contributing sources at the time of the event, then they must have been in place for the event to qualify as an exceptional event under the EER. (p 12)

This is one of several provisions in the guidance which exceed the scope of the EER and effectively turns the draft guidance document into a regulation. In § 3.1.2 on Page 14 of the draft guidance, EPA states that “. . . it could be reasonable to require controls more stringent than BACM or RACM, particularly in areas with recurring exceedances.” EPA’s expectation that states would need controls “more stringent than BACM” to establish that an event was “not reasonably controllable or preventable” is illogical and is not supported by the language in the regulation. This expectation would also place extreme financial burdens on both air regulatory agencies and stakeholders that likely cannot be supported in the current economy. Finally, such stringent levels of controls would serve no purpose in that the events are by definition uncontrollable and exceedances of the NAAQS would occur regardless of the stringency of controls.

The controls analysis discussions under § 3.1.5.1 and § 3.1.5.2 of the draft guidance indicates that the control analysis must include a discussion on how controls previously recommended by EPA have been addressed. In § 3.1.6, EPA suggests that states dealing with recurring high-wind events develop a high-wind action plan that would “. . . identify mutually agreed upon reasonable controls that a state could implement for subsequent high wind events.” Although not expressly stated, the implication of this section is that states having recurring high-wind events that do not submit and obtain approval of high-wind action plans would not receive EPA concurrence for exclusion of future high-wind events. As set forth on page 19 of the draft guidance, EPA will evaluate the long-term adequacy of the high-wind action plan and the “reasonableness” of the plan’s control measures as follows:

Once the state has begun implementation of the measures approved by EPA and EPA has formally recognized implementation of the High Wind Action Plan, EPA would consider *the controls to be reasonable as long as events do not recur.* (emphasis added)

This criterion is apparently based on the flawed assumption that if states and regulated entities will invest enough financial resources and effort on controls, then uncontrollable high-wind

Enclosure

driven events can be controlled. EPA has not provided any documentation to support the concept of high-wind driven events controllability and it is the experience of Clark County that such events are not controllable with any measures that could be implemented. The EER is predicated in part on the assumption that such events are in fact not controllable. Moreover, EPA has not provided documentation to support the related concept that very stringent controls may significantly reduce health impacts of uncontrollable high-wind events.

Under § 3.1.6 of the draft guidance, it further states:

EPA suggests that states use the Annual Monitoring Network Plan process to indicate that high wind dust events have not recurred and that the current High Wind Action Plan remains in effect. It is the state's obligation to notify EPA if events recur so that EPA and the state can discuss possible revisions to the High Wind Action Plan. *If events recur, EPA will need to re-approve the High Wind Action Plan regardless of whether it is revised or remains as-is.* (emphasis added)

The Clean Air Act § 110 provides a clear process that EPA must follow when requiring an increase in stringency of controls on significant sources of air pollution, including the requirement that EPA issue a SIP call, give public notice, provide the public an opportunity to comment, and respond to public comments. EPA's intent to circumvent § 110 of the Act under cover of the draft guidance is set forth in § 3.1.2 in footnote 16 on Page 13:

Legally, EPA believes the event-relevant measures that have already been included in the approved SIP as RACM or BACM to be an essential part of the set of controls that need to be in place for an event to be considered "not reasonably controllable or preventable," *but they may not be sufficient by themselves particularly if the SIP has not been recently reviewed or revised.* (emphasis added)

Clark County believes that control measures in an approved SIP should always meet the "...reasonable and appropriate measures (72 Fed. Reg. 13560, 13566 (Mar. 22, 2007))" criteria of the EER. Clark County believes that any action by EPA to require revisions to a state's SIP control measures without following the Clean Air Act § 110 processes exceeds EPA's authority under the Act and falls outside the purview of the EER.

Clark County therefore encourages EPA to revise the draft guidance to indicate that where states are not under the provisions of an attainment/maintenance SIP, RACM level controls on affected anthropogenic sources will comply with the reasonable and appropriate measures requirements of the EER. Where the state falls under the provisions of an attainment or maintenance SIP, the approved control measures in the SIP will meet the reasonable and appropriate measures requirements of the EER.

Comment 3: No Event But For Analysis

Under § 3.6 the draft guidance EPA includes the following stipulation: "For most cases, EPA expects a *quantitative* NEBF analysis" (emphasis added). This de facto requirement exceeds provisions of the EER and conflicts with the EER preamble, which states in part:

Enclosure

The EPA will consider such [quantitative] analyses as part of the weight of evidence to judge “but-for,” but will not make quantitative adjustments to reported measured values because EPA *does not believe sufficient quantitative methods are available at this time.* (emphasis added) (72 Fed. Reg. 13560, 13572 (Mar. 22, 2007))

Clark County agrees that quantitative methods are not available to adequately develop a quantitative “but for” analysis at this time. Moreover, § 6.2.7.2 (Quantitative NEBF) of the draft guidance further reinforces the fact that acceptable quantitative methods remain unavailable by indicating that no examples of such an analysis currently exist. Clark County encourages EPA to remove this de facto requirement from the draft guidance. We also note that even if accepted quantitative methods were available for establishing the “but for” criteria, these methods would likely be prohibitive in terms of the staff time, field studies, and expert consulting contracts required to complete such an analysis. Clark County believes that the financial resources required for conducting a quantitative analysis will better protect the public health if spent on other departmental programs.

Comment 4: Analysis of Historical Fluctuations

Clark County does not believe that an analysis of historical fluctuations adds value to exceptional event documentation and in fact may be misleading to reviewers and the public. Clark County believes that the issues of historical high-pollutant concentrations are more appropriately addressed in weight-of-evidence discussions germane to other elements of the documentation rather than through a separate rigid analysis of historical fluctuations. Historical high-pollutant concentrations may have occurred for various reasons. For example, previously recorded high concentrations may have occurred due to exceptional events for which the state submitted documentation, but which the regional office took no action. In case of point, EPA Region 9 announced it will not review any previously submitted high-wind event documentation.¹ In other instances, states may not have submitted documentation of exceptional events because of EPA inaction on previous submittals. In other cases, a state may have had anthropogenic emissions sources, which have historically not been properly controlled, but for which controls were properly implemented prior to and during time of the exceptional event at hand.

Given the questionable value of historical fluctuation analyses and the EER requirement that states provide such analyses as part of the exceptional event documentation, Clark County recommends that EPA revise the draft guidance to reduce the time period and number of data points for which the analysis must cover. The standard period used to calculate the design value for an attainment SIP is three years, and Clark County believes that this is also the appropriate time period for an historical analysis. Clark County notes that many states use one-in-three or one-in-six day sampling for PM₁₀, which in many cases will result in fewer than 300 data points during the three-year period. Clark County does not support the requirement for a minimum number of data points in a historical fluctuation analysis as set forth in the draft guidance.

Comment 5: Checklist for High Wind Dust Exceptional Events Demonstration Submission
Page 60 of the draft guidance, which contains the checklist which must be submitted with each exceptional events demonstration, includes the following statement:

¹ Region 9 workshop held in San Francisco on June 23, 2011.

Enclosure

Note that completion of this checklist does not indicate that the event in question is concurrable nor does this reflect the entire universe of information that EPA may require to satisfy the demonstration requirements. This checklist represents the minimum information that must be included in a package and serves to identify packages that are incomplete rather than show that a package is complete. In some cases (e.g., very high wind speeds) not all parameters under each criterion will need to be included. EPA will not review incomplete packages; failure to submit a complete package prior to regulatory decision will result in non-concurred events.

This statement suggests that if all of the items in the checklist are not included in the demonstration package, EPA will not review the package, leading to an automatic non-concurrence. Clark County requests refinement of the checklist and revision of the prefacing statement to clarify that where elements on the checklist are not required due to very high winds or other factors, EPA will review the demonstration documentation.