

June 30, 2011

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Gina McCarthy
Assistant Administrator
U.S. Environmental Protection Agency
Office of Air and Radiation
1200 Pennsylvania Avenue, NW
Washington, DC 20760

Dear Ms. McCarthy:

On behalf of the National Association of Clean Air Agencies (NACAA), we appreciate the opportunity to provide comments on the U.S. Environmental Protection Agency's (EPA's) draft materials, released May 2, 2011, to improve implementation of the federal Exceptional Events Rule (EER), particularly the draft *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*.

Generally speaking, the purpose of the EER is to ensure that monitored air quality data over which a state or local agency has little or no control (i.e., data related to "exceptional events") do not bias regulatory decisions under the Clean Air Act and to allow states and localities to exclude data affected by exceptional events when regulatory decisions are made. The draft guidance recently released by EPA for review demonstrates clearly that the agency has put forth a concerted effort to examine methods for streamlining the decision-making process and to clarify EPA's expectations relative to the technical demonstrations states and localities should provide when requesting that data related to high wind events be excluded.

We greatly appreciate EPA's efforts in this regard and believe that the draft demonstrates movement in the right direction. However, there are several key policy issues that are of considerable concern. We highlight these below.

First, NACAA is concerned that under the draft guidance, if specific actions are not taken or criteria are not met by states and localities, the request that data be excluded may be denied. Such mandatory requirements appear to cross the line between guidance and regulation. Where requirements are to be established, rulemaking and not guidance is the appropriate administrative process.

A second issue of concern relates to the "but for" test – that is, the requirement that in order for data to be excluded, a state or locality must demonstrate that "there would have been no exceedance or violation but for the event." The requirement for this test is included in EPA's EER along with a commitment by EPA, in the rule's preamble, to publish a proposed rule that would establish the parameters for making a demonstration once the agency

“determine[s] that techniques for adjustment of air quality data are sufficiently well demonstrated for use in exceptional events determinations.” That proposal has not yet materialized, nor has the agency provided a clear explanation of how to make such a demonstration. Therefore, NACAA believes that until such time as EPA is able to identify and promulgate technically feasible techniques for “backing out” that portion of the monitored data determined to have resulted from the exceptional event, EPA should revise the EER to remove the “but for” test.

A third key policy concern relates to the level of expertise and resources required for a state or locality to make the showings necessary for data to be excluded. Various requirements in the draft guidance and related documents, as well as the examples EPA provides on its website, assume a level of expertise and resources that some states and localities do not have. Accordingly, it is extremely important for EPA to distinguish between the more straight-forward cases and the more complex and to communicate clearly to states and localities what their exceptional events demonstration package must include in order for a particular request to be approved, thus allowing them to determine whether and how they will proceed.

Finally, we are concerned that there is no avenue available to states and localities that wish to challenge an EPA denial of an exceptional events request or a failure by EPA to respond to a request (which equates to a denial of a request for an exclusion in that, absent a decision by EPA, the data will remain in the data set). While we appreciate and value EPA Regional Office staff knowledge and understanding of local conditions, we are keenly aware of the potential for inconsistency between Regions in how they evaluate and act upon similar events and circumstances. Therefore, we recommend that EPA establish a process for dispute resolution and would welcome the opportunity to work with you to design such a process.

We would also like to add a word about another issue of great importance to NACAA members, also related to exceptional events – that of fires. We anxiously await the opportunity to review and comment on draft guidance on exceptional events affected by fires and the fire policy itself, which is long overdue, and look forward to having the opportunity to work collaboratively with EPA on this very important issue. In addition, once the fire policy is issued, we request a chance to review again the draft *Exceptional Events Rule Frequently Asked Questions* relative to fire issues.

Once again, we thank you and your staff for your hard work on the May 2, 2011 draft guidance on high wind events and for the opportunity to provide some overarching perspectives on this very important issue.

If you have any questions or require further information, please do not hesitate to contact us or Nancy Kruger, Deputy Director of NACAA.

Sincerely,



George S. (Tad) Aburn, Jr.
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Co-Chair
NACAA Criteria Pollutants Committee



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