
October 3, 2017

Honorable John Shimkus
Chairman
Subcommittee on Environment
Committee on Energy & Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Honorable Paul Tonko
Ranking Member
Subcommittee on Environment
Committee on Energy & Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20510

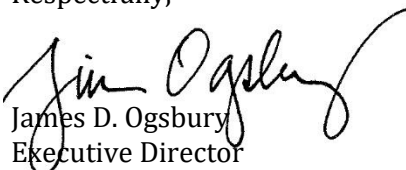
Dear Chairman Shimkus and Ranking Member Tonko:

Western Governors appreciate the attention you are bringing to the impacts of wildfires on air quality and emissions in tomorrow's Subcommittee hearing. To inform the Subcommittee's consideration of this subject, I request that the following attachments be included in the permanent record of the hearing:

- The August 11, 2016 letter from Western Governors to the Environmental Protection Agency (EPA), Office of Information and Regulatory Affairs, and the White House discussing background ozone in the West and the Exceptional Events Rule; and
- The February 3, 2016 letter from Western Governors to EPA articulating concerns regarding the retention of the "not reasonably controllable or preventable" criterion and the deference accorded to federal land managers and federal fire managers in the proposed Exceptional Events Rule and Draft Guidance.

Thank you for your consideration of this request.

Respectfully,



James D. Ogsbury
Executive Director

Attachments



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August 11, 2016

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Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
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Brian C. Deese
Assistant to the President and Senior Adviser
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Re: Background Ozone in the Western United States and the Exceptional Events Rule

Dear Administrator McCarthy, Administrator Shelanski, and Mr. Deese:

Western Governors write regarding final revisions to the Environmental Protection Agency's (EPA) Exceptional Events Rule (EER) which is now undergoing White House Review. Western Governors are concerned that the EPA decision to lower the National Ambient Air Quality Standard (NAAQS) for ground-level ozone under the Clean Air Act (CAA) is likely to cause areas in the West to enter non-attainment status based on high levels of uncontrollable background ozone through the final EER. We strongly urge EPA to adjust criteria to properly account for events that contribute to background ozone concentrations, which are impossible for states to control.

The CAA obligates all states to develop State Implementation Plans (SIPs) to attain and maintain the NAAQS. SIPs are intended to reduce emissions only from sources over which states can exert control, not including natural or international sources. However, various events and conditions result in elevated levels of background ozone, which states cannot and are not expected to control. Such events and conditions include wildfire, lightning, biogenic emissions, stratospheric ozone intrusion, and transported ozone from international and

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interstate sources. These events may be discrete (such as a wildfire or stratospheric intrusion) or may present as a periodic or ongoing condition (such as transported ozone). All result in emissions over which states have no control. Comments submitted to EPA by the Western States Air Resources Council (WESTAR) artfully elaborate challenges faced by western states as a result of these background ozone contributors and are supported by Western Governors.¹

Upon lowering the NAAQS for ground-level ozone in 2015, EPA affirmed that, “[u]nder the [CAA] states are not responsible for reducing emissions from background sources.”² The agency recognized that certain areas of the West are particularly susceptible to high background ozone levels and pledged to, “work directly with responsible air management agencies in these areas to ensure that all CAA provisions that would provide regulatory relief associated with background ozone are recognized.”³

Western Governors value the agency’s statements from late 2015. As stated in WGA Policy Resolution 2014-13, *State Clean Air Act Authority and Air Quality Regulation*, Western Governors believe EPA should engage states as co-regulators and should ensure state agencies and representatives have a robust voice and play a meaningful role in any EPA rule promulgated under the CAA.⁴ We recognize the critical importance of maintaining air quality in the West and appreciate the opportunity to work with EPA to achieve this.

In that regard, Western Governors have significant concerns over the lack of CAA tools available to account for ozone NAAQS exceedances resulting from factors outside state control. As noted in the EPA Memorandum, the CAA contains provisions to ensure states must address only man-made sources within their jurisdiction and must impose emissions controls only to the extent they are reasonably available.⁵ The existing regulatory framework, however, lacks effective tools to identify emission sources outside state control. Methods of accounting for background ozone sources identified by the EPA are insufficient.

In addition, although the proposed EER can be useful to account for ozone contribution from discrete events such as wildfires and stratospheric intrusion, the rule could be improved.

¹ May 11, 2016 Comments from WESTAR to EPA, *Western States Responses Regarding Background Ozone and Recommendations for Additional Efforts in the Western U.S.* [Available here](#).

² October 1, 2015 Memorandum from Janet G. McCabe, Acting Assistant Administrator, EPA Office of Air and Radiation, to Regional Administrators, Region 1-10, Paragraph D of Attachment (EPA Memorandum).

³ *Id.*

⁴ Section B(1)(a) of WGA Policy Resolution 2014-13. Attached and incorporated by reference.

⁵ *Id.*

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Western Governors suggested several such improvements in our February 3, 2016 comments in response to EPA's proposal.⁶

Even with our suggested improvements, however, the EER is not an adequate mechanism to account for factors such as lightning, biogenic sources and transported ozone. These sources are inherently difficult to measure and establish in a state's exceptional event demonstration. Identifying and quantifying the role of these factors and making a judgment about their relative importance is an onerous, if not impossible, undertaking. Prior to implementation of the NAAQS for ozone and before finalization of the revised EER, it is vital that EPA recognize the inadequacy of CAA mechanisms states have at their disposal to account for ozone-contributing factors outside state control and develop a more workable framework.

Western Governors believe the states – and in turn EPA – would benefit from a more holistic approach under which states could aggregate multiple ozone-contributing factors to prove a single exceptional event exceedance demonstration. This approach would be in line with EPA's shift to a "Clear Causal Relationship" standard outlined EPA's proposed revisions to the EER.⁷ Under such an approach, there would be no onerous requirement to differentiate and quantify contributions of various background sources or to utilize multiple CAA provisions to account for various background ozone contributors. Rather, the focus would be on showing that these sources, rather than controllable man-made emissions, are the principal contributing factor in a monitored NAAQS exceedance.

A potential path to implement this approach would be:

- Revision to the EER so that, either individually or in the aggregate, all factors contributing to high background ozone levels could be considered as "exceptional events," for which states are not held responsible.
- The approach could also be incorporated into Appendix U of the CAA, which sets out the methodologies EPA uses to interpret exceedances of the ground-level ozone NAAQS and assess factors contributing to NAAQS exceedances.

Western Governors are supportive of efforts by WESTAR and EPA to collaborate to address issues posed by background ozone in the West. Western Governors would like to be helpful in the development in this process. We look forward to working with EPA and other partners. We believe development of a state-EPA collaborative workplan with defined timelines

⁶ Attached and incorporated by reference.

⁷ Section V(B)(c) of proposed EER.

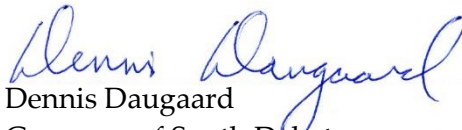
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consistent with this letter, the EPA Memorandum, and WGA Policy Resolution 2014-13 would be a positive step toward state and federal partnership on the issue of background ozone in the West. Western Governors will be following up to assure that its views are considered during final review of the EER revisions.

Sincerely,



Steve Bullock
Governor of Montana
Chair, WGA



Dennis Daugaard
Governor of South Dakota
Vice Chair, WGA

cc: Janet McCabe, Acting Assistant Administrator for Air and Radiation, EPA



WESTERN
GOVERNORS'
ASSOCIATION

Western Governors' Association
Policy Resolution 2014-13

State Clean Air Act Authority and Air Quality Regulation

A. **BACKGROUND**

1. Clean air is essential to strong communities and quality of life. Various factors, some of which are caused by anthropogenic activities and some by natural phenomena, influence air quality in the West.
2. The Clean Air Act (CAA), which established a regulatory structure for monitoring and improving air quality, is premised on a system of cooperative federalism under which states and the Environmental Protection Agency (EPA) work together as co-regulators.
3. States have statutorily recognized authority to manage air quality within their borders. The CAA recognizes that states should take a lead role in implementing various provisions of the Act, largely because factors affecting air quality often differ based on local industry, geography, population, meteorology and other state-specific or regional factors.
4. In addition, many Western states have requested and been granted broad delegated authority to implement CAA programs. Under the delegated authority framework, a state may assume primary responsibility for the development, implementation, and enforcement of CAA requirements, using an approach that makes sense within its jurisdiction, subject to minimum requirements established by EPA.
5. Delegated authority is particularly important in the West. The region's unique aspects – extreme variations in geological features, a largely arid climate, vast areas of high altitude, and vacillating weather patterns -- influence the movement, composition, and quality of air. Many Western states are also home to industrial operations and growing population bases, which impact air quality in the region.
6. Western Governors recognize the value and strength of cooperative federalism in air quality management and also believe the current relationship can be improved. Federal agencies are increasingly challenging state implementation plans (SIPs), asserting additional federal regulation or oversight, and often requiring duplicative documentation. These federal actions can disregard state expertise and dilute the statutorily defined authority of states to design, implement and manage delegated environmental protection programs.
7. The current fiscal environment exacerbates tensions among states and federal agencies responsible for air quality regulation. States are required to expend limited resources to

manage regulatory programs over which their strategic control is sometimes undermined.

B. GOVERNORS' POLICY STATEMENT

1. **State Authority under the CAA:** As is the case with other federal environmental statutes, states have significant regulatory responsibility under the CAA and are tasked with developing implementation plans to accomplish CAA objectives. New EPA regulations, rulemaking, and guidance should recognize state authority under the CAA, as well as under other federal environmental statutes. Western Governors have specifically enumerated their state consultation objectives for federal agencies – including EPA -- in Western Governors' Association Policy Resolution 14-09: *Respecting State Authority and Expertise*.

Regarding the CAA, Western Governors state the following:

- a) **Treatment of States as Co-Regulators:** In determining rules to pursue, and how to pursue them, EPA should take into account state views and opinions to a greater extent. Western Governors urge EPA to engage the states as co-regulators and to ensure that state agencies and representatives have a robust voice and meaningful role to play in the development of any EPA rule promulgated under the CAA, particularly in the early stages of rule development and before significant momentum precludes state participation or renders it non-meaningful.
- b) **State Implementation Plans:** Despite statutorily required state implementation responsibility, the recent *Regional Haze Rulemaking*¹ demonstrates EPA's willingness to second guess state technical expertise and site-specific decisions, challenge state SIPs, and pursue takeover of state-implemented programs.² EPA should follow the provisions of the CAA and defer to states with respect to implementation of its existing and newly promulgated rules. Prior to any intervention in state programs, federal agencies – especially EPA – should consult in a meaningful way, and on a timely basis, with states.
- c) **Early Action Credit:** In its review of SIPs, EPA should take into account and provide due credit for proactive actions taken by states to improve air quality and reduce emissions deemed detrimental to air quality. Early action credit

¹ "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations," 70 FR 39104 (6 September 2005), pp. 31513 - 31608.

² EPA claimed that the state plans it overturned were inadequate. Disagreeing with that assessment, Oklahoma, Wyoming, North Dakota and Arizona are all legally challenging EPA over the rule as of the date of this Resolution.

should recognize a full range of actions taken by states including, but not limited to, state-specific emissions reduction programs, renewable energy standards and objectives, and energy efficiency and conservation programs.

d) **State Flexibility to Determine Implementation Methods:** Western Governors believe states are best positioned to understand available technologies and methods for use in their SIPs. In reviewing SIPs for emission reduction or other air quality programs EPA should allow states the flexibility to integrate a variety of tools and compliance methods at their disposal. In this time of fiscal uncertainty, such flexibility would allow for creative and effective methods of emission reductions, while also allowing states to use and develop new means of meeting EPA requirements.

2. **Coordination of EPA Rulemaking Actions:** EPA should ensure that newly promulgated rules are drafted and issued, where appropriate, in coordination with existing regulations, taking into account elements and requirements common to both. Where new rules are related to regulations already in place, coordination among them would enable states to develop plans addressing the requirements of both rules, thereby saving time and money of the states while also ensuring that SIPs are developed in a manner to address multiple EPA rules.
3. **EPA Support and Technical Assistance:** EPA should provide states and local entities with adequate support and technical assistance to help them comply with regulations promulgated under the CAA. New requirements that impose additional burdens on states should be accompanied by adequate funding to enable states to implement the requirements.
4. **Prioritization of Rules:** EPA should collaborate with states to identify priority areas and focus on programs that provide the greatest benefit to air quality. This prioritization would allow states to focus on and devote necessary funding and staff resources to areas of the greatest concern.
5. **EPA Adherence to Schedule:** When engaged in the rulemaking process, EPA should adhere closely to the timelines in the CAA. Variation from these timelines results in undue strain being placed on state efforts to work with EPA, develop state responses to EPA rulemakings and determine appropriate tools to incorporate in SIPs.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with EPA, Congressional committees of jurisdiction, and the Executive Branch to achieve the

objectives of this resolution including funding, subject to the appropriation process, based on a prioritization of needs.

2. Additionally the Governors direct the WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.



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February 3, 2016

U.S. Environmental Protection Agency
EPA Docket Center
Docket No. EPA-HQ-OAR-2013-0572 and
Docket No. EPA-HQ-OAR-2015-0229
Mail Code 2821T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Ms. Palma:

The Western Governors' Association (WGA) appreciates the opportunity to comment on the Environmental Protection Agency's (EPA) proposed rule, Treatment of Data Influenced by Exceptional Events (the Exceptional Events Proposal), promulgated under section 319(b) of the Clean Air Act (CAA), and the related Draft Guidance on the Preparation of Exceptional Events Demonstrations for Wildfire Events that May Influence Ozone Concentrations (the Draft Guidance), both published November 20, 2015 (80 FR 72839).

STATEMENT OF INTEREST

WGA represents the Governors of 19 western states and 3 U.S.-flag islands. The association is an instrument of the Governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the western United States.

Western Governors recognize the critical importance of maintaining air quality in our states and the western region and appreciate the opportunity to work with EPA to achieve this. As stated in WGA Policy Resolution 2014-13: [State Clean Air Act Authority and Air Quality Regulation](#), Western Governors believe EPA should engage states as co-regulators and should ensure state agencies and representatives have a robust voice and play a meaningful role in any EPA rule promulgated under the CAA.

Western Governors previously expressed concern that the 2007 iteration of the Treatment of Data Influenced by Exceptional Events rule (the 2007 Exceptional Events Rule) did not adequately address factors impacting air quality over which states have little or no control. Western Governors also requested that substantive consultation, as described in WGA Policy Resolution: 2014-

09: [Respecting State Authority and Expertise](#) occur prior to publication of the Exceptional Events Proposal.¹

Background of Western Governors' Position

Under section 319 of the CAA,² the term “exceptional event” refers to either a natural event or an event caused by human activity that is unlikely to recur at a particular location. Exceptional events can affect air quality but are not reasonably controllable or preventable by states. Section 319 of the CAA further states, “EPA may exclude air monitoring data influenced by exceptional events from use in making designations” provided states establish certain criteria.

The exceptional events rule is intended to ensure a state is not required to submit a State Implementation Plan (SIP) to address monitored air quality data from sources over which states have little or no control. The current exceptional events submission process is lengthy, inconsistent and ambiguous. As a result states, out of practical necessity, address exceptional events in a SIP. Given time and resources needed to create or modify a SIP, an efficient, consistent exceptional event submission process is vital.

Western Governors support EPA’s effort to improve the exceptional events rule and submission process. A review of EPA’s proposal shows that, while the agency has taken state concerns into account in certain circumstances, there are several additional steps the agency should take to ensure states’ obligations are commensurate with regulatory authority delegated to states in the CAA.

EPA Change to “Clear Causal Relationship” Standard

The 2007 Exceptional Events Rule requires exceptional event submissions to establish that, “there would have been no exceedance or violation *but for* the event” (i.e., the “but for” standard).³ It is extremely difficult to quantitatively establish that a particular exceptional event was the sole cause of a monitored National Ambient Air Quality Standard (NAAQS) exceedance.

Western Governors appreciate EPA’s proposed shift to a “clear causal relationship” standard and removal of the “but for” test. This change will bring directives of the exceptional events

¹ Prior related WGA communications are: [March 17, 2015, comments to EPA on the proposed rule, National Ambient Air Quality \(NAAQS\) Standards for Ozone](#) (79 FR 75233, December 17, 2014), and [August 27, 2015, letter to EPA Administrator Gina McCarthy requesting substantive consultation with states on the then-expected revisions to the Treatment of Data Influenced by Exceptional Events rule.](#)

² 42 U.S.C. § 7619 – Air Quality Monitoring.

³ 40 C.F.R. 50.14(c)(3)(iv)(D).

rule within the statutory requirements of CAA section 319(b). It will enable states to establish a clear causal relationship between a monitored NAAQS exceedance and an exceptional event. This standard will allow for reliable and consistent reviews.

EPA Effort to Streamline State Submission Processes

Western Governors support EPA's effort to streamline the exceptional event submission process when circumstances surrounding an event are clear. EPA plans to codify certain fire-related definitions and exceptional event demonstration factors. While we raise some concerns in these comments, we hope EPA's effort will help with a common understanding of relevant terms.

Western Governors agree with EPA's proposed rebuttable presumption that every wildfire on wildland satisfies the "not reasonably controllable or preventable" criterion unless the record shows otherwise.⁴ EPA's inclusion of this proposed directive in section 5 of the Draft Guidance will help address longstanding concerns about the extraordinary commitment of resources required in an exceptional event submission.

Role of Past Occurrences in Exceptional Event Submission

The Western States Air Resources Council (WESTAR) has previously expressed concern to EPA⁵ about the agency's interpretation of the "not reasonably controllable or preventable" aspect of an exceptional event submission within the meaning of the 2007 Exceptional Events rule. It is WESTAR's position – and that of Western Governors – that EPA's past interpretation required a state to implement an undefined set of emission control or prevention measures in anticipation of uncontrollable events that may occur in the future.⁶

Section 319(b)(1)(A)(ii) of the CAA states an exceptional event, whether caused by natural phenomena or human activity, is one that is, "not reasonably controllable or preventable." EPA's past approach to the criterion, as described in section V(E)(2) of the proposal, has been:

- An exceptional event must be "not reasonably controllable." Under EPA's interpretation, this means if a set of measures to reduce the magnitude and impact of event-related emissions *should reasonably have been in place* for emission sources that contribute to emissions, then those controls *must* have been in place; and

⁴ Section V(F)(2)(c)(ii) of the Exceptional Events Proposal.

⁵ *Public Hearing Testimony of Dan Johnson, Executive Director of WESTAR: Proposed Exceptional Events Revisions*. Testimony given before the Environmental Protection Agency. December 8, 2015.

⁶ *Id.*

- An exceptional event must also be “not reasonably preventable.” Under EPA’s interpretation, this means if a set of measures to stop or avert the event *should reasonably have been in place* (for human activity-caused sources), then those measures *must* have been in place for the event.

The Exceptional Events Proposal retains this interpretation and section 5 of the Draft Guidance incorporates this approach. This interpretation, as a pre-condition for approval of an exceptional event request, requires states to demonstrate to EPA’s satisfaction any state emission control or prevention measures that “reasonably” could have been in place at the time of the events were in place. This would require control measures in all areas that might experience dust events, wildfire events, or volcanic events.⁷

Natural emission sources in western states are often on federal land. Under EPA’s interpretation states would be required to take undefined emission reduction steps to account for future events that are both uncontrollable and unpredictable, but that also may occur under federal managers.

This approach creates a potential disadvantage for western areas in attainment with current NAAQS that are home to expanses of federal land. It could require state implementation of proactive emission control or prevention measures prior to event occurrence and prior to a finding of NAAQS non-attainment.

States should not be held accountable for determining on a prospective basis:

- What control or prevention measures EPA or federal land managers (FLMs) would find “reasonable” under the exceptional events rule; or
- What unforeseen and uncontrollable NAAQS pollutant emitting events may occur in the future.

EPA should consider relevant control measures included in recent non-attainment or maintenance SIPs as sufficient to meet the “not reasonably controllable or preventable” criterion. This concept should apply in attainment areas as well.⁸

⁷ Section V(B)(1) of the Exceptional Events Proposal notes volcanoes are known to vent plumes of sulfur dioxide (SO₂) as well as particulate matter (both PM_{2.5} and PM₁₀) precursors.

⁸ *Id.*

Prescribed Fires, Wildfires and Deference to Fire Managers

State and local agencies are responsible for achieving or maintaining NAAQS attainment status. Consequently, Western Governors have concerns about substantive changes EPA proposes to address NAAQS impacts from wildfires. The changes could detrimentally affect state and local agencies by necessitating an exceptional event submission under the exceptional events rule. In particular, Western Governors are concerned about EPA's proposed deference to a land management agency representative conducting prescribed fires to declare a prescribed fire a wildfire because a unilateral FLM decision to prescribe a fire, and later declare it a wildfire, would necessitate action – or additional action – by a state.

The proposed rule's language regarding exceptional event submissions by FLMs exacerbates Western Governors' concern. The proposed rule requires the FLM's "discuss[ing] such submittal with the state" before submitting it to EPA. However, it does not require the FLM to integrate a state's concerns into its submittal to EPA. Therefore, a FLM's submittal to EPA could conflict with a state's position. We also recommend that western states with existing, comprehensive state air quality regulatory programs should have the option of being the lead entity, instead of the EPA, for the receipt of exceptional event submissions from FLMs or from state land or fire managers.

Finally, Western Governors seek to clarify in the proposed rule on the application of definitions of wildfire⁹ and wildland¹⁰ to areas of the wildland urban interface (WUI). Wildfire can begin in a wildland area and progress through the WUI into suburban areas. Also, air pollution emissions originating in a wildland area can have subregional effects beyond the wildland area or WUI. The proposed rule should clearly state that in those cases, the entire fire progression is a natural event for the purposes of an exceptional event submission.

SUMMARY

Western Governors appreciate those state concerns addressed in the Exceptional Events Proposal and Draft Guidance, including the "clear causal relationship" standard and EPA's effort to better streamline the state exceptional event submission process. WGA continues to be concerned by the retention of "not reasonably controllable or preventable" criterion (and its interpretation) and the deference accorded by EPA to FLMs and federal fire managers. While it is Western Governors' position that there is a vital need for a more active federal role in forest

⁹ EPA's proposal would also revise the definition of a "natural event" so that an event with a mix of non-anthropogenic emissions and reasonably controlled human-affected emission sources may be considered a natural event. Section V(D)(2) of the Exceptional Events Proposal.

¹⁰ *Id.* Section 1 of the Draft Guidance also incorporates relevant definitions, including the definition of "wildland" EPA plans to adopt.

Beth W. Palma
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management, that role must respect state authority and not create unnecessary burdens on state or local regulators. Western Governors ask EPA to address these concerns before finalizing the Exceptional Events Proposal and Draft Guidance and to engage western states as partners to identify workable solutions for all parties involved.

Sincerely,



Matthew H. Mead
Governor of Wyoming
Chairman, WGA



Steve Bullock
Governor of Montana
Vice Chair, WGA