

W E S T E R N S T A T E S A I R R E S O U R C E S C O U N C I L



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

Dear Ms. McCarthy,

The Western States Air Resources Council (WESTAR), an association of 15 western state air quality management agencies, appreciates the opportunity to work in partnership with EPA on approaches to improve the implementation of the Exceptional Events Rule. The purpose of this important rule is to ensure that regulatory decisions under the Clean Air Act are not biased by monitored air quality data over which a state has little or no control. By excluding monitoring data affected by exceptional events from regulatory decisions, state and local agencies will be able to focus resources on solving problems that they can fix. Please note that the California Air Resources Board is submitting separate comments in its own behalf.

WESTAR appreciates the effort EPA has made to respond to our recommendations dated September 11, 2009. It is clear that EPA has put considerable effort into evaluating approaches to streamline decision-making and to clarify the technical showings states will be expected to include in their requests for data exclusion. In the attachment, we identify areas where EPA's draft guidelines are helpful and areas where, in our view, further discussion is needed. In general, we believe that the guidance is a step in the right direction, but there are areas that remain a concern.

The attachment includes a number of recommendations, all of which would improve implementation of the exceptional events rule. Of particular concern to WESTAR are the following four issues, discussed in detail in the attachment:

1. Guidance in lieu of rule revisions. Guidance that has the effect of requiring specific actions or establishes criteria that, if not met, results in denial of a State's request for data exclusion is not guidance but is regulation through guidance. WESTAR reiterates its view that the appropriate mechanism to address several of the implementation issues addressed in the draft guidance is to revise the regulation.
2. "Not reasonably controllable or preventable" showing. As a condition for approval of an exceptional event request, the draft guidance requires a State to demonstrate, to the satisfaction of the EPA Regional Office, that any control measures that could "reasonably" have been in place at the time of the event must have been in place, including escalating control measures in areas subject to recurring dust events. WESTAR reiterates its view that if a specific set of controls is required that is not currently in the State Implementation Plan, it is EPA's responsibility to notify the State of the SIP deficiency or to clearly articulate in the regulation what emission controls are required as a condition of an exceptional events approval.
3. The "but for" test. EPA's draft guidance retains the requirement for a State to show that there would not have been a NAAQS exceedance but for the event without a clear explanation of how such a showing can be made. In fact, in the preamble to the exceptional events rule, EPA commits to publishing, in a notice of proposed rulemaking, the means by which a state could make this showing once the techniques for adjusting data are sufficiently well documented. Until this rulemaking is completed, WESTAR sees no alternative but for EPA to revise the exceptional events rule to remove the "but for" test.
4. Level of effort for showing; State agency capabilities and resources. The draft guidance, other background documents, and examples provided on EPA's website imply a level of expertise and resources that is simply not available in some State and local agencies, underscoring the importance of differentiating the simple cases from the more complicated. In this regard, a means of dispute resolution can reduce repeated requests for additional information where little gain may be realized. In any event, clear communication between EPA and the State on what is needed to approve a particular request is essential so that States can make informed decisions about whether to commit the resources to the task.

We look forward to continuing our discussions on this important issue. If you have any questions or comments, please contact Dan Johnson at 206-254-9145.

Sincerely,



David Collier, President
Western States Air Resources Council

APPENDIX

The following comments are grouped into four sections. In the first section, we address the portion of the draft guidance that covers the specific technical elements required in an exceptional events demonstration package. Section 2 covers other elements of an exceptional events demonstration package. In section 3, we address EPA's recommendations on process and timeframes. Finally, in section 4, we touch on several additional overarching issues.

Section 1: Technical elements of evidence in a demonstration package

Not reasonably controllable or preventable

In our September 2009 recommendations, WESTAR provided comments on the requirement that a state requesting exclusion of data under the exceptional events rule must show that emissions causing the event were not reasonably controllable or preventable, including a demonstration that reasonable actions to protect public health have been implemented. We reiterate our previous view that State Implementation Plans define the measures states must take to attain and maintain compliance with NAAQS. Section 110 of the Clean Air Act requires each State's SIP to include enforceable emission limits and other control measures to prevent NAAQS violations and holds EPA responsible for ensuring that these measures are sufficient. If not, EPA's responsibility is to require the State to revise its SIP to address any identified deficiencies through a SIP call.

Based on our review of the draft guidance, EPA proposes to implement this provision in such a way that for recurring events, States must implement escalating emission control measures, beyond those required under Section 110 and Part D (for nonattainment areas) of the Act, to be eligible for exclusion of data under the exceptional events rule.

In Section 3.1.2, the draft guidance says, "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." Later in this section, the draft guidance says "In areas where events continue to recur, EPA may consider BACM, or greater levels of control, as the appropriate starting point [to determine reasonable controls], regardless of attainment status...it could be reasonable to require controls more stringent than BACM or RACM, particularly in areas with recurring exceedances."

Where wind events may recur, states can elect to develop a voluntary High Wind Action Plan, agreed upon by EPA that may provide an additional measure of emission controls during an exceptional event. Section 3.1.6. of the draft guidance states the following:

"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." ... "If events

recur, EPA will need to re-approve the High Wind Action Plan regardless of whether it is revised or remains as-is. If EPA indicates that the High Wind Action Plan needs to be revised and the state chooses not to do so, this will be considered in EPA's determination of whether controls in place were reasonable for subsequent events."

We are very uncomfortable with EPA's expectation that States implement successive High Wind Action Plans with escalating emission control programs, outside of the statutory framework of the Clean Air Act, as a precondition of concurrence of recurring exceptional events. We are very uncomfortable with BACM, or greater levels of control, as the appropriate starting point for consideration of reasonable control measures in attainment, maintenance and moderate areas.

WESTAR is also concerned about EPA's expectation that States show reasonable controls were implemented "at the time of the event." While this is a reasonable requirement for local sources and sources addressed in the State Implementation Plan, it is ambiguous for many sources in the West. For example:

- For dust raised from distant sources by high winds, documentation of specific control measures underway "at the time of the event" is unlikely to be available.
- For many states, high wind events are regional in scope and can extend for hundreds of miles rather than being localized events and thus difficult to characterize because of their scope.
- Crop rotations, which are Best Management Practices for preventing agricultural wind erosion, are multi-year practices that include recurring cycles of greater and less vulnerability to wind erosion depending upon such factors such as the specific crops or fallow periods, tilling, crop development, and harvest.

In summary, if EPA intends to require emission control measures beyond those required under Section 110 and Part D requirements, those requirements should be included in an amendment to the regulation with appropriate citations to the authorizing provisions of the Act. Until such a rulemaking has been completed, we reiterate that the test of reasonable controls should be limited to an evaluation of whether or not the State implemented the applicable provisions of their State Implementation Plan and any applicable High Wind Action Plan.

Historical Fluctuation

We support the approach in the proposed guidance to demonstrate historical fluctuation. In an environment where recurring high wind events cause spikes in PM values, we don't see added value in showing that a particular wind-caused PM exceedance is above a certain historical value to qualify as exceptional. We reiterate our recommendation that this requirement should be deleted by rule revision, at least for wind events. The suggested simple presentation of historic data points as evidence of historical fluctuation should help support weight-of-evidence showings for other elements of the exceptional event demonstration, including the Clear Causal Relationship showing, the But For test, and the showing that air quality was affected.

Clear Causal Relationship

In our September 2009 recommendations on the requirement to show that there was a clear causal relationship (Clear Causal) between the exceedance and the event, WESTAR provided a suggested outline of elements and thresholds that could be accepted and result in expedited review of the Clear Causal showing. The proposed guidance does address several of those suggestions, including the narrative in the conceptual model to establish elements of the causal relationship. We think the section on process provides a good framework for review and timelines, including early consultations and notifications of additional needed information.

Our concerns remain as to the ability of agencies to produce “all” information requested. For example, the Clear Causal guidance in Section 3.3, Table 4, nos. 2. and 4 suggests an analysis to demonstrate temporal relationships, “Wind direction data showing that emissions from sources identified as part of nRCP demonstration were upwind of the monitor(s) in question, satellite imagery,” and, “24-hour time series showing PM concentration at the monitor in question in combination with sustained and maximum wind speed data at area where dust was entrained.” Examples of analyses are given, but these are in areas that are extensively monitored. There are numerous areas throughout the arid west where source-receptor relationships are regional in scope, and where dust sources are remote from ambient monitors that may detect the event. In most such areas meteorological information at the source would not exist, because there are no wind instruments deployed there. Satellite imagery can be a matter of luck, with cloud cover or other visibility obscuring conditions. We would expect EPA to take such factors into consideration as well as resource commitments when determining the information to be requested from the State and level of analyses needed to demonstrate Clear Causal relationship. We would expect EPA to consider these factors for other technical elements as well.

The “But For” test

In our September 2009 recommendations, WESTAR provided comments on the regulatory implications of including data affected by exceptional events in the dataset used to make important regulatory decisions, including determinations of attainment status and the impact of inflated design values on the classification of a nonattainment area and the design day used to establish the basis of emission reductions required in an attainment SIP. We reiterate our previous recommendation to revise the regulation to remove the requirement for the state to demonstrate that “[t]here would have been no exceedance or violation but for the event.”

In Attachment 1: Exceptional Events Rule Frequently Asked Questions, question 13, EPA offers an approach that would retain the data affected by an exceptional event for the purpose of determinations of attainment but would allow the state to “back out” that portion of the monitored value determined to have come from the event. In concept, the actual monitored value would be included in attainment/nonattainment determinations, but could be adjusted to exclude the non-anthropogenic fraction in design value calculations used for other regulatory determinations (e.g. nonattainment area classifications). If such an approach were available, much of the concern WESTAR has raised about inflated design values in air quality datasets could be lessened. However, it appears this approach cannot be implemented without

a rule revision. In its discussion of this issue in the preamble to the exceptional events rule (Section V. E.) EPA acknowledges that "...we are not aware of the existence of precise and universally applicable techniques that are administratively and technically feasible and that could support partial adjustment of air quality data..." and goes on to state "When we determine that techniques for adjustment of air quality data are sufficiently well-demonstrated for use in exceptional events determinations, we will publish a notice of proposed rulemaking...". Until such an approach is adopted by EPA through rulemaking, we see no alternative but for EPA to revise the rule in such a way that any data affected by exceptional events may be excluded.

Caused by Human Activity Unlikely to Recur at a particular location or a Natural Event

We appreciate the idea that recurring events must be "natural" to qualify as exceptional, and that recurring high wind/dust events that may be caused all or in part by emissions from anthropogenic sources judged to be reasonably controlled may be treated the same way as natural events. We are troubled nonetheless about the proposal to, in effect require High Wind Action Plans that include escalating emission control measures to define what "reasonably controlled" anthropogenic sources means for recurring events, rather than the control measures approved in the State Implementation Plan, as discussed in the above section on Not Reasonably Controllable or Preventable.

Section 2: Other elements of technical demonstration

Wind Data

WESTAR, in its September 2009 recommendations proposed a wind speed threshold of 20 MPH or greater to trigger expedited review for high wind dust events. The EPA proposed threshold is 25 MPH to trigger "basic analysis," apparently from a DRI study of desert dust in Clark County that concluded that dust from wind at that speed or above can entrain dust from undisturbed natural surfaces. Other studies in other areas indicate different soil types, ground cover, etc., and suggest that in these areas different threshold wind speeds would be more appropriate to determine the rigor of analysis needed in the demonstration package.

Most of the examples throughout the guidance assume more extensive meteorological monitoring than exists in many areas of the west. Source wind data do not typically exist when events cover large distances, for example, when the source is the southwest desert. Meteorological data are sometimes available from local airports. We suggest allowing the use of available regional wind data as surrogate for source data as needed.

Conceptual Model

A conceptual model is not a required component of an exceptional event demonstration package, but we think a comprehensive narrative lays the groundwork for the technical demonstrations and assists with weight of evidence showings. As such, it can be a positive addition to the demonstration package. This would be particularly helpful in reducing the need for detailed explanations later in each package.

Mitigation

We generally support the proposed guidance as written, which interprets actions to protect public health through individual actions as mitigation of exposure to exceedances from any source of air pollution, as distinguished from measures that control or prevent emissions. Emission control measures are covered in section 3.1, Not Reasonably Controllable or Preventable (including High Wind Action Plans), about which we have strong concerns.

Public Comment

In this section of the proposed guidance, EPA asserts that “the state should submit the public comments along with the state’s responses, if any, to EPA within 10 days of the close of the comment period”. In many cases, response to public comments within 10 days will not be possible.

Section 3: Proposed Process Timeframes and Demonstration Package Recommendations

We are very supportive of the process timeframes and action steps outlined in the proposed guidance. They represent steps forward to resolve a number of long-standing issues of uncertainty about timing of communications and reducing unnecessary delays in processing exceptional events requests. We are also supportive of the optional process steps to prioritize actions in recognition of the very limited resources we all have.

The guidance should encourage continuing communication and negotiation of issues between states and EPA to make the process work. Depending on the amount and availability of relevant information, it may not be possible to submit ALL requested supplemental information within the proposed time frames, or at all. Some variation to the schedule may be needed, as well as a process for determining what is possible when not all of the information requested is available.

We also are supportive of the overall recommended methods of preparing each of the technical elements and recommended order of analyses to facilitate using the technical work developed in support of one showing to support more than one element.

Section 4: Additional Issues

A significant concern remains about the uncertainties as to the level of analyses required to demonstrate that a given event was not reasonably controllable or preventable. It is an important concern in that analyses of the other required elements, particularly the But For test are derived in part from the reasonably controllable analyses. WESTAR’s September 2009 recommendations include expedited reviews for cases where the conditions of the exceptional event are clear, required elements of the package are presented and concurrence easily reached. This concern is partially addressed in this high wind guidance by the wind threshold

approach and the recommended sequence of analysis steps. We would encourage EPA to make this concern a priority as a general matter.

We are impressed with the extent of the existing backlog of unanswered demonstration packages. We would encourage EPA to go beyond acting only on events upon which regulatory actions may be pending. The flagged data, much of which we think would be concurred (and excluded from the regulatory data base) distorts the air quality values that are used for ongoing planning and regulatory purposes. It also affects eligibility for Limited Maintenance Plans.

WESTAR believes that the guidance should include a section on dispute resolution. While we acknowledge the importance of having EPA Regional Office personnel with an understanding of local conditions evaluate exceptional event requests, we remain concerned about inconsistencies between Regions in their respective evaluations of substantially similar events. We believe state and local regulatory agencies should have the opportunity to challenge non-concurrence rather than waiting for EPA regulatory action based on event-caused high values. A decision of non-concurrence and a subsequent regulatory action, such as non-attainment designation could be separated by several years, resulting in significant duplicative resource expenditure challenging the non-attainment designation while developing a non-attainment SIP to meet the submittal timing requirements.