

May 25, 2006

Stephen L. Johnson
U.S. Environmental Protection Agency
Air and Radiation Docket
Mail Code 6102T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Attention: Docket ID # EPA-HQ-OAR-2005-0159

Re: *Treatment of Data Influenced by Exceptional Events*

Dear Administrator Johnson:

NESCAUM offers the following comments on the U.S. Environmental Protection Agency's (EPA's) notice of proposed rulemaking, published on March 10, 2006 in the Federal Register (71 FR 12592-12610), entitled *Treatment of Data Influenced by Exceptional Events*. NESCAUM is the regional association of air pollution control agencies representing Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

We support EPA's effort to develop a nationally-consistent approach to dealing with the impact of exceptional events on exceedances of the National Ambient Air Quality Standards (NAAQS). While it may be appropriate to exclude monitored data from regulatory determinations of an area's status under the NAAQS in truly exceptional cases, EPA's proposed criteria are too broad, and allow for data to be excluded from regulatory determinations too easily. This may significantly weaken the protections provided by the Clean Air Act and affect states' abilities to achieve the health-based pollutant limits established through the particulate matter and ozone NAAQS. NESCAUM urges EPA to narrow and clearly define the proposed criteria in the final regulation as suggested below.

Definition of an Exceptional Event

While the proposed rule does not detail the specific types of events EPA intends to include as exceptional events, in the Federal Register notice EPA indicates that exceedances due to transported pollution are examples of exceptional events, as follows:

Transported pollution, whether national or international in origin and whether from natural or anthropogenic sources, may cause exceedances which are eligible for exclusion under this rule as long as the other criteria and requirements for exceptional events are met (71 FR 12596).

The Clean Air Act already has several provisions and mechanisms to address national and international anthropogenic transported pollution, among them sections 110, 126, 179, and 184. Rather than creating a regulatory exception, we urge EPA to address transported pollution from anthropogenic sources in accordance with the existing statutory law. It is important that the option of excluding data does not detract from the ongoing need to address anthropogenic pollution transport nor contravene the Clean Air Act.

The proposal, as written, could be interpreted to provide relief to nonattainment areas that might attain a NAAQS “but for” transported pollution, allowing an area not to consider those data for designation purposes. Interpreted in this way, this approach is similar to EPA’s 1998 “bump up policy”¹ (which was overturned in several District Courts) that allowed attainment deadlines to be extended without requiring either the afflicted nonattainment or upwind source areas to do more to reduce pollution. We would not agree with such a policy, and do not believe EPA intends this. The final exceptional events rule should clearly state that transported pollution affecting air quality in a downwind area will not be considered an exceptional event unless it is the direct result of a qualifying exceptional event in an upwind area. While we believe this is EPA’s intent, the proposal is not clear and could be subject to interpretation that would exempt a range of transported pollution impacts.

In the Federal Register notice, EPA indicates that natural disasters are examples of exceptional events (71 FR 12596). While we agree that such events could cause monitored readings that warrant exclusion, we urge EPA to develop specific criteria that would help to narrowly define the conditions under which this can occur. For example, a blanket exemption for any cleanup activities associated with natural disasters could lead local and state authorities into not considering available cleanup alternatives that minimize impacts on air quality. EPA should, at a minimum, include a requirement in the final regulation that associated cleanup activities take air quality effects into consideration to the maximum extent feasible, given the circumstances of the natural disaster and the needs for cleanup that it presents. This is particularly important in cleanup situations that may generate releases of toxic air pollution after the disaster event, thus exacerbating an already dire situation. EPA should clarify what activities are considered “associated cleanup activities” for natural disasters, and in each instance only allow activities that meet cleanup goals while minimally affecting air quality. EPA could allow, on a case-by-case basis and for specified activities (e.g., burning debris, reconstruction of buildings) a limited duration for claiming such an exemption provided that air quality impacts are minimized to the extent feasible. As currently written, the proposed rule could allow for monitored data to be excluded over a long period of time, thus undermining the intent of the program as well as the public health protections afforded by the NAAQS.

EPA indicates in the Federal Register notice that unwanted fires are examples of exceptional events (71 FR 12596-12597). The final rule should be clear that unplanned, unwanted fires (e.g., wildfires, accidental or arson-based commercial or residential building fires) are the only type of fire that fits cleanly within the definition of an exceptional event provided by the Clean Air Act (i.e., a natural event or an event caused by human activity that is unlikely to recur at a particular location) and thus the only type of fire that should be able to be flagged, if necessary. In particular, prescribed land management fires that burn more than planned and are not put out or managed should not be treated as exceptional events. While a decision can be made that it is more important for forest management purposes to let the fire burn, the impacts on air quality and public health from that managed fire should not be able to be “flagged” away. The decision not to extinguish the fire is an “event caused by human activity” and thus does not qualify as an exceptional event.

¹ “Guidance on Extension of Attainment Dates for Downwind Transport Areas,” U.S. Environmental Protection Agency, Office of Air and Radiation, July 17, 1998.

EPA should develop specific criteria that would help to narrowly define the conditions under which natural disasters and unwanted fires would warrant data exclusion, and ensure that actions to minimize air quality impacts occur as a condition for granting limited data exemptions.

Flagging Data for Exclusion

Of the three options proposed by EPA for determining whether and when air quality is affected by an exceptional event, we support Option 1, the 95th percentile criterion. We agree with EPA that this would be a “somewhat more rigorous qualification requirement than is reflected in EPA’s past case-by-case approach” (71 FR 12598). We further agree with EPA that this approach would eliminate state-to-state and region-to-region variability and believe that this consistency is needed. Option 1 is the most well defined option and would best assist states in maintaining the effectiveness of the National Ambient Air Quality Standards.

In cases where an exceptional event may be affecting an area where air quality standards are already exceeded or violated, EPA proposes requiring that the air quality data may not be excluded, except when a state can demonstrate that the exceedance or violation would not have occurred but for the influence of the exceptional event (71 FR 12599). We agree that states must not be allowed to exclude data on days when exceedances could have occurred irrespective of the contribution of emissions generated from an exceptional event. Furthermore, the burden should be on the state to demonstrate that an exceedance would have been highly unlikely but for the exceptional event. EPA should establish clear and consistent national criteria for such demonstrations that are subject to review and comment prior to being finalized.

Schedules and Procedures for Flagging Data

Of the three options proposed by EPA for flagging and requesting exclusion of data, we prefer Option 2, “Early Data Flagging and Delayed Demonstration Submittal” (71 FR 12600). The NESCAUM states support early flagging of data. We do not support any approach that would allow retrospective or delayed flagging of data as per Option 3, “Delayed Data Flagging and Demonstration Submittal” (71 FR 12600). If an event is truly exceptional, the state should realize that when it occurs and flag those data at that time or shortly thereafter. As proposed, Option 3 would provide an incentive for states to review their data to find possible dates to claim exceptional events in order to avoid a nonattainment designation.

We do not see the benefit of preparing a demonstration before knowing whether or not the data for the flagged exceptional event would cause a three-year design value to exceed a National Ambient Air Quality Standard. We believe Option 2 provides the appropriate information (i.e., flagged data) in a timely manner and directs state resources most efficiently.

Mitigation Plans and Measures

EPA proposes four options for states to address exceptional events (71 FR 12604-12605). We support a combination of Options 1 and 3. Option 1 requires that the state takes action to notify and educate the public, as well as implement measures to abate or minimize the exposure and then demonstrate that it had done so. Option 3 requires that a state develop a mitigation plan (but not a State Implementation Plan, as proposed in Option 2) to mitigate impacts of episodic events that will recur. It does not make sense to require states to divert planning resources to adopt and implement specific mitigation plans and measures for exceptional events if the event is truly exceptional and is not expected to recur. If, however, there are

specific categories of events that EPA expects to be exceptional and likely to recur (particularly in a region), then EPA's approach of requiring a mitigation plan under Option 3 that can be tailored to the particular circumstance is appropriate.

Treatment of Fireworks Displays

EPA proposes to address certain fireworks displays "in a manner similar to exceptional events" (71 FR 12606) in terms of data exclusion. We are concerned about the public health impacts of fireworks displays. Children, who are sensitive to air pollutants, are typically present at such displays. Perchlorate, which is routinely used in fireworks production, can be carried into groundwater, thereby contaminating it. Including for regulatory purposes air quality data during fireworks displays does not *per se* prohibit such activities; it can provide incentives for properly managing and mitigating the air quality impacts of fireworks events. We urge EPA to provide incentives through this and other rulemakings for making fireworks safer and less polluting. We also urge EPA to require that states and local jurisdictions inform the public of the health effects of exposure prior to all fireworks displays.

If you or your staff has any questions regarding the issues raised in this letter, please contact Leah Weiss at the NESCAUM office at 617-259-2000.

Sincerely,



Arthur N. Marin
Executive Director

Cc: NESCAUM Directors
Frank Wallace, U.S. EPA
Neil Frank, U.S. EPA