



February 3, 2016

Ms. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OAR-2013-0572
Mail Code 28221T
1200 Pennsylvania Ave. NW.
Washington, DC 20460

Subject: Wisconsin Department of Natural Resources Comments on United States Environmental Protection Agency's Treatment of Data Influenced by Exceptional Events Proposed Rule and Related Draft Guidance (EPA-HQ-OAR-2013-0572)

Dear Administrator McCarthy:

The Wisconsin Department of Natural Resources (WDNR) submits the following comments on the U.S. Environmental Protection Agency's (EPA) Treatment of Data Influenced by Exceptional Events proposed rule and related draft guidance (80 Fed. Reg. 72840; November 20, 2015). WDNR, along with numerous other air agencies, has experienced difficulties when interpreting and implementing the Exceptional Events rule for use in developing exceptional event demonstrations for EPA review. While the proposed rule attempts to clarify some of the requirements of the rule, the revisions do not adequately address implementation issues associated with developing exceptional event demonstrations and their subsequent review by EPA. WDNR's comments on the proposed rule fall under four general topics: 1) administrative burden on air agencies; 2) consistency across EPA regions; 3) EPA responsibilities and accountability; and 4) insufficient and unclear requirements and definitions.

1. Administrative Burden on Air Agencies

EPA's stated goal in both its Interim Exceptional Events Implementation Guidance in 2013 and this proposed rule is to "increase the administrative efficiency of the 2007 Exceptional Events Rule criteria and process." EPA clearly indicated in several sections of the preamble that interpreting and administering the 2007 Exceptional Events rule continues to be a challenge for air agencies developing exceptional events demonstrations. Unfortunately, similar to the 2013 Interim Guidance, EPA's proposed rule removes little to none of the administrative burden in submitting exceptional event demonstrations. In some cases, the revised rule actually creates more of a challenge to air agencies by increasing the administrative burden. On this issue, WDNR specifically makes the following comments:

EPA should allow the initial notification process to be done at the state's discretion

EPA solicited comment on whether EPA should require an "Initial Notification of Potential Exceptional Event" from air agencies, with a provision that EPA can waive the Initial Notification on a case-by-case basis. Alternatively, EPA solicited comment on making the Initial Notification of Potential Exceptional Event a voluntary process.

In order to reduce the potential administrative burden on both air agencies and EPA, the preliminary notification to EPA of an exceptional event should be voluntary. The flagging of the data should remain adequate notification of a potential exceptional event.

The public notification process should remain voluntary

EPA proposed that all air agencies and, where applicable, their political subdivisions, must notify the public immediately whenever an event occurs, or is reasonably expected to occur, which will result in an exceedance of an applicable air quality standard. This should be a voluntary notification, not a requirement, as air agencies have resource constraints and limitations that may preclude the reporting of every event. It should be noted that historically, WDNR has voluntarily notified the public when potential exceptional events have occurred. In addition, EPA is not clear regarding what it would consider acceptable methods for notifying the public.

EPA should further streamline the Exceptional Events process for agencies through this proposal

WDNR recognizes the effort that EPA has made in defining requirements of demonstration submittals. However, much more could, and should, be done to make the process less burdensome on the submitting air agency. For example, EPA stated it will not provide templates for exceptional events demonstration submittals; in its experience, this would be challenging because each exceptional event is unique. Further, the proposed rule does not provide a minimum level of data or case-specific analyses necessary to support exceptional event demonstrations of the same type.

EPA should do more to streamline the process for air agencies and ensure consistency among demonstrations. Specifically, EPA should provide templates for specific types of common exceptional event demonstrations such as industrial fires, firework displays and prescribed fires. EPA should also specify the minimum level of documentation needed for some of these more common demonstrations. In addition to helping reduce administrative burden, templates create consistency overall by allowing the ability to compare demonstrations across events over time and support consistency in reviews across EPA regions.

It should not be incumbent upon the air agency to develop templates they believe would be accepted by EPA

The preamble states that, following a completed demonstration, the EPA regional office that acted on the demonstration and the submitting air agency should discuss elements of the process that should continue and those that should be improved. Through this communication, the expectation is that the air agency will develop demonstration templates for future events of the same type. EPA should not finalize this requirement. As previously noted, EPA should develop templates for exceptional events demonstrations to assist air agencies in developing approvable demonstrations.

EPA should allow for automatic approvals in cases where exceptional events are obvious

EPA proposed to exclude data for several types of events (including firework displays, prescribed fires, wildfires, and high wind dust events) if the air agency can demonstrate to the Administrator's satisfaction the reason data should be excluded. Requiring this type of demonstration for events that are obvious and uncontroversial places an unnecessary administrative burden on both air agencies and EPA. EPA should instead automatically and presumptively approve demonstrations involving obvious, self-evident events without requiring air agencies to satisfy all of the requirements of the rule.

In September, 2011 a wildfire originating in the Superior National Forest in Northwestern Minnesota (also referred to as Pagami Creek) created a smoke plume that impacted a monitor in Wisconsin. During the event, the EPA Regional office notified WDNR to indicate that an exceptional event was likely occurring in Wisconsin. DNR began the demonstration process, which included a very detailed and laborious analysis that took over two years to develop. Despite the level of effort put forth in the creation of the demonstration packet, as well as the EPA regional office's initial indication that the event was exceptional the demonstration never reached concurrence. This example demonstrates a specific case in which an exceptional event was obvious and agreed upon by the EPA regional office and should have been automatically approved.

EPA should not hold air agencies accountable for providing a Smoke Management Plan (SMP) or other forestry planning documents

The proposed rule states that, for prescribed fires, the air agency must demonstrate the availability of a smoke management plan, basic burn management practices, or multi-year land/resource plan. EPA should eliminate this requirement in the final rule. First, it is not appropriate for EPA to hold air agencies accountable for developing or providing SMPs because they neither have jurisdiction over, nor expertise in, forestry management. In addition, this creates additional administrative burden by forcing coordination between air agencies and forestry managers. Finally, it should be assumed that prescribed burns are initiated with ample research and planning, and therefore always part of a natural resources plan.

2. Consistency Across EPA Regions

The proposed rule gives too much flexibility to the EPA regional offices, which is likely to lead to significant inconsistencies in interpretation and application of the rule across the regions. On this issue, WDNR offers the following comments:

EPA should adequately define terms to ensure consistent application of the rule across regions

EPA's proposed rule contains many examples of important terms either left undefined or lacking clear criteria or guidance. For example:

- The term "compelling evidence" is used repeatedly, but never defined.
- The vague term "Administrator's satisfaction" is repeatedly used, rather than specifying approvable criteria.
- For prescribed fires, EPA states, "If an exceptional event occurs using the basic smoke management practices approach, the State must undertake a review of its approach to ensure public health is being protected." However, the criteria needed "to ensure public health is being protected" are not provided.

Often, components of the rule are left to the Administrator's discretion, which could result in further inconsistencies. The vagueness of EPA's review criteria potentially prevents states from using approved submittals from other regions as templates for similar exceptional events in their region. To ensure the rule is consistently and uniformly applied, EPA needs to both eliminate the use of vague terminology and provide specific criteria to help EPA regional offices act similarly on exceptional events demonstrations of the same or similar type.

EPA should not use Air Quality Control Region (AQCR) boundaries when defining the area used to determine exceptional event recurrence at a particular location

EPA solicited comment regarding the area it should use to determine if an exceptional event has recurred at a particular location; specifically, EPA proposed using AQCRs to define the bounds for an area subject to event recurrence.

There are several issues with this proposal. First, AQCRs may be quite large in area; it would be a more accurate representation of an event recurrence at a particular location if the boundaries were smaller. Second, this approach is inconsistent with EPA's method for designating areas for criteria pollutants under the National Ambient Air Quality Standards (NAAQS); in these cases, EPA's presumptive jurisdictional unit is generally the county. Rather than using AQCRs, EPA should either use counties or, alternately, some other jurisdictional area smaller than AQCRs and more consistent with how EPA determines areas when implementing the NAAQS.

3. EPA's Responsibilities and Accountability

The proposed rule includes several requirements and deadlines to which air agencies are subjected, but does not impose similar deadlines on EPA. EPA should be held to the same level of accountability and timeliness as air agencies. This ensures both EPA and air agencies will properly prioritize the exceptional event demonstration and move the process forward expediently. On these issues, WDNR makes the following comments.

EPA should be required to respond to agencies in a timely manner

The proposed rule describes how EPA can issue a “due date” to an air agency for submitting information. However, the rule does not impose any corresponding due dates on EPA regarding its review of air agency submittals or any request it might make for additional information. EPA should face similar requirements to respond to an air agency’s exceptional event demonstration submittal within 90 days. If there is no response to the submittal within that timeframe, the exceptional event should automatically be accepted and approved. If EPA needs more information, it should respond within that timeline with specific feedback on the submittal, including: (1) what criterion was not met satisfactorily in the initial submittal, and (2) what specific piece(s) of data or information is still needed for the demonstration submittal to be acted upon.

All submitted Exceptional Event demonstrations should be reviewed by EPA in a timely manner, regardless of the impact on attainment designations

EPA should review all demonstrations in a timely manner. However, if EPA is unable to review all demonstrations, it should create an acceptable template for abbreviated demonstrations that may not have regulatory significance. For areas where attainment designations are not impacted, EPA should utilize presumptive approval for demonstrations that are obvious. If presumptive approval is not used the abbreviated exceptional event demonstration template submitted by air agencies should not expire and should be reviewable by EPA on a continuous basis.

EPA should not require the resubmittal of a demonstration after it is deemed inactive

The proposed rule states that, if the air agency does not submit evidence to EPA within 12 months, then the exceptional event demonstration is considered inactive. In these cases, EPA proposes that the agency would need to start the process from the beginning and resubmit the demonstration. There is no reason this should be the case, and EPA should not finalize this requirement.

4. Insufficient and Unclear Requirements and Definitions

The proposed rule does not adequately clarify the guidelines air agencies must follow, and the information they must submit, in order to have exceptional event demonstrations approved by EPA. The proposed rule lacks a dispute resolution process and a threshold to compare historical concentrations. There are also numerous specific proposals and definitions that lack clarity. WDNR makes the following comments regarding these issues.

EPA should include a formal dispute resolution process in the rule

Dispute resolution has been an ongoing issue. Adequate mechanisms however still do not exist in the proposed rule for air agencies to challenge an EPA regional office “deferral or non-concur” response to an exceptional event demonstration. An approach EPA could utilize to address this issue is to include in its final rule a formal process whereby an air agency can request that EPA headquarters review a regional office decision. The review would ensure the final rule and EPA guidance were appropriately interpreted and was consistent with decisions made by other EPA regional offices on similar submittals.

EPA should develop a threshold that simplifies the determination of whether an event will be accepted as exceptional

EPA proposed requiring air agencies to compare concentrations on the claimed exceptional event day(s) with historical data. However, Table 3 of the proposed rule does not provide a threshold above which a

concentration would automatically be considered by EPA to satisfy the comparison between measured and historical concentrations. EPA should identify such a threshold in the final rule.

While an effort to address this concern is included with the introduction of a “tier system” in EPA’s draft “Guidance on the Preparation of Exceptional Events Demonstrations for Wildfire Events that May Influence Ozone Concentrations,” depending on the severity of an exceptional event, EPA does not include a threshold to streamline demonstrations. A clearly defined threshold that distinguishes simple events from more complex exceptional events would help air agencies determine if the level of effort required for documenting a potential exceptional event merits the commitment of resources.

The proposed rule text must clarify if tribes with Treatment as State (TAS) authority under Section 319 of the Clean Air Act (CAA) can submit exceptional events demonstrations

The preamble to the proposed rule says that, in addition to states, Federal Land Managers (FLM), other federal agencies, or tribes that operate monitors and have TAS authority under Sec. 319 of the CAA are allowed to submit exceptional event demonstrations. However, the proposed regulatory text does not appear to reflect this. The rule text needs to be clarified to be consistent with what is defined in the preamble.

EPA should clarify that only air agencies that are authorized to submit raw data have the authority to submit exceptional event demonstrations

In Wisconsin, there are two tribes that operate monitors, but do not have TAS authority under Sec. 319. For these tribes, it is unclear which air agency (state, tribal, or federal) has the authority to submit an exceptional event demonstration on their behalf. If EPA were to submit an exceptional event demonstration for a tribe that operates a monitor, but does not have TAS under Sec. 319, a conflict of interest would occur since EPA would, in effect, be submitting a request to itself. To create data processing and subsequent demonstration consistency; EPA should clarify that the air agency that is authorized to flag and submit raw data (i.e., the screening group of the monitor, the Reporting Organization, or the Primary Quality Assurance Organization) is the only agency authorized to submit demonstrations. The air agency and tribe would be expected to collaborate on exceptional event demonstrations in cases where reservation lands have a monitor and the tribe does not have TAS under Sec. 319.

EPA should waive the requirement that air agencies fulfill the “not reasonably controllable or preventable” measure in the rule for specific events

EPA solicited comments on components and approaches associated with “not reasonably controllable” and “not reasonably preventable.”

The proposed rule states that EPA shall determine an event is not reasonably controllable or preventable if the air agency shows that reasonable measures to control or prevent an event were taken at the time of the event. The three referenced subparts are vague in terms of what EPA will consider “not reasonably controllable and preventable.” The section, as written, is unnecessarily vague and leaves it up to the submitting agency to guess the type of information required to prove these criterion to EPA’s satisfaction. Events such as wildfires, dust storms, and industrial fires cannot be easily shown to have been reasonably controlled or prevented. Approval of the criterion should be automatic by EPA without the need for air agencies to demonstrate that these types of events were “reasonably controlled and prevented.”

EPA should clarify or modify the following definitions

Natural event – It is unclear as to what EPA would consider “reasonably controlled” and what criteria EPA will use to determine whether a natural event has been reasonably controlled. Natural events are beyond the control of air agencies and EPA should not require air agencies to demonstrate that a natural event was reasonably controlled.

Prescribed fire – EPA should include in the definition that a prescribed fire will be considered as a “natural event” if it is part of a land management plan. The approach that prescribed fires are a land management tool that replaces a natural process is described in the preamble and should therefore be included in the rule text.

Wildfire – A wildfire that occurs on wildland but spreads to a developed area should be considered a “natural event” since the fire initially started on wildland. This definition should be modified to include that all fires started on wildland will be considered a natural event.

Wildland – It is unclear in the proposed definition if lands such as state parks, recreation areas, wildlife areas, etc., would be considered by EPA as wildlands and, if a fire occurred on these areas, the fire would be considered a natural event. These types of public lands should be considered wildlands and EPA should include examples of these types of areas in the definition for wildlands.

Thank you for the opportunity to provide comments on EPA’s Treatment of Data Influenced by Exceptional Events proposed rule. Please contact Katie Praedel of my staff at (414) 334-1649 or Katie.Praedel@wisconsin.gov if you have any questions about these comments.

Sincerely,



Gail Good
Director, Air Management