

## **1. Eliminate the Practice of Notices of Proposed Rules Containing Various Possible Versions of the Regulatory Text**

It is common practice for the Environmental Protection Agency (EPA) to propose rules with a notice that contains several alternative versions of the text. A notice of proposed rulemaking must include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>1</sup> The courts have interpreted this requirement to mean that the final rule must be a “logical outgrowth” of what was proposed.<sup>2</sup> According to the Supreme Court, the goal of publishing a proposal is to provide fair notice as to what the final rule may contain.<sup>3</sup> EPA’s practice of proposing rules that contain a myriad of possible outcomes probably meets the minimum requirements of the law. However, EPA could do more, as a matter of good policy, to provide fair notice to affected parties as to what it intends to adopt as a final rule.

One example of this is EPA’s PM<sub>2.5</sub> Implementation Rule that was proposed in 2015. The proposed regulatory text contains four separate places in which it provides alternative sections that EPA intends to choose from.<sup>4</sup> Within the preamble, EPA proposes an even greater number of potential options for altering the rule. These options are not included in the proposed regulatory text, but EPA invites the public to comment on them. This approach is beneficial in the sense that it gives affected parties the opportunity to comment on a variety of policy outcomes. However, the numerous possible outcomes also make it difficult to know what the rule is going to look like in the end. The practice increases the burden on state environmental agencies and regulated entities that must evaluate the potential impacts and provide detailed technical review and thoughtful comments on potential variations that may be found in the final action.

Significant rules that are proposed with an assortment of regulatory text to choose from should be re-proposed after the initial comment period. EPA should, when developing the regulatory agenda for these rules, provide time in the agenda for EPA to use the initial comments from the first notice to draft a version of the rule that is more closely aligned with what a final rule may look like. Then EPA should propose the more complete rule for public comment. Based on the new proposal, affected parties may have concerns that they had not considered while the original rule was in its disjointed form. This approach will better satisfy the Supreme Court’s stated goal of the notification requirement, to provide a fair notice of what the final rule may be.

## **2. Regulation through Guidance Documents should Stop**

EPA should stop regulating through guidance documents, policy statements, and other agency declarations that have not gone through the notice and comment rulemaking process. The Administrative Procedure Act and the Clean Air Act require EPA to undertake notice and comment rulemaking for rules that are promulgated under the authority of the Clean Air Act.<sup>5</sup>

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<sup>1</sup> 5 U.S.C. § 553 (b)(3).

<sup>2</sup> *Long Island Care at Home, Ltd. v. Coke*, 551 US 158, 172 (2007) .

<sup>3</sup> *Id.*

<sup>4</sup> See Environmental Protection Agency; Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements, 80 Fed. Reg. 15340 (March 23, 2015) (proposed rule).

<sup>5</sup> 5 U.S.C §§ 552-553; 42 U.S.C. §7607(d)(3).

EPA's guidance documents are often useful tools that provide state agencies clarity on how to comply with certain federal requirements, but EPA has sometimes treated guidance documents as if they were rules. Guidance documents become rules for all practical purposes when they have a "binding effect" and impose "obligations" on state agencies or other parties.<sup>6</sup> This occurs when EPA acts like the guidance document is controlling, it bases enforcement actions on the policies in the document, or it leads regulated entities to believe that failing to conform to the guidance will result in adverse consequences.<sup>7</sup> In cases where EPA uses its guidance documents as if they were binding rules, EPA should adhere to the procedures of notice and comment rulemaking.

Despite EPA's legal obligations, undertaking notice and comment rulemaking is often the preferred policy option.<sup>8</sup> The public participation process gives regulated entities the opportunity to provide alternative policy proposals, it ensures that the agency has all the relevant information for its rulemaking,<sup>9</sup> and it provides transparency on issues like the economic impact of the policy.<sup>10</sup> State agencies also prefer rulemaking over guidance documents in situations where EPA may be reaching beyond what is actually required by the Clean Air Act. The rulemaking process is a check on EPA's power and any potential overreach, and it ultimately leads to more effective, well rounded policies.

### **3. Eliminate the PM10 Indicator for Particulate Matter NAAQS**

In its 2006 NAAQS revision for Particulate Matter (PM), EPA lowered the 24-hour standard for fine particulate matter (PM<sub>2.5</sub>) from 65 µg/m<sup>3</sup> to 35. It is this fine particle fraction that poses the most adverse effects to human health. Alongside the tightening of this fine particle standard, EPA retained the current indicator of fine PM, PM<sub>10</sub> to address what it now refers to as inhalable coarse PM. The existing 24-hour standard for PM<sub>10</sub> was retained at 150 µg/m<sup>3</sup>, while the annual standard (50 µg/m<sup>3</sup>) was eliminated for lack of a definitive connection to adverse human health.

In its initial proposal (January 17, 2006, 71 FR 2620-2708), EPA introduced a new definition of inhalable coarse particles (PM<sub>10-2.5</sub>) that included only those coarse particles which come from sources such as high-density traffic on paved roads, industrial sources, and construction activities. The agency characterized emissions of these types as being typical of urban areas. Conversely, it specifically excluded from the proposed definition any contribution from windblown dust, agricultural sources, and mining sources.

In its final rule (October 17, 2006, 71 FR 61144-61232), EPA reversed its position on the qualified indicator of coarse PM (PM<sub>10-2.5</sub>) and retained instead an unqualified indicator. The

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<sup>6</sup> *Morton v. Ruiz*, 415 US 199, 232 (1974); *Chrysler Corp. v. Brown*, 441 US 281, 302 (1979); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

<sup>7</sup> *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

<sup>8</sup> Section 307(h) of the Clean Air Act emphasizes this preference by requiring regulations listed under Section 307(d) that are exempt from the Administrative Procedure Act, to undergo a similar public participation process.

<sup>9</sup> See *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1140-41 (D.C. Cir. 1995).

<sup>10</sup> Legislative rules under the Administrative Procedure Act have more review requirements than guidance documents. This includes extensive review by the Office of Information and Regulatory Affairs.

EPA selected PM<sub>10</sub> rather than PM<sub>10-2.5</sub> in an attempt to differentiate indirectly between urban and rural coarse PM.

This, in a qualitative sense, was because urban areas tend to have higher levels of fine PM than rural areas, and a coarse PM limit based on PM<sub>10</sub> would effectively require urban areas to have lower levels of true coarse PM — that is, particles between 2.5 and 10 µm in diameter — than rural areas. The EPA thusly believes the standard will target protection toward urban areas, where it is most needed.

In practice, the 24-hour standard for (fine) PM<sub>2.5</sub>, at 35 µg/m<sup>3</sup>, has become so dominant in controlling PM emissions that the standard for PM<sub>10</sub> has become obsolete. EPA's initial proposal in 2006 is somewhat telling, in that it was ready to exclude emissions from windblown dust, agricultural sources, and mining sources. If EPA was searching for a reason to retain, as part of the PM NAAQS, an indicator of an inhalable coarse fraction, it no longer needs one.

Additionally, retaining the PM<sub>10</sub> NAAQS in urban areas is problematic in that urban areas are also required to establish transportation conformity budgets, and MPOs are required to demonstrate conformity with those budgets, and SIP planning goals, objectives, and processes are very different from those for transportation planning. For example, SIP development requires planning for 4-10 years in the future, while transportation planning is looking out 20 or more years. Because of this discrepancy, the end-year transportation budget in a PM<sub>10</sub> plan has to account for an emissions level out 20 or more years, which is not reality, but necessary to allow transportation planners to do their jobs. This problem would go away, were EPA to eliminate the PM<sub>10</sub> NAAQS.

#### **4. Exceptional Event Resource Constraint and Rule Complexity**

The intent of the last Exceptional Events rulemaking was to streamline the process and reduce the level of effort for both states and EPA. In conjunction with the Exceptional Events rulemaking, EPA concurrently released the *Guidance on the Preparation of Exceptional Events Demonstrations for Wildfire Events that May Influence Ozone Concentrations*. The States worked together with WESTAR and EPA for years to find workable solutions to the inherent challenges and complexities of documenting evidence of ozone exceptional events. Our assessment of the level of resources necessary to meet the requirements outlined in this guidance is that, in fact, some air quality regulatory agencies do not have the technical abilities or access to the resources and data requirements to comply with the guidance.

Broadly speaking, the proposed guidance is written from the perspective of one or two local fires affecting one air monitor. This does not address the complexity and intricacies of the regional conditions prevalent in the western US. For example, page 8 of the guidance requires the mapping and inventory of wildfires every day a NAAQS exceedance occurs. During the western wildfire season, dozens to hundreds of wildfires are common. In the summer of 2015, as many as 800 wildfires burned simultaneously from Alaska to California and Idaho.

The guidance further requires that states conduct emissions analysis for each wildfire for each day. That data are currently extremely difficult to obtain, especially for downwind states. The

data gathering and analysis requirements present an extreme resource drain and would not be achievable by some air quality agencies.

EPA states in the preamble to the proposed rule that it will not establish a statistical bright line for an event, yet the guidance requires that the monitored value exceed 99 percent of the historic data for a Tier 2 assessment to be undertaken. This sets a very high bar and a statistical bright line. We support a tiered approach, but do not support a bright line dividing the tiers, but rather a requirement that states submit more detailed supporting documentation. We believe that air quality agencies should be able to submit demonstrations no matter the statistical percentile, so long as wildfire is a contributor to an ozone exceedance. As mentioned in comments on the proposed rule, EPA should provide an option for states to work with their respective Regional Offices and submit demonstrations other than the five types listed in the draft that may have regulatory significance for the states.

The sample documentation in EPA's proposed guidance also includes CMAQ modeling. CMAQ modeling is a resource-demanding, costly, and time-consuming task and therefore this level of analysis is counter to a streamlining objective for all but the most complex events. In support of these broad concerns about the guidance, we offer the following specific comments and recommendations to EPA.

The Utah Division of Air Quality (DAQ) along with WESTAR supports the tiered approach; however, it needs to be clarified or potentially modified. While we agree that EPA's proposed approach is beneficial in evaluating when certain events clearly qualify for a given tier, the criteria should not limit applicability as there may be additional situations where a lower tier level of analysis may be appropriate. EPA should work with the states through WESTAR on developing a broader suite of criteria and procedures to support the tiered approach.

Another concern we have about the tiered approach is that it appears new monitors (e.g. ozone monitors with less than five years of data) would automatically require a Tier 3 level analysis. Some locations do not have a five-year historical record and the event otherwise may meet the Tier 1 criteria. EPA should allow for the use of data from monitors with less than five years of data to make weight-of-evidence determinations about the level of effort needed for the demonstration (i.e., which Tier is required). We are willing to work with EPA to develop metrics for differentiating the tiers.

## **5. A Dispute Resolution Process for Exceptional Event Demonstrations is Needed**

As noted in comments DAQ worked with WESTAR to repeatedly submit to EPA, we believe that the Exceptional Events Rule should contain an administrative dispute resolution process to resolve disagreements over concurrence or approvals before a significant regulatory action is taken. We agree that establishing early and regular communication with EPA regional office staff is a positive step. As part of this communication process, we support EPA's proposal regarding requirements for initial notification of exceptional event requests states expect to pursue. This initial notification will help establish a dialog between EPA and states regarding expectations for subsequent documentation that will support development of approvable demonstrations.

However, situations may still occur where states will disagree with an EPA Regional Office action to disapprove a demonstration package. We therefore reiterate the recommendation we have made through WESTAR that EPA develop an administrative dispute resolution process. This process should ensure that states have the ability to present their concerns to EPA Headquarters staff directly, or could alternatively involve a third party with technical expertise to provide for an independent review of the documentation prepared by a state and the EPA Regional Office assessment.

## **6. Relieve Burdens on States through Maintenance Plan and Monitoring Termination**

Section 175A of the Act prescribes the maintenance plan requirements for redesignation. Essentially, the Act calls for a 20-year monitoring period. The Act does not specify what procedures or processes states must follow to request termination of the monitoring program when the area has successfully demonstrated attainment over the maintenance period. The Regional Administrator should have authority to approve cessation of all monitoring and repeal of obsolete rules related to the initial NAAQS violation.

## **7. Address Ozone Transport in the West**

The “Good neighbor” provision of the Clean Air Act, section 110(a)(2)(D)(i)(I), requires upwind states to develop SIPs that prohibit emissions of pollutants in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, a NAAQS in another state. These Good Neighbor SIPs are due within 3 years of promulgation of a new or revised NAAQS, meaning that transport SIPs for the 2015 ozone NAAQS will be due by October 2018. In a memo to EPA Regional Administrators, then Acting Assistant Administrator Janet McCabe, made it clear that states should rely on the framework of the Cross-State Air Pollution Rule (CSAPR) to address the Good Neighbor provision. One of the provisions of CSAPR is a screening threshold of 1 percent of the NAAQS. If States contribute more than 1 percent to a nonattainment or maintenance area in another state then it is considered significant. While Utah is not necessarily opposed to the 1 percent threshold, it would have to be within the margin of error of the models used to determine the percent contribution. The EPA recognized in their White paper Implementation of the 2015 Primary Ozone NAAQS: Issues Associated with Background Ozone that there is significant uncertainty in the models used for assessing international and state-to-state contributions. This is particularly difficult in the Western States where the topography heavily influences meteorological patterns. The coarseness of the models cannot account for the western terrain. In fact in a study of a similar meteorological model Gale Hoffnagle, from TRC Environmental Corporation, found that the margin of error could be as high as 41%. Unless the model can be refined, or a new model created, with a margin of error within the threshold, then 1 percent should not be the threshold for determining significant contribution from upwind states.

## **8. Consolidate the Air Monitoring within States**

All air quality monitoring in the state should be under DAQ, not each independent federal agency. EPA has determined that any ambient monitoring by any federal agency is regulatory and can be used against the state where collected, regardless of whether the federal agency has any kind of quality assurance method – all federal data is considered equal to data collected by

the state. The state monitoring sites are required to meet very rigorous quality assurance programs. Monitors are currently operated by the Bureau of Land Management, National Park Service, and the National Forest Service in Utah. Additionally, EPA should cease treating states as research associates for monitoring purposes. For example, EPA tried to get the states to establish monitors near airports to see how much lead is coming from planes using AvGas. They also are requiring states to establish Roadside Monitoring sites to see if there are elevated pollution levels near highways (i.e., research facilities). The requirement for airport sites was finally greatly reduced and/or eliminated, but EPA is still forcing the states to expend huge financial resources to develop roadside monitoring sites. In Utah's case, even though EPA is now allowing states to remove sites they already established because they did not find what they thought they would find, they are still coercing the State to establish two roadside monitors that will cost the state hundreds of thousands of dollars – for no reason except because they want it and against the wishes of the state air program.

## **9. Revise Transportation Conformity Planning**

As mentioned in the discussion about the retention or elimination of the PM10 NAAQS, there is a disconnect between transportation planning and SIP development. The SIP development process requires planning for as few as 4 and up to about 10 years in the future, while transportation planning is looking out 20 or more years. Because of this discrepancy, the end-year transportation budget in a SIP has to account for an emissions level out 20 or more years to meet the transportation planning requirements of the MPOs. However, while the transportation models may be reliable out 20 or more year, air quality planning assumptions are not. The end result is sometimes counterproductive. For example, an area where transportation is the only or major source of pollution in a nonattainment area will not be able to proceed with projects that could improve the air quality if the Transportation Conformity Finding lapses. The federal Transportation conformity rules need to be either changed to only apply to the out-years included in the associated SIPs, or eliminated.