



## WESTERN GOVERNORS' ASSOCIATION

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August 11, 2016

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Assistant to the President and Senior Adviser  
The White House  
1600 Pennsylvania Avenue, NW  
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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.<sup>1</sup>

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.”<sup>2</sup> 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.”<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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.

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<sup>1</sup> 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.](#)

<sup>2</sup> 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).

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

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

<sup>5</sup> *Id.*

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

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.<sup>7</sup> 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

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<sup>6</sup> Attached and incorporated by reference.

<sup>7</sup> Section V(B)(c) of proposed EER.

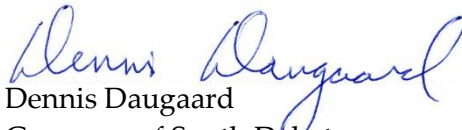
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consistent with this letter, the EPA Memorandum, and WGA Policy Resolution 2014-13 would be a positive step toward state and federal partnership on the issue of background ozone in the West. Western Governors will be following up to assure that its 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*<sup>1</sup> demonstrates EPA's willingness to second guess state technical expertise and site-specific decisions, challenge state SIPs, and pursue takeover of state-implemented programs.<sup>2</sup> 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

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

<sup>2</sup> 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.