DRAFT

Revised Policy
On Exclusions from "Ambient Air"

United States Environmental Protection Agency
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I. INTRODUCTION

The Environmental Protection Agency (EPA) defines "ambient air" as "*that portion of the atmosphere, external to buildings, to which the general public has access*." 40 CFR § 50.1(e) (emphasis added). The regulatory definition plainly excludes areas that are inside buildings, and such areas are not specifically addressed in this document. However, the EPA has long recognized that some areas that are external to buildings are also not covered by the regulatory definition of ambient air. In 1980, Administrator Douglas Costle wrote a letter to Senator Jennings Randolph saying that the EPA was retaining the policy that "the exemption from ambient air is available only for the atmosphere over land owned or controlled by the source *and* to which public access is *precluded by a fence or other physical barriers*" (emphases added).[1]

Stakeholders have identified situations arising in specific air quality analyses (*e.g.*, in the Prevention of Significant Deterioration (PSD) permitting process), that the EPA may not have considered when it issued the 1980 letter. These stakeholders have argued that the application of the ambient air policy is overly restrictive and that, given the advances in surveillance and monitoring capabilities and the variety of ambient air situations that have arisen since 1980, the restrictive language from the 1980 letter that solely focuses on the use of "a fence or other physical barriers" to preclude public access should be updated to provide for consideration of additional types of measures that are effective in deterring or precluding access to the land by the general public, and that can be implemented consistent with the regulatory definition of ambient air.

As stakeholders have noted, the ability of a regulated entity, such as a PSD permit applicant, to exclude a particular area of land from a specific air quality analysis has generally depended on the source showing that the public does not have access to that area. Historically, a source has been expected to demonstrate that (1) the area, although external to buildings, is owned or controlled by the source, and (2) access to the area by the public is precluded by means of a fence or other physical barriers. For example, a PSD permit applicant generally has been able to exclude from its air quality analysis the site of the proposed source where that site is owned by the source and the site is fenced so as not to allow access by the general public.

As articulated by Administrator Costle, the EPA's policy has been that an area's exclusion from ambient air is available only if both conditions described above are met. At the same time, Administrator Costle said that the "EPA will continue to review individual situations on a case-by-case basis to ensure the public is adequately protected."[2] Considering the wording of that policy, the EPA has often expressed in individual cases that both conditions, *i.e.*, (1) ownership or control and (2) preclusion of public access by physical barriers, should be satisfied in justifying the exclusion of an area from ambient air. However, notwithstanding that historic

[1] Letter from EPA Administrator Douglas Costle to Senator Jennings Randolph, Chairman, Committee on Environment and Public Works, December 19, 1980 (1980 letter).

[2] The Administrator also said that the EPA would seek to ensure "that there is no attempt by sources to circumvent the requirement of section 123 of the Clean Air Act." Section 123 of the CAA states that the emissions limitations required under state implementation plans (SIPs) shall not be affected by the use of air pollutant dispersion techniques.

approach, the EPA has never codified either of these two conditions in the regulatory definition of ambient air or elsewhere in regulations.

The policy articulated by Administrator Costle has over time resulted in concerns, such as those expressed by parties seeking to obtain permits under the PSD program, especially after the promulgation of increasingly stringent National Ambient Air Quality Standards (NAAQS) (such as the 1-hour 2010 nitrogen oxide and sulfur dioxide standards.) The EPA has received numerous stakeholder requests to clarify what areas may be excluded from ambient air in required air quality analyses, consistent with applicable regulations. Additionally, in accordance with the President's initiative to promote regulatory reform, including the streamlining of the federal permitting processes,[3] stakeholders have identified the ambient air policy as a topic that they would like the EPA to address.

In response, the EPA has evaluated its ambient air policy and identified an element of the policy that warrants revision.

II. BACKGROUND

As discussed above, the EPA's longstanding policy has been that the general public should not be deemed to have access to land occupied by a stationary source (or that would be occupied by a proposed stationary source or modification) when the land meets both of the following two conditions: (1) the land is "owned or controlled" by the owner or operator of the stationary source; and (2) the land is surrounded by a fence or other physical barriers that preclude general public access to it. Although not expressly stated by Administrator Costle in 1980, it is clear that these conditions of the policy have been fundamentally grounded on an interpretation of the regulatory phrase "to which the general public has access." In a 2007 memo, the EPA explained that it uses "controlled" in the context of the first condition of the policy to mean that the owner or operator of the source has the legal right to use the land, and that its land-use right includes "the power to control public access" and "the power to exclude the general public."[4] The EPA has also explained that the second condition calls for a source to actually take steps to preclude the general public from accessing the property "by relying on some type of physical barrier (such as a fence, wall, or natural obstructions)."[5] Thus, the first condition establishes that the general public does not have access in a legal sense (is not permitted to enter) while the second establishes that the general public does not have access in a practical or physical sense (is not able to enter). The EPA has also recognized that some persons that have both legal and practical access to the property are not necessarily considered members of the general public, such as employees of the owner or operator who work at the site, or "business invitees," such as contractors or delivery persons.[6]

[3] Executive Order 13777, 82 FR 17793 (April 13, 2017).
[4] Memorandum from Stephen D. Page, EPA OAQPS, to EPA Regional Air Division Directors, "Interpretation of 'Ambient Air' in Situations Involving Leased Land Under the Regulations for Prevention of Significant Deterioration (PSD)," attachment at 2-3, June 22, 2007.
[5] *Id.*, attachment at 2.
[6] *Id.*, attachment at 5-6.

Over the years, the EPA has provided clarifying guidance to explain how the definition of ambient air, and the associated ambient air policy, should be applied under specific circumstances for air quality analyses, such as analyses used to demonstrate compliance with the NAAQS and PSD increments within the PSD permitting process. For example, in the aforementioned 2007 memo, we explained how the EPA intended to apply the definitions of "ambient air" and "building, structure, facility, or installation" to arrangements where a source locates on land that it leases from another entity. The EPA has provided its views in other cases, on a case-by-case basis, concerning the adequacy of certain types of fencing or other physical barriers (*e.g.*, a steep cliff or rugged terrain) based on the EPA's understanding of the core concept of "access" to an area of land by the public, as this term is used in the regulatory definition of ambient air.

In addition to seeking assistance from the EPA in case-specific permitting situations, stakeholders have requested that the EPA reconsider aspects of the ambient air policy that they consider to be inflexible or outdated, such as the need to demonstrate NAAQS attainment just beyond the property boundary in areas where few or no members of the general public are expected to be present. As relevant here, stakeholders have specifically argued that the EPA's historic focus on a fence or other physical barriers is outdated in that it does not address or allow consideration of the additional ways by which a facility can deter or preclude public access (*e.g.*, routine security patrols, remote surveillance cameras, drones). They point out that fences or physical barriers are not mandated by the regulatory definition of ambient air and, therefore, the EPA's ambient air policy should not consider them to be the only allowable means of preventing access by the general public.

In its review of individual situations on a case-by-case basis, the EPA in a few instances has agreed that an area may qualify for exclusion from ambient air notwithstanding the fact that the specific property or facility at issue, or a certain portion of the property or facility, was not completely surrounded by a fence or other physical barriers.[7] In one instance, the EPA granted an exclusion based on a means of preventing or deterring practical access by the general public other than a fence or other physical barriers. The United States Court of Appeals for the Ninth Circuit reviewed and upheld the exclusion, finding that although fencing or other physical barriers were not used, other methods were used to effectively preclude public access, and "[t]he essence of the EPA's regulatory definition links ambient air to public access."[8,9] Although that case involved permitting of a source located over water, where installation of a fence or other physical barriers was not feasible, the language of the regulatory definition of ambient air does not preclude extending this reasoning to other factual situations. For example, there are situations over land where it may also be impractical or unduly burdensome to require a source to install a fence or other physical barriers when other means of precluding or deterring access by the general public may be equally effective. Indeed, as discussed above, the EPA has on occasion already supported excluding some areas of land from ambient air by recognizing that access by

[7] *See, e.g.,* 50 FR 7056, 7057 (Feb. 20, 1985) (allowing ambient air exclusion based on cumulative effect of company's extensive property holdings, installation of fences, posts, and no-trespassing signs, security patrolling, and the rugged mountainous terrain).
[8] *See REDOIL v. EPA*, 716 F.3d 1155, 1164-65 (9th Cir. 2012) (A proposed offshore drill ship in the Arctic Ocean seeking a PSD permit was allowed to exempt from ambient air a "safety zone" surrounding the ship that was established by the U.S. Coast Guard and effectively precluded public access).
[9] *See* Arco Alaska Permit Application for Beaufort Sea Exploratory Drill Project, March 1, 1993.

the general public may be effectively precluded or deterred by means other than a fence or other physical barriers and still be consistent with the regulatory definition of ambient air.

III. CORE ELEMENTS OF REGULATORY DEFINITION OF "AMBIENT AIR"

In response to stakeholders' concerns, the EPA has evaluated the terms in the regulatory definition of ambient air and identified three core conceptual elements: "access," "general public," and "external to buildings." The EPA has then assessed how it has been applying each of these terms or phrases under the existing ambient air policy and whether additional flexibility may be appropriate within the context of the regulatory definition of ambient air. The EPA concludes that it is reasonable and appropriate to adopt and apply a revised policy addressing how public access to land may be precluded in order to facilitate greater flexibility while at the same time ensuring that the public health protection afforded by current Clean Air Act programs is not eroded.

Consistent with the EPA's past practice and the discussion above, the access element of the ambient air policy encompasses two concepts: physical or practical access, and legal access. First, the physical or practical aspect addresses whether the general public has the physical or practical ability to enter a particular parcel of land. As discussed above, the EPA previously stated in the 1980 letter that for an area to be excluded from ambient air, public access should be precluded by means of a fence or other physical barriers. Notwithstanding this earlier policy statement, however, in some situations the EPA has subsequently found that a natural barrier, such as a steep cliff or rugged terrain, may be an adequate substitute, in lieu of a fence, to prevent public access.

The EPA's revised ambient air policy replaces "a fence or other physical barriers" with "measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public." The EPA expects that this change in its ambient air policy will provide greater flexibility in determining where to place modeling receptors for air quality analyses, while maintaining public health protection.

With advances in technology and greater experience in a variety of ambient air scenarios since the 1980 letter, the EPA believes there are various measures other than fencing or other physical barriers that a facility can employ to serve as an effective deterrent to public access. These measures may include traditional fencing, but may also include video surveillance and monitoring, clear signage, routine security patrols, drones, and other potential future technologies. In many cases, such measures are already being used as effective means to deter or preclude public access to private property, even if not specifically for purposes of an ambient air exclusion.

Air agencies should evaluate the effectiveness of a "measure" in precluding public access based on the relevant, specific circumstances. This evaluation should address relevant factors, such as the nature of the measure used (*e.g.*, physical or non-physical), facility location (*e.g.*, rural or urban), type and size of facility and property to be excluded, surrounding area (including the proximity, nature, and size of the population in the area), and other factors affecting the extent to which persons would be likely or able to trespass upon or otherwise have access to the

facility's land. Air agencies should consider any information provided by the regulated entity, or otherwise available to the air agencies, regarding the effectiveness of the measures to prevent public access. For instance, the use of clearly visible, well-spaced "No Trespassing" signs, either with or without fencing, may be effective in certain areas. Another example of an effective measure may involve atypical public access such as swamps and large tracts of undeveloped private land. In other cases, where there is a greater incentive for persons to access or trespass over the property (*e.g.*, to shorten the walking distance to a destination), it may be necessary to use a combination of measures, and not solely signage, to adequately preclude public access.

It is not the intent of this revised policy to prescribe the specific types of measures (physical barriers or otherwise) that should be used but, instead, to provide guidance to air agencies when assessing whether measures to prevent public access are sufficient under the circumstances to exclude an area from ambient air. The goal of such an assessment is to ensure that the measures in question are effective in preventing or deterring public access. Air agencies are expected to apply a rule of reason in assessing the effectiveness of proposed measures. Even under the prior policy, it was always possible for some fences to be scaled and other types of barriers to be breached. It is generally recognized that a fence is an effective means of precluding or deterring public access, even if it might not in all conceivable cases prevent site access. Similarly, under this revised policy, measures may be considered to be acceptable even if they are not 100 percent effective in preventing public access. Instead, measures should provide reasonable assurance that the general public will not have access.

The second aspect of the access element concerns whether the public is legally precluded from entering onto the property by its owner. The EPA's historic policy states that an exclusion from ambient air is available only for areas owned or controlled by the source, which generally means that the source has legal authority to preclude access by the public to the area of land it owns. This revised policy makes no change in this regard.

As previously stated, determinations concerning the adequacy of such measures can only be made by air agencies on a case-by-case basis after consideration of the relevant administrative record in each case. Where air agencies seek EPA's assistance in making such determinations, the EPA will address these requests via the Ambient Air Review Team (AART). The AART is responsible for evaluating ambient air issues, in conjunction with the appropriate EPA regional office, to ensure nationally consistent implementation of the ambient air policy.

IV. CONCLUSION

In setting forth this revised ambient air policy, the EPA is making a limited change to the way it applies the regulatory definition of ambient air, while maintaining public health protection. This change replaces the specific concept of a fence or other physical barriers with the more general concept of measures, which may include physical barriers, that are effective in deterring or precluding access by the general public. Accordingly, the EPA's revised ambient air policy, consistent with its discretion available under the regulatory definition of ambient air, is that it is appropriate to exclude *the atmosphere over land owned or controlled by the stationary source, where the owner or operator of the source employs measures, which may include*

physical barriers, that are effective in deterring or precluding access to the land by the general public.

This revised policy should be implemented by EPA Regional offices and delegated state and local air agencies, *e.g.*, for the issuance of federal PSD permits. The EPA expects each air agency with a State Implementation Plan-approved program to ensure that its ambient air policy is applied consistent with the definition of ambient air contained in its approved program.

This revised policy is neither a regulation subject to notice-and-comment rulemaking requirements nor a final agency action and does not create or change any legal requirements on the EPA, on state, local, and tribal agencies, or on the public. This document does not provide any final determination that any particular area may be excluded from ambient air on the basis of particular measures taken to deter or preclude access, since determinations concerning the adequacy of such measures can only be made by air agencies on a case-by-case basis after consideration of the relevant administrative record in each case.