UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 0 2 2019

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Revised Policy on Exclusions from "Ambient Air"

FROM: Andrew R. Wheeler

TO: Regional Administrators

The U.S. Environmental Protection Agency is updating its policy on the exclusion of certain areas from the scope of "ambient air." In the context of developing and implementing national ambient air quality standards under the *Clean Air Act*, the EPA defines "ambient air" at 40 CFR § 50.1(e) as "that portion of the atmosphere, external to buildings, to which the general public has access." In applying this definition, the EPA has long followed a policy that allows excluding certain areas of a source's property, located outside of a building, from ambient air. As described in a 1980 letter from then-Administrator Douglas Costle to Senator Jennings Randolph, this "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." In the attached revised policy, I am revising the "fence or other physical barriers" element of this ambient air policy, while maintaining public health protection.

This revision to the ambient air policy, like the 1980 letter, considers as eligible for exclusion only the atmosphere over "land owned or controlled by the [stationary] source." While the 1980 letter said such areas may only be excluded when public access is precluded by "a fence or other physical barriers," this limited revision more clearly recognizes that a *fence or other physical barrier* is not the only type of measure that may be used to establish that the general public does not "have access" to an area of land that is owned or controlled by the source. These other types of measures, potentially combined with physical barriers, may be used to support exclusion of an area from ambient air. Thus, the EPA's revised ambient air policy, consistent with its discretion available under the regulatory definition of ambient air, is that *the atmosphere over land owned or controlled by the stationary source may be excluded from ambient air where the source employs measures, which may include physical barriers, that are effective in precluding access to the land by the general public.*

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The revised policy reflects input from stakeholders, and the EPA expects this policy to maintain the same level of public health protection that was originally intended by the 1980 letter. For example, under the Prevention of Significant Deterioration program air quality analysis requirement, the air agency[1] must still determine, based on the administrative record for the permit, that the general public does not have access to property in order to exclude an area from ambient air.

The revised policy reflected in the attachment is neither a regulation subject to notice-and-comment rulemaking requirements nor a final agency action. This action does not amend the definition of "ambient air" in EPA regulations at 40 CFR § 50.1(e) and does not create or change any legal requirements applicable to the EPA, air agencies or the public. This policy does not of its own force determine that any specific portion of any particular source's property may be excluded from ambient air on the basis of particular measures taken to preclude public access. Determinations concerning the adequacy of such measures can only be made by the EPA or another air agency on a case-by-case basis after consideration of the relevant administrative record. Air agencies are not required to apply this policy and retain the discretion to determine whether the steps taken by a source will be adequate to preclude public access.

Please share this memorandum and the attached revised policy with air agencies in your region. For any questions regarding this memorandum and the attached revised policy, please contact Scott Mathias, Acting Director of the Air Quality Policy Division in the Office of Air Quality Planning and Standards at (919) 541-5310 or mathias.scott@epa.gov.

Attachment

[1] "Air agency" refers to a state, local or tribal air permitting agency and may also refer to the EPA, depending on the context.

Revised Policy on Exclusions from "Ambient Air"

I. INTRODUCTION

In the context of developing and implementing national ambient air quality standards under the *Clean Air Act*, the U.S. Environmental Protection Agency defines "ambient air" at 40 CFR § 50.1(e) as "that portion of the atmosphere, external to buildings, to which the general public has access."[1] The regulatory definition plainly excludes from ambient air areas inside buildings, and these areas are not addressed further in this document. In addition, the EPA has long recognized that certain areas external to buildings may be excluded from the regulatory definition of ambient air because the general public does not have access to them. Based on this interpretation, the EPA has a longstanding policy in allowing an exclusion from "ambient air" of the atmosphere over certain areas external to buildings when particular conditions are satisfied. This interpretation and policy were affirmed in a 1980 letter from Administrator Costle, which stated 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."[2]

The 1980 policy was criticized by those who believed that allowing exclusions of atmosphere, even on a source's own property, resulted in inadequate public health protection. In a 1989 report, the U.S. General Accounting Office reviewed the EPA's implementation of its ambient air policy and found that, in some cases, EPA Regional offices approved ambient air exclusions that allowed sources to increase pollution where air quality modeling predicted violations of the NAAQS.[3] The report recommended that the EPA "initiate a formal rulemaking process to redefine ambient air in a manner that is more protective of the environment." The report criticized the EPA for allowing the use of land acquisition to exclude such land from determinations of compliance with the NAAQS. It equated such land acquisition practices to prohibited dispersion techniques – a comparison with which the EPA has disagreed.[4]

Notwithstanding the GAO report, the EPA left the policy in the 1980 letter in place and decided neither to redefine its regulatory definition of ambient air nor to issue guidance concerning land acquisition practices. The EPA has continued to apply the policy described in the 1980 letter for nearly 40 years, and the EPA has periodically provided guidance to address the application of the policy in specific situations.

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[1] *See also Train v. NRDC*, 421 U.S. 60, 65 (1975) ("'ambient air' [is] the statute's term for the outdoor air used by the general public").

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

[3] "Air Pollution: EPA's Ambient Air Policy Results in Additional Pollution," United States General Accounting Office, GAO/RCED-89-144, July 1989, at 14-21.

[4] Policy statement on the definition of Ambient Air, David G. Hawkins, Assistant Administrator for Air, Noise, and Radiation, Draft, January 9, 1980.

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In recent years, industry representatives have argued that the longstanding ambient air policy is overly restrictive because it purports to require the use of a fence to preclude public access and justify excluding an area. These stakeholders have identified situations arising in specific types of air quality analyses (*e.g.*. Prevention of Significant Deterioration (PSD) permitting) that the EPA may not have considered when it issued the 1980 letter.[5] Industry representatives have requested that, given the advances in surveillance and monitoring capabilities and the variety of ambient air situations that have arisen since 1980, the language from the 1980 letter should be updated to more readily allow regulatory authorities to consider additional types of measures that are effective in precluding public access to a source's property, consistent with the regulatory definition of ambient air.

The EPA has reviewed the general principles expressed in the 1980 letter and has concluded, after considering a wide range of stakeholder comments, that it is reasonable to update the language from the 1980 letter that calls for the use of "a fence or other physical barriers" to preclude public access. In summary, this policy statement describes a refinement to the language of the existing policy that recognizes that a variety of measures (including, but not limited to, physical barriers) could be appropriately considered effective, depending on site-specific circumstances, to preclude public access from property owned or controlled by a source. The limited exclusion in this updated ambient air policy continues to apply only to property "owned or controlled" by the source and reflects only an update to the criteria the EPA will apply when determining whether a source effectively precludes public access to its property for purposes of analyzing the source's impact on ambient air.

A draft of the revised policy was made available for public review and comment from November 18, 2018, through January 11, 2019.[6] A total of 37 sets of comments were received from individuals and stakeholders representing state, local and tribal government agencies, industry and environmental groups. Some of the comments are discussed below. After consideration of all comments received, the EPA believes the revised policy is appropriate and will maintain public health protection. The revised policy is fully consistent with the regulatory definition of ambient air and fulfills the objective of protecting the public from exposure to potentially adverse levels of air pollution in a manner no less effective than the "fence or other physical barriers" called for under the previous policy.

II. BACKGROUND

As discussed above, the EPA's longstanding policy is based on the view that the general public does not 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 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. For

[5] American Forestry and Paper Association/American Wood Council, NAAQS Permitting White Paper on Flexible Procedures (September 2014) (*see* relevant discussion in sections 2 and 3).
[6] *See https://www.epa.gov/nsr/forms/draft-guidance-revised-policy-exclusions-ambient-air.*

example, under this policy, the EPA allows a PSD permit applicant to exclude from its air quality analysis the site of the proposed source where the record shows that the site is owned or controlled by the source and surrounded by a fence or other physical barriers that do not allow public access.[7]

Although not expressly stated by Administrator Costle in 1980, it is clear that these dual 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 memorandum, 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."[8] The EPA explained that the second condition calls for a source to actually take steps to preclude the general public from accessing its property "by relying on some type of physical barrier (*e.g.*, a fence, wall, or natural obstruction)." Thus, the first condition calls for a consideration of whether the general public has access in a *legal* sense (whether the owner or controller of the land has the right to preclude the general public's access), while the second condition calls for a consideration of whether the general public has access in a *practical or physical* sense (whether the general public is able to enter). The EPA also recognized that some persons that have both legal and practical access to the source's 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.[9] Of all of these aspects of the analysis, the sole change to the EPA's ambient air policy reflected in this attachment is that the EPA no longer considers "a fence or other physical barriers" to be the only type of measure available to a source in order to preclude public access in a practical or physical sense.

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 memorandum, the EPA explained how it intended to apply the definitions of "ambient air" and "building, structure, facility or installation"[10] to arrangements where a source locates on property that it leases from another entity. The EPA has provided its views in other situations, 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 source property by the public, as this term is used in the regulatory definition of ambient air.

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[7] *See, e.g.*, *In re Hibbing Taconite*, 2 E.A.D. 838 (Admr. 1989). In this case, the EPA's Administrator called for additional review of whether physical barriers were present at all locations around the perimeter of excluded property.
[8] 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. The memorandum refers to the 1980 letter, but this revised policy does not affect the interpretations expressed in the 2007 memorandum, as described above.
[9] *Id.*, attachment at 5-6.
[10] *See* 40 CFR 52.21(b)(6).

In its review of individual situations, the EPA has sometimes agreed that an area may qualify for exclusion from ambient air despite the fact that the specific property or facility at issue, or a certain portion of the property or facility, was not surrounded by a fence or other physical barriers. For example, five years after the 1980 letter, the EPA allowed an ambient air exclusion based on the cumulative effect of a company's extensive property holdings, installation of fences, posting of "No Trespassing" signs, security patrolling and the rugged mountainous terrain.[11] More recently, the EPA excluded an area from ambient air based on a source's proposal to preclude public access using measures 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."[12] Although that case involved permitting of a source located over water, where installation of a fence or other physical barriers was not practical, the language of the regulatory definition of ambient air does not preclude extending this reasoning to other factual situations. For example, there may be situations over land where it is also impractical or unduly burdensome to require a source to install a fence or other physical barriers when other means of precluding public access may be equally effective. The EPA has thus not read the regulatory definition to require the use of physical barriers in all cases. After evaluating the specific circumstances, the EPA has in some cases supported excluding areas of land from ambient air that were not surrounded by physical barriers. The EPA has previously recognized that public access may be effectively precluded by means other than a fence or other physical barriers and still be consistent with the regulatory definition of ambient air.

In addition to seeking assistance from the EPA in case-specific permitting situations, organizations representing permit applicants have on various occasions requested that the EPA reconsider aspects of the ambient air policy that their membership considers to be inflexible or outdated, such as the need to demonstrate NAAQS attainment on railroad tracks and roadways on or just beyond their property boundary, in areas where these organizations assert few or no members of the general public are expected to be present. These requests resurfaced in comments on the draft revised policy that was made available for informal public comment. Furthermore, some commenters 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 additional security technology and other measures by which public access may be precluded (*e.g.*, routine security patrols, remote surveillance cameras, drones). Some commenters also pointed out that a fence 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 precluding public access. On

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[11] *See*, 50 FR 7056, 7057 (February 20, 1985). In this instance, Kennecott maintained that public access was precluded from ambient air by a combination of rugged terrain, dense vegetation, limited perimeter fencing, no-trespassing signs and security patrols.

[12] *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); *see also* EPA memorandum from Phil Millam, Region X, to Randy Poteet, ARCO Alaska, Inc., titled "Arco Alaska Permit Application for Beaufort Sea Exploratory Drill Project," March 1, 1993 (EPA regional comment letter asking ARCO to certify that an exclusionary safety zone exists with reasonable zone boundary control measures for EPA to consider the area to be controlled by the source, and therefore, excluded from being considered ambient air).

the other hand, some commenters argued that the EPA's 1980 policy allowing an exemption for fenced land owned or controlled by a source was contrary to law.[13] These stakeholders argued that the regulatory definition should be revised through rulemaking to eliminate or narrow the exclusion for areas external to buildings. Other commenters argued that the draft revised policy would further loosen the existing policy and therefore would be clearly inappropriate.

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

Considering these views of interested stakeholders, 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 then considered how each of these terms or phrases has been applied under the existing ambient air policy and whether additional flexibility or clarification may be appropriate, consistent with the existing regulatory definition of ambient air. The EPA concluded that it is reasonable and appropriate to update its ambient air policy[14] concerning methods for precluding public access to source property in order to facilitate greater flexibility in light of developments and experience since the 1980 letter, while at the same time ensuring that the public health protection afforded by the 1980 letter is maintained.

Consistent with past practice and the discussion above, the EPA continues to interpret the term "access" to encompass two key concepts: legal access and physical or practical access.[15] Some commenters argued that the EPA's policy should allow areas to be excluded where there is no legal access, even if there is physical access, by the general public. They argued that physically precluding public access should not be necessary under the ambient air policy because it is not specifically required by the CAA or the regulatory definition of ambient air. Commenters also argued that persons entering private property without the owner's permission are trespassers and therefore their access is unlawful and irrelevant. While the regulatory definition of "ambient air" does not use some of the terms reflected in the EPA's ambient air policy, the definition also does not explicitly exclude any area external to buildings. The exclusion for such areas is reasonably inferred as the inverse of what is affirmatively covered ("areas ... to which the general public has access"). Nor does the regulatory definition prescribe specific criteria that are in conflict with the EPA's policy. The EPA 's view is that the approach advocated by these commenters of focusing only on legal access reads the term "access" too narrowly and ignores the EPA's longstanding

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[13] One commenter cited memoranda issued in 1972 and 1977; *see* Appendix for the EPA's response.

[14] Some commenters refer to the 1980 letter as an EPA interpretation, but it also contains statements of EPA policy. The 1980 letter stated the EPA was retaining "the existing 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." The policy clarified how the EPA intended to apply the concept in the regulatory definition of the general public having (or not having) "access" to property (and the air above it). Although not expressly stated in Administrator Costle's letter, that letter, and this revised policy, "interpret" the regulatory definition to be inapplicable to areas outside of buildings to which the general public does not have access and read the term "access" to encompass both legal and practical access. The 1980 letter and this revised policy then proceed to provide policy guidance as to the conditions under which the EPA believes it may be appropriate for one to conclude that general public does not have such access to an area. This revised policy describes how the EPA intends to exercise its discretion to determine whether the public has access based on record-based facts (and provides guidance for others to do likewise).

[15] The word "access" has a variety of meanings. As used for applying the regulatory definition of ambient air ("atmosphere . . . to which the public has access"), the EPA believes the term encompasses both the public's *legal right* and the public's *practical ability* to enter a particular parcel of land.

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understanding that the general public may have access based on, not only the right, but also the ability, to enter an area.

The first aspect of the access element (*i.e.*, legal access) concerns whether the general public has the right or permission to enter a specific property. Under the ambient air policy as described in the 1980 letter, an exclusion from ambient air is available only for areas owned or controlled by the source (*i.e.*, the source has legal authority, via ownership or control, to preclude access by the public).

Although the draft revised policy did not propose any change in this element of the ambient air policy, some commenters advocated that the EPA allow exclusions of property owned or controlled by other parties. These commenters argued that the regulatory definition of "ambient air" does not mandate that the *source* own or control the land from which the public is otherwise precluded. As discussed above, the EPA's policy allowing exclusion of some areas external to buildings is not based on language in the regulatory definition mandating exclusion or providing particular criteria for such an exclusion, but rather, is inferred as the inverse of what is affirmatively covered by that definition (*i.e.*, if "ambient air" is defined as that to which the general public has access, then that to which the general public does not have access is not ambient air). The EPA's view is that the general public has legal access to areas that are owned and controlled by parties other than the owner or operator of a stationary source. The EPA continues to view the "general public" to include any person(s) other than those who are permitted access to the property as employees or business invitees of a specific stationary source (including trespassers). Although a landowner who owns a stationary source downwind of another landowner's separate stationary source may restrict public access onto his or her private property, the owner and the individuals that are permitted access to his or her downwind property are, generally speaking, members of the general public relative to the upwind stationary source. An alternative reading of "general public" that excludes all persons on any private property to which access is restricted (*e.g.*, private homeowners with fenced yards) would expand the exclusion beyond reason and deny the protection of the NAAQS to large numbers of people. This revised policy makes no change to the "owned or controlled by the source" and "general public" elements of the policy.

The second aspect of the access element (*i.e.*, physical or practical access) addresses whether the general public is able to, under actual circumstances, enter a particular parcel of land. As discussed above, the EPA 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. Since 1980, the EPA has found that a natural barrier (*e.g.*, steep cliff, rugged terrain or dense vegetation), was sufficient, in the absence of a man-made barrier like a wall or fence, to prevent public access, in some situations.[16]

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[16] *See* 50 FR 7056, 7057 (February 20, 1985). On a related issue, one commenter cited two EPA memos from 1985 and 2000 for the conclusions that "a shoreline by itself is not a sufficient barrier to public access" and "publicly accessible areas such as highways and rivers may show violations of NAAQS," respectively. The EPA believes the revised policy would not necessarily result in different conclusions, depending on the facts presented. Relevant factors for an air agency to determine whether an unfenced "shoreline" is a sufficient barrier to preclude public access across the border of a source property may include: the ability of users of the water body (*e.g.*, boaters, to access the shore in that location, whether the general public has access to the water body, and whether the source uses any additional measures, such as signage and video surveillance). Regarding a highway or river, the revised policy makes no change

Based on concerns that a physical barrier is not always needed to restrict access, the EPA invited public comments on a draft revised ambient air policy that would replace the term "a fence or other physical barriers" in the "access" element of the policy with the broader term "measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public."[17] Some commenters agreed that "fences or other physical barriers" should not always be necessary for precluding public access.

Recognizing advances in security technologies and greater experience in the diversity of ambient air scenarios since the 1980 letter, the EPA's view is that a source can in many instances employ measures, other than fencing or other physical barriers, or in combination with fencing or other physical barriers, to effectively preclude public access. While sources often use traditional fencing at the boundary of a facility, there are examples of other measures, of which more than one may be used in combination, that have been effective in precluding public access when adequate procedures are followed (*e.g.*, video surveillance, monitoring, clear signage, routine security patrols). Furthermore, the EPA recognizes that there will be future technologies such as drones and more advanced video surveillance capabilities, that will potentially be used to preclude public access.[18]

The EPA does not regard this revision as a fundamental change to the longstanding ambient air policy. For example, under the prior policy, it was always possible for some fences to be scaled and other types of barriers to be breached.[19] The EPA agrees with commenters who stated that a fence is an effective means of precluding public access, but even a fence, depending on factors such as its height, composition, scalability, resistance to damage or tunneling and remoteness of location, will not in all conceivable situations prevent persons who desire to gain access (although

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to the "owned or controlled by the source" element, as stated above, so the EPA generally would not expect the revised policy to change a determination of whether an area should be excluded from ambient air, where it includes "publicly accessible areas such as highways and rivers" since such areas generally are not owned or controlled by the source. Thus, the EPA sees no conflict between past policy memorandums and the revised policy.

[17] In the draft revised policy made available for public comment, the EPA used the word "deter" in addition to "preclude." This was intended to acknowledge that non-physical measures might be defeated (perhaps temporarily) by a deliberate trespasser in a manner similar to a physical obstruction, but this scenario is appropriately defined through the word "preclude" such that the word "deter" is not necessary in this context. The EPA maintains its view that any type of measure employed by a source should preclude public access to justify excluding a portion of source property from ambient air and its effectiveness in doing so should be evaluated on a case-by-case basis.

[18] By listing examples in this paragraph, the EPA does not suggest that any such measure by itself will be effective in precluding access to any particular property without procedures that ensure that the measure will be used in a manner that effectively precludes public access. Nor, by listing examples, does the EPA intend to foreclose the possibility that some other measure or measures not listed as an example might be effective in precluding access to any particular property. The determination by an air agency of whether access to any particular property is precluded is fact-based and facility-specific.

[19] One commenter argued that "the fact that even 'physical barriers' conceivably could be scaled or breached means that 'the general public has access" within the meaning of 40 CFR § 50.7(e), even if a fence or other physical barrier is used. The EPA believes that the regulatory definition is reasonably read not to require absolute certainty that no one could ever overcome a fence or other physical (or non-physical) barriers around a source. Another commenter noted that some physical barriers such as "short walls, three-rail fences, [or] easily scaled walls or fences" may be insufficient to actually prevent access. The EPA believes that the effectiveness of particular measures, whether physical or non-physical, to preclude public access should be addressed by the source and the air agency on a case-by-case basis considering the totality of the circumstances.

unlawfully) to a source's property. Generally, the air agency[20] should be satisfied that the measures proposed by the source are adequate to assure that the general public will not have access under reasonably anticipated circumstances that could occur in the area. This revised policy does not prescribe, approve, or disallow any specific types of measures (physical barriers or otherwise) that may be used to preclude public access. Rather, this revised policy calls for staff at the EPA (and other air agencies as well) to carefully assess measures proposed by a source to preclude public access under specific, factual circumstances. The goal of such an assessment is to be satisfied that the measures (whether physical or not) proposed by a source are effective in precluding public access under the circumstances presented. Thus, under this revised policy, measures may be considered effective, under a given set of circumstances, even if there is not 100 percent certainty that they will prevent public access.[21]

The EPA will apply a rule of reason in evaluating the effectiveness of any measures proposed by a source. In doing so, this evaluation should address relevant factors, such as the nature of the measure used (*e.g.*, physical or non-physical), source location, type and size of source and property to be excluded, surrounding area (including the proximity, nature, and size of the population in the area), and other factors affecting whether members of the general public would readily be able to trespass upon or otherwise have access to the source's property. Air agencies should consider all relevant information provided by the source or other interested parties, 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 in conjunction with some degree of fencing or other physical and/or non-physical barriers, may potentially be effective to preclude access by the general public in appropriate situations. In other cases, such as in areas accessible to children (*e.g.*, areas adjacent to schools), or where the nature of the property offers an incentive for persons to access or trespass (*e.g.*, a short cut to a destination), it may be necessary to use a different combination of measures to effectively preclude public access.

Related to the use of measures (particularly non-physical measures) to preclude public access is the question of whether such measures should be addressed in enforceable conditions (*e.g.*, PSD permit conditions). Although the draft revised policy did not address this issue, a few commenters submitted comments either supporting or opposing inclusion of such measures as enforceable permit terms. One air agency commented that while a physical barrier such as existing source fencing can be reasonably considered to be fixed and to last for the operational life of the source, a non-physical measure may warrant consideration as a permit term, especially where the measure does not "correspond with the facility's [source's] operational footprint." EPA will consider the need for enforceable permit conditions on a case-by-case basis and other air agencies may similarly exercise discretion in determining whether a permit condition is appropriate to ensure that a source administers the selected measures in a way that maintains continued public health protection. For example, security procedures and maintenance of surveillance records might be considered as enforceable permit conditions to help ensure that a particular measure continues to be carried out in an effective manner. A permit condition may be appropriate if, for example, a

[20] "Air agency" refers to a state, local or tribal air permitting agency and may also refer to the EPA, depending on the context.

[21] *See* discussion at fn.17.

decision was made to exclude a model receptor at a particular location where, prior to implementation of effective measures to preclude public access, there was an historic practice of allowing public access to the area of concern.

As previously stated, determinations concerning the adequacy of measures to preclude public access should be made on a case-by-case basis after consideration of information in the relevant administrative record. When an air agency, other than the EPA, is responsible for the determination, EPA Regional offices will be available to assist as needed.

IV. CONCLUSION

In setting forth this revised ambient air policy, the EPA is making a limited change to the way it applies the "access" element in the regulatory definition of ambient air, while maintaining the level of public health protection afforded by the original policy. This narrow change is that the EPA will no longer consider a fence or other physical barriers to be the exclusive means by which public access may be effectively precluded for purposes of excluding an area owned or controlled by the source from ambient air under the regulatory definition. Accordingly, the EPA is replacing a concept in the 1980 letter with a broader concept of measures, which may include physical barriers, that are effective in precluding access by the general public. Thus, the EPA's revised ambient air policy, consistent with its discretion available under the regulatory definition of ambient air, is that *the atmosphere over land owned or controlled by the stationary source may be excluded from ambient air where the source employs measures, which may include physical barriers, that are effective in precluding access to the land by the general public.*

This revised policy is intended to be implemented by EPA Regional offices and by those air agencies to which the EPA has delegated its authority to issue federal PSD permits under 40 CFR § 52.21(u). The EPA is also making this policy available as guidance for consideration by air agencies with SIP-approved programs. Depending on the particular regulatory context and wording of the applicable SIP, air agencies implementing a SIP-approved program may be able to use this revised policy. In addition to PSD permitting, the EPA intends, as appropriate, to apply the revised policy to other NAAQS-related assessments and characterizations of air quality.

This revised policy is neither a regulation subject to notice-and-comment rulemaking requirements nor a final agency action. This action does not amend the definition of "ambient air" in EPA regulations at 40 CFR § 50.1(e) 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 determine that any particular area or type of area may be excluded from ambient air on the basis of particular measures taken to preclude public access. 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. State and local air agencies are not required to apply this policy and retain their existing discretion to require measures (including fences or physical barriers) that they consider appropriate in each circumstance to establish that the general public does not have access to all or a portion of a source's property.

For any questions regarding this revised policy, please contact Scott Mathias, Acting Director of the Air Quality Policy Division in the Office of Air Quality Planning and Standards at (919) 541-5310 or mathias.scott@epa.gov.

Appendix

One commenter cited a May 23, 1977, memorandum from Walter C. Barber, Director of the Office of Air Quality Planning and Standards titled, "Applicability of PSD Increments over Company Property." That memorandum addressed the question of whether PSD increments apply over a proposed source's property if the general public is effectively precluded from access to that property. The response to this question has the word "yes" crossed out and "no" written in its place; the response also says "[t]his issue has been addressed with respect to the NAAQS" in an OAQPS Guideline and a 1972 memorandum from the Office of General Counsel. The response goes on to state that PSD increments should be treated the same as the NAAQS in this respect and "[t]herefore, as indicated in the OGC memorandum, the test for determining if public access is effectively precluded requires some kind of physical barrier." The response attaches a September 28, 1972, memorandum from Michael A. James, Attorney, OGC, Air Quality and Radiation Division, to Jack R. Farmer, Chief, Plans Management Branch, Standards Development and Implementation Division that states that, in the context of identifying sites for air monitoring equipment to be located near certain smelters that were the subject of a pending rulemaking, the phrase "to which the general public has access" in the EPA's regulatory definition of "ambient air" was "most reasonably interpreted as meaning property which members of the community at large are not physically barred in some way from entering." The "Discussion" section of the 1972 memorandum quotes 40 CFR § 50.1(e) and expresses the view that the regulatory definition limits the applicability of the NAAQS to the atmosphere outside the facility fenceline "since 'access' is the ability to enter," citing a dictionary definition of "access" as "permission, liberty, or ability to enter." Administrator Reilly referenced this portion of the memorandum in a 1989 decision on the appeal of a PSD permit. *In re Hibbing Taconite*, 2 E.A.D. 838 (Admr. 1989).

The 1972 memorandum further explains that areas to which access has not been restricted by physical means can be trespassed upon and that persons, whether knowing or innocent trespassers, would be exposed to air above the property. The memorandum disagrees with treating the property line, rather than the fenceline within the property, as the boundary for ambient air for two reasons: 1) "access" includes the right or the ability to enter; and 2) a definition of "ambient air" that excepts fenced private property is "probably inconsistent" with section 107 of the CAA, and expanding the exception is "clearly not legally supportable." The memorandum goes on to say that "an argument can be made" that 40 CFR § 50.1(e) is not inconsistent with section 107 of the CAA as to primary NAAQS but that no such argument applies to secondary NAAQS.

While Administrator Reilly subsequently relied on a portion of the 1972 attorney memorandum to support his decision in the *Hibbing Taconite* permit appeal, EPA decisionmakers have not endorsed all the views expressed in the memorandum. First, the 1972 memorandum does not express the official position of the EPA's General Counsel. Instead, it was a response from an EPA line attorney to questions posed by a program office branch chief, and as such, is more appropriately viewed as an internal communication rather than a statement of the EPA's position or views. While the memorandum advised that the existing, duly promulgated regulatory definition of ambient air, unchanged since its issuance, was "probably inconsistent" with section 107 of the CAA, the EPA did not subsequently take any action to revise the definition on this basis. The revised policy is intended to implement, not revise, the regulatory definition. In addition, the 1977 OAQPS memorandum attached to the 1972 memorandum, did not adopt or endorse all of the

discussion by the line attorney. It appears the attorney memorandum was attached merely to show that the issue in the 1977 memorandum (whether PSD increments apply over a proposed source's land) had already been addressed previously in the analogous context of whether NAAQS apply over a proposed source's land. The EPA's ambient air policy was authoritatively stated in the 1980 letter and 1989 adjudication by the EPA's Administrator, and thus the views expressed in the 1977 memoranda and portions of the 1972 memorandum that were not referenced in the 1989 adjudication did not become part of the EPA's ambient air policy.

The revised policy is consistent with the principal view expressed in the 1972 memorandum that the border of the ambient air surrounding a source is not automatically out at the property line, but rather is located where there is an effective measure, whether a physical barrier or not, to preclude public access. The only specific ambient air issue addressed in the 1972 memorandum was whether a property line or fenceline should be used as the border of ambient air, and the memorandum concluded a fenceline was more appropriate because "access" in the regulatory definition meant "the ability to enter" and trespassers could enter the property if there was no physical barrier.

The 1972 memorandum also asserted a policy conclusion that the only type of effective measure to preclude access was a physical barrier, which was essentially a factual conclusion rather than a legal interpretation of the regulatory language. Such a factual conclusion is inherently subject to change over time, as developments occur in the availability and effectiveness of measures to preclude public access to property. Although the incoming questions from the program branch chief refers to signage, the 1972 memorandum did not provide factual information to show that signs or other potential means of precluding access could never be effective to preclude access by the general public.

As explained in the body of this document, the EPA believes the clarification and flexibility provided in the revised policy is reasonable, appropriate, and consistent with the existing regulatory definition of ambient air in 40 CFR § 50.1(c).

NMED EIB Exhibit 26