CALIFORNIA
AIR RESOURCES BOARD

Gavin Newsom, Governor
Jared Blumenfeld, CalEPA Secretary
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July 15, 2019

New Source Review Group
Mail Drop C504-03
U.S. Environmental Protection Agency
Research Triangle Park, North Carolina 27711

RE: Comments on the United States Environmental Protection Agency (U.S. EPA) Revised Policy on Exclusions from "Ambient Air"

To Whom It May Concern:

The California Air Resources Board (CARB) is providing comments on the U.S. EPA draft guidance document released in November 2018, titled Revised Policy on Exclusions from "Ambient Air". In that draft guidance, U.S. EPA is proposing to revise its 1980 policy on the exclusion of certain areas from the scope of "ambient air" under the federal Clean Air Act (CAA) and U.S. EPA's regulations, while keeping the regulatory definition of ambient air as "that portion of the atmosphere, external to buildings, to which the general public has access." Based on U.S. EPA's previous policy as described in the 1980 letter by U.S. EPA Administrator Douglas Costle, the atmosphere over land "owned or controlled" by a stationary source could be excluded from "ambient air" if public access is "precluded by a fence or other physical barriers." The draft guidance released in 2018 replaces "precluded by a fence or other physical barriers" with "measures, which may include physical barriers, that are effective in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." U.S. EPA suggests, for instance, that rugged terrain may be a sufficient barrier, or that drones might be used to deter the public from accessing certain areas.

The draft guidance is inconsistent not only with the regulatory definition of ambient air[1] but also with the protective public health and welfare purposes of the CAA, and

[1] The South Coast Air Quality Management District, in its December 12, 2018 letter commenting on this draft guidance, effectively addressed the concerning inconsistencies between this proposed guidance and U.S. EPA's regulatory definition of ambient air. CARB shares not only this concern but also the concern raised by South Coast that the draft guidance would necessarily conflict with the bounds of areas protected by secondary ambient air quality standards. Indeed, the significant conflict between the draft guidance and the regulations and governing statute – and the gravity of the changes in law it appears to create – warrants a formal administrative rulemaking process to consider this proposal, rather than an informal draft guidance review process.

raises serious implementation concerns. It should not be finalized and should be withdrawn.

The draft guidance invites more confusion on how to define areas that may be excluded from "ambient air" analysis.

This draft guidance was developed by U.S. EPA with the intention "to clarify what areas may be excluded from ambient air in required air quality analyses, consistent with applicable regulations." However, the revision creates more confusion than clarity, as it suggests that a broad range of areas – including those that are difficult to access because of "rugged" terrain – may be excluded from air quality protections. This unclear definition of what are considered to be "measures" that are "effective in deterring or precluding access to the land by the general public" will introduce additional ambiguity and controversy when defining the area of a stationary source that can be excluded from "ambient air" analysis. Almost all of the examples U.S. EPA does provide to attempt to illustrate additional "measures" are some form of surveillance, signage, or monitoring, which, on their own, do not necessarily amount to deterring or precluding public access.[2] U.S. EPA establishes no threshold, nor provides any further guidance or explanation, as to when these monitoring "measures" become enough to amount to public deterrence or preclusion.

Further, the policy change is exceptionally hard to implement, even if it were legally proper. A fence, at least, is clearly marked. But how rugged must terrain be to qualify as inaccessible? Is the standard focused on the average hiker, leaving aside trail runners, skiers, and other sorts of outdoors users who penetrate the backcountry? Are rock climbers exempt from protections on the "steep cliff[s]" that U.S. EPA suggests may be excluded? What about seasonally inaccessible land, which is sometimes covered by snow and floodwater, but which is accessible at other times? Regarding signage, how closely spaced should signs be? How does that vary as a function of terrain? How large must the signs be? The possibility U.S. EPA raises of drone enforcement as a means of creating inaccessibility is equally unclear: how effective must drones be and how often must they pass by to establish that a landscape is not in ambient air? Is a single robotic warning repeated by a passing drone sufficient? And how, ultimately, are modelers and permitting agencies to know? In essence, the guidance, far from providing clarity, undermines its own stated purpose and creates a large evidentiary and permitting puzzle that is wholly unnecessary and open to litigation and confusion.

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[2] Nor do these measures address the simple fact that air moves – meaning that high pollutant concentrations over a rugged area are likely to diffuse outward, causing further health and welfare problems in less rugged locales.

The policy may ultimately lead to more air pollution emissions and cause more harm to public health.

By relaxing the requirements from areas with fences "precluding" public access to areas with ill-defined features "deterring or precluding" public access, the area that is excluded from "ambient air" will likely increase. If an area is excluded from "ambient air", a source permit applicant does not need to include that area in its air quality analysis (i.e., no modeling receptors are required in the exempted area) for the permit applications (see, e.g., 42 U.S.C. §§ 7475(a)(6), 7503(a)(1)(B)). The ambiguity introduced by the proposed guidance could lead to inequitable permitting decisions by improperly or inconsistently excluding areas from air quality modeling that arguably are hard to reach. The result could be improper levels of pollution from some sources, and inconsistent operation of these permitting programs based upon varying interpretations of the unclear guidance document. Reducing the extent of the area that a source must include in its permit modeling and analysis could result in more emissions allowed from the source – meaning worse air quality and more harm to public health in communities that are located downwind of the source. This is flatly in conflict with the purposes of the CAA to protect, enhance, and prevent backsliding in air quality.[3] It ignores the Act's broad focus on cleaning the air even in areas that are not immediately accessible.

The proposed policy revision may lead to smaller nonattainment areas and increased emissions in wilderness areas.

Under this proposed policy revision, the atmosphere over privately held, currently undeveloped land in wilderness areas might not be considered "ambient air" if that land's rugged terrain impairs accessibility by the public. Some of these areas may be located near a boundary of a current nonattainment area. The potential exists for such land to be excluded, for purposes of future designations, from that nonattainment area. *See, e.g.*, 42 U.S.C. § 7407(d). In that event, permitting requirements applicable to new stationary sources (such as mining operations) locating on that land would provide lesser mitigation. In effect, the proposed policy could incentivize new emissions having air quality impacts on neighboring publicly held land. The general public present at those nearby public lands – for instance, at national parks – could consequently be exposed to more polluted air.

The revised policy may result in reduced protection of public welfare.

The CAA requires U.S. EPA to set National Ambient Air Quality Standards (40 CFR part 50) for pollutants considered harmful to public health and the

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[3] CAA §§ 101(b), 109(b), 110(*l*), 160(1)-(2), 42 U.S.C. §§ 7401(b), 7409(b), 7410(*l*), 7470(1)-(2).

environment. The CAA identifies two types of national ambient air quality standards: primary standards, which provide public health protection, including protecting the health of "sensitive" populations such as asthmatics, children, and the elderly; and secondary standards, which provide public welfare protection, including protection against decreased visibility and damage to animals, crops, vegetation, and buildings. *See* 42 U.S.C. §§ 7409, 7602(h).

Even if U.S. EPA's suggested alternative measures can be effective in "deterring or precluding" public access to certain areas surrounding a major air pollution source, the impacts of air pollution on the public welfare of these exempted areas need to be considered. Secondary standards protect public welfare, including the public benefits associated with natural areas that may be rugged or otherwise hard to access. *See* 42 U.S.C. § 7409(b)(2). Air pollution that, for instance, damages a remote forest and makes it more vulnerable to wildfire whose smoke will fill a valley below has important public consequences, and should be ameliorated even if the remote forest does not see many hikers. *See* 42 U.S.C. § 7473. Public access may be difficult in areas surrounded by rugged terrain, but air pollution in these areas can cause regional haze, reduce visibility, affect wildlife, and damage vegetation. Research shows that air pollution has resulted in significant negative impacts on ecosystems in the Sierra Nevada mountains.[4, 5, 6] Likewise, extensive visibility protections for natural areas also, obviously, concern air pollution that may be in hard-to-access but important regions such as the Grand Canyon; these protections further demonstrate Congress' clear concern with landscape-level protections, even for difficult-to-access landscapes. *See* 42 U.S.C. §§ 7491, 7492. Yet, the draft guidance, by expanding a narrow loophole for fenced factories to entire landscapes, badly weakens important protections that Congress directed U.S. EPA and the states enforce.

U.S. EPA is not free to depart from Congress' purposes. U.S. EPA is required to take the secondary air quality standards into consideration when proposing changes to areas that may be excluded from "ambient air" and so may not finalize the draft guidance.

The revised policy impacts many Clean Air Act and California air pollution control programs.

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[4] Cisneros, Ricardo, et al. "Ozone, nitric acid, and ammonia air pollution is unhealthy for people and ecosystems in southern Sierra Nevada, California." Environmental Pollution 158.10 (2010): 3261-3271.

[5] Bytnerowicz, Andrzej, Rocío Alonso, and Michael Arbaugh, eds. Ozone Air Pollution in the Sierra Nevada-Distribution and Effects on Forests. Vol. 2. Elsevier, 2003.

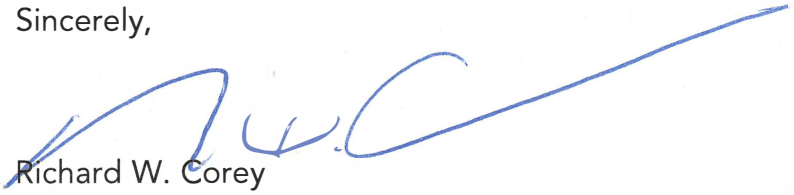
[6] Bytnerowicz, Andrzej, et al. "Nitrogenous air pollutants and ozone exposure in the central Sierra Nevada and White Mountains of California–Distribution and evaluation of ecological risks." Science of the Total Environment 654 (2019): 604-615.

The term "ambient air" is widely used in numerous programs under the CAA, and yet U.S. EPA does not address how its policy change will impact any of these programs or conform with the purposes of the CAA. There is a potential for wider confusion and disruption, because "ambient air" is a frequently used term in state and federal air programs, such as air quality monitoring, area designations, classifications, and planning. For example, in California, CARB recently established the Community Air Protection Program per California Assembly Bill 617 (C. Garcia, Chapter 136, Statutes of 2017). One of the Program's purposes is to reduce exposure in communities most impacted by air pollution, including communities that are located close to major stationary sources some of which are in rural areas like the San Joaquin Valley or the Imperial Valley. Fenceline and community monitors have been established to ensure that the ambient air quality in these communities are protected regardless of whether they are located in California's cities, farmland, desert or forests. Although California law provides a level of protection by setting a stringency floor applicable to some programs (Cal. Health & Saf. Code §§ 42500 et seq.), efforts to shrink the definition of ambient air risks greater exposure in vulnerable communities. U.S. EPA should not finalize the draft guidance without a more holistic assessment of how its new definition of ambient air will affect other CAA and state programs.

In summary, the Revised Policy on Exclusions from "Ambient Air" will cause more confusion and controversy than clarity when defining areas around stationary sources to be excluded from "ambient air". The revised policy may result in more air pollution emissions and cause more damage to public health and welfare. CARB urges U.S. EPA to withdraw the proposed policy revision.

Thank you for considering CARB's perspectives on these important issues. If you have questions or would like further information, please do not hesitate to contact me at richard.corey@arb.ca.gov.

Sincerely,



Richard W. Corey
Executive Officer