

Exclusions from Ambient Air/Clean Air Act: U.S. Environmental Protection Agency Announces Final Revised Policy



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The United States Environmental Protection Agency (“EPA”) issued a December 2nd memorandum titled: *Revised Policy on Exclusions from “Ambient Air” (“Memorandum”)*

The December 2nd *Memorandum* was transmitted from EPA Administrator Andrew R. Wheeler to the agency Regional Administrators.

The *Memorandum* objective is stated to be the updating of EPA’s policy on the exclusion of certain areas from the scope of “ambient air.” The agency had previously released a draft November 2018 document addressing this issue.

This prior policy has been in place since 1980. The agency states it has identified an element warranting revision.

The term “ambient air” has been defined by EPA as “that portion of the atmosphere, external to buildings, to which the general public has access.” 40 CFR § 50.1(e). EPA has, in the past, exempted the air above the facility’s property from Clean Air Act National Ambient Air Quality Standards because it is not considered ambient air. For example, see *In re Hibbing Taconite Co.*, Env’tl Protection Agency, Prevention of Significant Deterioration Appeal, No. 87-3 (July, 1989) (discussion of area at a stationary source that must be included for purposes of ambient air quality monitoring)

By way of historical background, the *Memorandum* notes that EPA Administrator Douglas Costle wrote a letter to Senator Jennings Randolph in 1980 stating 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.

Administrator Wheeler states in the December 2nd *Memorandum* that he is:

... revising the “fence or other physical barriers” element of this ambient air policy, while maintaining public health protection.

The December 2nd *Memorandum* states that the Costle letter limits the exclusion to “land owned or controlled by the stationary source.” It further notes that the letter said such areas could only be excluded when public access is precluded by a “fence or other physical barriers.”

Administrative Wheeler in the *Memorandum* states that the revised policy (described as a “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.

He further states that “other types of measures, potentially combined with physical barriers, may be used to support exclusion of an area from ambient air.” This revision is summarized with the following statement:

. . . 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.

A copy of the *Memorandum* can be downloaded [here](#).