

Exclusions from Ambient Air: U.S. Environmental Protection Agency Announces Draft Revised Policy



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11/27/2018

The United States Environmental Protection Agency ("EPA") issued a draft November 2018 policy document titled:

Revised Policy on Exclusions from "Ambient Air" ("Draft Policy")

EPA states by way of introduction that it has evaluated its ambient air policy that has been in place since 1980 and identified an element that warrants 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 C.F.R. § 50.1(e). The federal agency has, in the past, exempted the air above a facility's property from Clean Air Act National Ambient Air Quality Standards because they do not consider it ambient air. For example, see *In re Hibbing Taconite Co., Env'tl. Protection Agency, Prevention Significant Deterioration Appeal*, No. 87-3 (July 19, 1989) (discussion of area at a stationary source that must be included for purposes of ambient air quality monitoring).

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

Stakeholders are stated to have identified situations arising in specific air quality analyses that the agency may not have considered when it issued the 1980 letter. The Prevention of Significant Deterioration ("PSD") permitting process is cited as an example. Concerns raised include:

- Application of the current policy is overly restrictive
- Given the advances in surveillance and monitoring capabilities and the variety of ambient air situations that have arisen since 1980, the restrictive language (i.e., fence or other physical barriers) should be updated
- Consideration of additional types of measures that are effective in deterring or precluding access to the land by the general public should be considered

Applicants such as those seeking a PSD permit attempting to exclude a particular area of a property from a specific air quality analysis have generally been required to demonstrate that the public does not have access to that area. The demonstration is stated to have required 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.

EPA states that in evaluating the terms in the regulatory definition of ambient air it has identified three conceptual elements:

- Access
- General Public
- External to Buildings

The federal agency states that in producing the *Draft Policy* it assessed how it has been applying each of the terms or phrases under the existing policy. It further determined whether “additional flexibility may be appropriate within the context of the regulatory definition of ambient air.”

The *Draft 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 agency notes its belief that measures other than fencing or other physical barriers are available to employ as a deterrent to public access. Measures cited as examples besides traditional fencing include:

- Video surveillance and monitoring
- Clear signage
- Routine security patrols
- Drones
- Potential future technologies

The *Draft Policy* includes an explanation of how such measures should be evaluated in terms of effectiveness.

EPA also evaluates in the *Draft Policy* a second aspect of the access element. This concerns whether the public is legally precluded from entering onto the property by its owner. The *Draft Policy* makes no change to EPA’s typical analysis of this element.

A copy of the *Draft Policy* can be found [here](#).