**COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON 40 CFR §50.1 and §50.14 TREATMENT OF DATA INFLUENCED BY EXCEPTIONAL EVENTS**

**EPA DOCKET NO. EPA-HQ-OAR-2013-0572**

**I. Summary**

On November 20, 2015, the Environmental Protection Agency (EPA) proposed a rule change for the Treatment of Data Influenced by Exceptional Events (40 CFR §50.1 and §50.14). The Federal Clean Air Act allows states to request that the EPA exclude monitoring data that contributes to exceedances or violations of National Ambient Air Quality Standards (NAAQS) when making determinations related to an area’s attainment status. A state does this by submitting a technical demonstration to the EPA showing that particular monitor measurements were caused by unavoidable events such dust storms, wildfires, or fireworks. According to the EPA the “… purpose of this action is to propose revisions to the 2007 Exceptional Events Rule to address certain substantive issues raised by state, local, and tribal co-regulators and other stakeholders since promulgation of the rule and to increase the administrative efficiency of the Exceptional Events Rule criteria and process.”

**II. Comments**

**The EPA should modify existing rule language to show more transparency regarding the standards it uses to evaluate exceptional event demonstrations and ensure more consistency in how regional offices evaluate demonstrations by creating a more structured evaluation process for exceptional event demonstrations.**

Texas has expressed these concerns regarding transparency in reviewing exceptional event packages since 2007 and the EPA has failed to address these concerns in this rule revision. For example, the EPA has dropped language referring to “historical fluctuations” of monitoring data. It has made the percentile ranking of an exceptional event day with respect to historical data an explicit requirement of the rule (Table 3 to §50.14. Evidence and Analyses for the Comparison to Historical Concentrations) and explicitly refused to require a state to “prove a specific percentile point in the distribution of data.” Without a transparent standard for this criteria or at least an explanation of how this criteria is used, Texas has no way of knowing whether its exceptional event demonstrations can possibly meet EPA “requirements” or whether EPA “requirements” are applied in a consistent manner. Texas has also expressed concerns that different regional offices use different standards for evaluating exceptional event demonstrations and that some regional offices seem to evaluate demonstrations in a manner inconsistent with the guidance issued by the EPA’s Office of Air Quality Planning and Standards. These issues should be written into rule (as opposed to the guidance) to increase the fairness and consistency of evaluations.

**Section 50.14 (a)(1)(i) narrowly limits the situations in which the exceptional event rule would apply and should be widened to reflect additional situations in which a state submits an exceptional event demonstration for a previous NAAQS. Such a demonstration will provide Texas with relief from ongoing obligations associated with the standard. For example, Texas would like to be able to show that it has attained the 1990 One-hour ozone NAAQS using an exceptional events demonstration.**

 While the EPA offers an alternative path for scenarios not listed in the current rule proposal, it is not clear that the EPA has exhaustively thought through all possible scenarios in which states might wish to submit an exceptional event demonstration. The rule should apply in situations where a state is in jeopardy of having an area declared nonattainment or it wants to use the exceptional event to demonstrate that it has attained a NAAQS.

**The definition of Exceptional Event in §50.1 Definitions, should include situations where multiple events (spread over a large geographic area) may become aggregated in such a way that causes a monitored exceedance or NAAQS violation downwind.**

In Texas’ experience, large numbers of events can combine to cause a violation or exceedance of a NAAQS. Moreover, because the different individual events can occur in large numbers and across multiple jurisdictions, a state may not be able to list all events that it believes contributed to the NAAQS exceedance or violation.

**The TCEQ supports the inclusion of §50.14(b)(7)(v), which provides that states will not have to demonstrate that events occurring outside of their borders were not reasonably controllable or preventable.**

This provision is necessary because it acknowledges the reality that a state has no ability to prevent or control either natural or anthropogenic events occurring outside of their borders.

**The EPA should eliminate §50.14 (c)(3)(iv)(C) because there is no transparent standard or methodology by which it will determine whether a state has met this requirement and the notion that an exceptional event day’s percentile ranking somehow supports a clear causal relationship is false.**

Several states have consistently requested more certainty in how they might be confident of meeting this requirement and have never received any feedback from the EPA as to what constitutes an acceptable range of percentiles or the process/methodology the EPA might use to determine whether this requirement is met. The lack of transparency with respect to this requirement raises questions as to whether states’ demonstrations are evaluated in a consistent and reasonable manner. Moreover, an exceptional event day’s percentile ranking with respect to historical data provides no photochemical or meteorological mechanism to support a clear causal relationship. Accepting a percentile ranking as supportive of a clear causal relationship is analogous to accepting correlation as evidence of causation.

**Given that the EPA defines ozone monitoring seasons in Table D-3 to Appendix D of Part 58: “Ozone Monitoring Season by State”, the EPA should clarify what it means by “seasonal” in the context of 40 CFR §50.14 if it chooses not to delete** **§50.14 (c)(3)(iv)(C).**

Making this clarification would avoid unnecessary confusion.

**The TCEQ supports the proposal to allow states 12 months to provide new evidence when requested to do so by the Administrator (§50.14 (c)(3)(vi)). However, if some demonstrations are to be given this second chance then all demonstrations should be provided that same opportunity. The EPA should include a commitment in the rule language to notify a state of any shortfalls that could jeopardize the approval of the state’s demonstration prior to the EPA’s formal disapproval of that demonstration. The state should then be given that 12-month period to address the identified shortfalls. This proposed revision should also expressly note if the additional evidence provided by a state would require additional public notice.**

If the EPA anticipates giving states the opportunity to address shortfalls on some demonstrations then it should offer that opportunity on all demonstrations. States can only address perceived problems with their demonstrations if they are notified in a timely manner. The EPA provides no justification for offering this opportunity for some demonstrations and not others. Selectively offering these opportunities will only increase states’ fears regarding inconsistent treatment of exceptional event demonstrations.

**The EPA should finalize revisions to the Exceptional Events Rule in a timely manner in order for it to be used in making state designation recommendations. The final 2015 Ozone NAAQS rule (80 FR 65292) establishes October 1, 2016, as the deadline for exceptional event demonstration submittals for 2013 through 2015 data years (the years upon which state recommendations will be based). Considering that the analysis of exceptional events is critical for developing state designation recommendations, the TCEQ requests that revisions to the Exceptional Events Rule be finalized as soon as possible.** **(Preamble III. Executive Summary)**

Ideally, this rulemaking would have been on the same timeline as promulgation of the 2015 ozone NAAQS in order to implement the exceptional event statutory objective. In order to be useful in focusing limited state resources, the Exceptional Events Rule should be finalized at least five to six months prior to the October 1, 2016, deadline for state designation recommendations and exceptional event demonstrations. Otherwise, the EPA should allow for initial exceptional events submittals for the 2015 ozone NAAQS to be supplemented as necessary to meet the Exceptional Events Rule requirements.

**The TCEQ urges the EPA to finalize the guidance entitled *Draft Guidance for Excluding Some Ambient Pollutant Concentration Data from Certain Calculations and Analyses for Purposes Other than Retrospective Determinations of Attainment of the NAAQS* no later than October 1, 2017, when nonattainment designations are made for the 2015 ozone NAAQS, so that it can be used in developing conformity analyses for any new nonattainment areas, which are due one year after final designations.**

The TCEQ agrees that there should be additional pathways for excluding event-affected data for purposes other than determinations of attainment. If the EPA fails to finalize this guidance in a timely manner, states will not be able to utilize these options when upcoming designations are made.

**In Section IV.B of the preamble, the EPA references the Natural Resources Defense Council (NRDC) lawsuit in which the D.C. Circuit held that the high wind events section of the 2007 Exceptional Events Rule was a legal nullity because the final rule published in the Code of Federal Regulations (CFR) did not mention high wind events. The TCEQ believes that, despite the noted shortcoming, the EPA still has not adequately justified its reliance upon certain passages of the high wind events section of the 2007 Exceptional Events Rule.**

The EPA acknowledges in the rule proposal that the D.C. Circuit held that the high wind events section of the 2007 Exceptional Events Rule preamble was legally null because there was no final rule published in the CFR that mentioned high wind events. Yet, the EPA maintains that portions of that preamble section are appropriate and consistent with the Federal Clean Air Act (FCAA) without explaining which portions and without justifying how those portions can be relied upon in light of the D.C. Circuit’s opinion. As the D.C. Circuit expressly stated, “an unpublished final rule on high winds can have no legal consequences, and neither can preamble statements mentioning such a rule.” *Nat. Res. Def. Council v. E.P.A.*, 559 F.3d 561, 565 (D.C. Cir. 2009).

**The rule should explicitly declare that a state can submit an exceptional event demonstration for any monitored exceedance or NAAQS violation that is caused by an exceptional or natural event within that state’ borders (regardless of what entity operates the affected monitor).**

The rule language does require a federal agency to notify the state in which the monitored exceedance occurred prior to initiating a request for an exceptional event flag (§50.14 Treatment of air quality monitoring data influenced by exceptional events. (a) Requirements—(1) Scope. (ii)). However, the proposed rule language does not clearly say whether a state may submit exceptional event demonstrations for natural or exceptional events monitored at a regulatory monitoring site operated by federal or local entities. Adding this language would clearly allow a state to initiate and submit an exceptional event request and demonstration even if the relevant federal agency refuses to submit a demonstration. The proposed rule language also fails to clarify whether the EPA would evaluate competing proposals from a state and federal agency.

**The TCEQ believes that the EPA has not adequately demonstrated that Federal Land Managers have the legal authority to prepare and submit an exceptional event demonstration request directly to the EPA.**

The EPA’s only justification for its proposal that FLMs have the legal authority to prepare and submit an exceptional event demonstration is a reference to Section 319(b)(3)(B)(i) of the FCAA. Specifically, this section provides that “the occurrence of an exceptional event must be demonstrated by reliable, accurate *data* that is promptly produced and provided by Federal, State, or local government agencies” (emphasis added). First, this provision does not mention the submission of *demonstration packages*, but rather only mentions the ability of federal agencies to produce and provide *data* to demonstrate that an exceptional event occurred. Second, while this provision references federal agencies, it only does so in the context of producing and providing *data*. The EPA’s revised interpretation of this section conflicts with the EPA’s current approach, which allows federal, state, or local agencies to submit and flag data to the EPA’s AQS database, but requires the relevant *state* to submit the exceptional event demonstration. This current approach aligns with the plain meaning of FCAA Section 319(b)(3)(B)(i).

Further, the EPA does not justify why its new statutory interpretation would extend only to FLMs and other federal agencies. When interpreting statutes, every word must be given effect. FCAA Section 319(b)(3)(B)(i) makes reference to federal, state, and local government agencies. By proposing to extend the authority to prepare and submit exceptional event demonstrations to only federal agencies, the EPA effectively reads out the statutory reference to local agencies. The TCEQ recommends that the EPA continue to apply its current approach.

If the EPA is determined to give this authority to federal agencies operating air quality monitors, then the TCEQ strongly recommends that the EPA codify in the rule language a process for handling overlapping/competing authorities of state and federal agencies and conflicts of interest that the EPA might face in evaluating exceptional event demonstrations. For example:

* Would it be possible for a state and federal agency to submit independent demonstrations? If so, how would the EPA evaluate the demonstrations?
* Could the EPA submit or collaborate with a state on an exceptional event demonstration for an affected Clean Air Status and Trends Network (CASTNET) monitor?
* Could the EPA evaluate an exceptional event demonstration for an affected CASTNET monitor?

**The TCEQ supports the EPA’s removal of the “but for” regulatory language (40 CFR 50.14(c)(3)(iv)(D)) to instead emphasize the clear causal relationship criterion that is expressly required under Section 319(b)(3)(B)(ii).**

The TCEQ agrees that the EPA should rely more directly on the requirements in Section 319(b)(3)(B) in order to ensure air agencies satisfying the requirements of the statute are able to exclude data under this rule.

**In Section V.E.1 of the preamble, the EPA requests comment on its proposed guidance regarding recurrence at a particular location in respect to whether human activity is unlikely to recur at a particular location outside a state’s borders. Given that events such as fires may last for periods of multiple days and affect air quality over several days, the TCEQ recommends that the EPA *codify in rule* that a single event can encompass multiple days for purposes of determining whether human activity is unlikely to recur at a particular location.**

The EPA proposes as guidance that if there had been three separate events of a similar type within a three-year period in an Air Quality Control Region, then the third event would not satisfy the “human activity that is unlikely to recur at a particular location criterion.” (80 FR 72856) However, the EPA has not adequately defined what constitutes an “event” for purposes of determining the number of events that have occurred within a three-year period. As the EPA has noted numerous times, events such as fires can affect air quality over several days. However, as currently proposed, the EPA could count each day the fire affects air quality as a separate event for purposes of determining how many events occurred within a three-year period. This would prevent a state from submitting exceptional event demonstrations for events that last multiple days.

**In Section V.E.1 of the preamble, the EPA requests comment on its proposed guidance regarding recurrence at a particular location in respect to whether human activity is unlikely to recur at a particular location. The TCEQ believes that the rule should not require states to demonstrate that events associated with human activity outside of its borders are unlikely to recur at a particular location.**

Texas frequently receives smoke associated with agricultural fires (spring and fall) that occur outside of Texas and the United States. Under the proposed rule language, a state is not required to show that exceptional or natural events outside of its jurisdiction are reasonably controllable or preventable. Likewise, it seems clear that a state should not have to show that the exceptional or natural events are unlikely to recur when the state has no authority to manage or prevent these events.

**In Section V.E.2 of the preamble, the EPA requests comment on its proposal to codify a five-year rebuttable presumption window following approval of a SIP submittal in which the control measures included in the SIP are presumed sufficient for purposes of satisfying the not reasonably controllable or preventable criterion. The TCEQ supports the EPA’s proposal that controls in the SIP should be given deference for purposes of satisfying the not reasonably controllable or preventable criterion but recommends that deference be given to the controls in the SIP so long as the SIP remains in effect.**

The EPA argues in the preamble (80 FR 72861) against extending deference to controls in the SIP beyond five years because there may be new sources of importance that are not addressed by the control measures in the SIP, new control measures may have become available since the SIP was approved, or conditions in the area may have changed. However, one remedy in those situations is for the EPA to issue a SIP call to address those concerns. The fact that a SIP may be in effect for an extended period demonstrates that the EPA continues to agree that the control measures included in the SIP remain an effective approach to control the relevant pollutant.

**The EPA notes in the preamble (80 FR 72886), that it anticipates formally responding to an air agency’s Initial Notification within 90 days of receipt. The TCEQ recommends that the EPA indicate what information the EPA intends to provide air agencies in the formal response.**

The rule language proposed by the EPA does not indicate what the formal response will entail. Having a specified set of information would increase the utility of the EPA’s formal response and make the exceptional event demonstration process more consistent.