

-----Original Message-----

From: Liberatore, John J.
Sent: Tuesday, January 29, 2008 6:36 AM
To: Butt, Neal T.; Nieto, Margaret ; Kearny, Adelia W.; Amend, Janice C.
Cc: Tavarez, Isreal L.; Albrecht, Christopher P.; Gallegos, Billy A.; Stebleton, Matt B.; Aragon, Charles A.
Subject: FW: Public Review Draft for 20.11.20 NMAC, Fugitive Dust Control

-----Original Message-----

From: Edward L Huffman [<mailto:elhuffman@fs.fed.us>]
Sent: Monday, January 28, 2008 3:16 PM
To: Walter Keyes; KENNETH.PITT@OGC.USDA.GOV; Liberatore, John J.
Cc: Cid H Morgan; Jeanne Hoadley; Mark J Fitch; Mary Dereske; Nancy Brunswick; Nancy Rose; Wayne A Robbie; Liberatore, John J.; Marcia Miolano; Beverly deGruyter
Subject: Public Review Draft for 20.11.20 NMAC, Fugitive Dust Control

Ken,

I have attached the City's response to our concern letter of 07.27.2007 which you have seen, but will help with the context of our discussion earlier of remaining concerns with the 20.11.20 NMAC Fugitive Dust Control regulations. Please express our appreciation to the City for all of the hard work and collaboration that has gone into the regulations to date. As with most things as we found concerns and the City addressed them we formulated additional questions and concerns.

(See attached file: remaining_brenco_fugitive_dust_concerns.doc)

Thanks, -Tedd

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1. General: Some unpaved roads on National Forest System lands are County and State roads. It appears that the responsible state and county agencies would need to apply for a permit under 20.11.20 NMAC. Please confirm if this is the case [*42 USC 7418 may allow this*].

RPAC response: Each governmental agency is responsible for its roadways, and must apply for a fugitive dust control permit if required. Therefore, each city, county, state, or federal agency is responsible for its own roads that each agency has control over.

Addresses our concerns

2. General: There does not seem to be any provision for exempting a catastrophic event or “Act of God.” For example, in the event of a forest fire, dust could be a problem after the fire is put out and before the area is completely rehabilitated. We would like to see clarification on how 20.11.20 NMAC applies in such situations, or whether they would be exempt.

RPAC response: Section 20.11.20.2 is applicable to such an emergency.

Emergency stipulations in 20.11.20.2.B.(3) do not speak to an ‘Act of God’ type emergency. Similarly, the inclusion of ‘reasonably available control measures’ even as defined leaves it open to the discretion of the City-County to determine what is reasonable. Given a wildfire situation this could become unmanageable and exceedingly expensive. We would prefer wording that would allow for negotiation on ‘reasonably available control measures’ to be utilized.

3. General: Some of the sections go beyond the control and abatement of air pollution, and attempt to regulate National Forest System land use. There has been no Congressional waiver of federal immunity and supremacy that would authorize the Forest Service to allow such regulation of federal lands by Bernalillo County.

RPAC response: The waiver of federal immunity related to the local air quality regulations and programs is effective, even if the air quality regulations and programs indirectly affect federal land use. Every time a federal agency like the FAA or Kirtland Air Base has to obtain an air quality permit from the EHD or comply with local Air Board regulations, the requirement may indirectly affect federal land use and federal activities. However, the waiver of federal immunity still is effective. The concept is similar to the analysis applied to preemption arguments. Our attorney referred us to the recently-decided US District Court case for the District of Vermont, *Green Mountain Chrysler et al. v. Vermont*, Case No. 2:05-cv-302, consolidated with Case No. 2:05-cv-304, filed September 12, 2007. When the Court considered an argument that federal Energy Policy and Conservation Act fuel economy regulations preempted federal Clean Air Act pollution prevention regulations, the court at page 20 found the two regulatory schemes were “overlapping, not incompatible”. The two federal regulatory schemes could co-exist. A similar concept was addressed in the New Mexico case *PNM v. EIB*, 80 NM 223 (Ct. App. 1976), which stated at page 227 that standards and regulations promulgated by the state board that adopts air quality regulations “will

have an impact on the industrial development of the area, but such an impact should be as a consequence not by design.”

The ¼ mile conditional exemption meets our immediate practical concerns, yet we will need to reserve our legal argument if needed. We prefer, as we are sure you do as well, to continue in the collaborative manner under which the City and Forest have been working.

4. 20.11.20.2.C. NMAC as amended states the conditional exemptions shall apply unless the department determines fugitive dust will “adversely affect the safety of an individual within Bernalillo County.” Under the waiver of federal immunity under the Clean Air Act, 42 U.S.C. 7418, the federal government must comply with state and local “requirements” related to the control and abatement of air pollution. Requirements have been defined by the courts as objective promulgated numerical or narrative requirements that are applicable to all entities equally. As currently proposed, 20.11.20.2.C. NMAC would not fit this definition of a “requirement” and, as such, federal immunity would not be waived. In addition, without a corresponding definition of “safety,” this exemption appears open to broad interpretation and could be problematic for maintaining the listed exemptions.

RPAC response: When discussing the three year review for the “exempt for three years” sources, the Committee was given feedback from field surveillance/enforcement personnel and compliance personnel suggesting that in most cases these sources should remain in an exempt type of situation. However, to allow total exemption, as is applicable to Indian lands, over which the Albuquerque – Bernalillo County Air Quality Control Board lacks jurisdiction, was not justifiable when it came to issues of safety. On several occasions EHD has documented and taken action to stop activities that caused particulates to blow across or from a roadway that has obscured visibility and caused unacceptable risk to the safety of the occupants of cars and others. If safety of an individual is involved, EHD responds uniformly. The committee, therefore, proposes that all sources should be subject to the general provisions (20.11.20.12 NMAC), which state that reasonable precautions shall be taken by all persons, whether or not Part 20 requirements for permitting apply.

The ¼ mile conditional exemption meets our immediate practical concerns, yet as stated above we will need to reserve our legal argument if needed. We prefer, as we are sure you do as well, to continue in the collaborative manner under which the City and Forest have been working.

5. 20.11.20.2.C NMAC: The first exemption under Conditionally Exempt sources of fugitive dust emissions, “areas zoned for agriculture and used for growing a crop,” appears to be prejudicial. While most National Forest System land in Bernalillo County is zoned A-2 “Rural Agricultural” and is used for growing a “crop” by the definition in 20.11.20.7.F NMAC, there appears to be no rationale to exclude one land use or emission source from air quality regulations. Under the waiver of federal immunity under the Clean Air Act, 42 U.S.C. 7418, the federal government must comply with state and local “requirements” related to the control and abatement of air pollution, in the same manner and to the same extent as any non-governmental entity.

By exempting a large class of non-governmental potential polluters, while at the same time attempting to regulate the Forest Service, the Forest Service is not being treated in the same manner and to the same extent as non-governmental entities. As currently proposed, 20.11.20.2.C. NMAC would not fit the waiver at 42 U.S.C. 7418 and, as such, federal immunity would not be waived.

RPAC response: Cases have confirmed that in order for an agency to address a problem, the agency doesn't have to include in its program every conceivable source of that problem. In the case of fugitive dust, the agency doesn't have to ban every source of fugitive dust within its jurisdiction in order significantly address the issue. There is a rational basis for exempting agricultural land and all areas zoned for agriculture and used for growing a crop are treated the same, whether the areas are qualifying Forest Service agricultural areas or qualifying agricultural areas owned by an individual or corporation. Part 20 is applied to governmental agencies (Forest Service, SNL, FAA, KAFB, etc.) in the same manner and to the same extent as any non-governmental entity. The Forest Service would not be responsible for including in the permit areas such as "logging roads" or other type of activities that may fall under a definition as 'areas zoned for agriculture and used for growing a crop'.

Your response addresses our concerns satisfactorily.

6. 20.11.20.2.C.(2) NMAC: We are pleased to see that "paths used exclusively for purposes other than travel by motor vehicles" are maintained in a conditionally exempt status given their low potential for contribution of fugitive dust. However, paths or trails used by motor vehicles are not discussed in 20.11.20 NMAC Fugitive Dust Control regulations. Please clarify if motorized vehicle trails are to be held to these regulations and the associated permit/fee system. As stated in the July 2007 informal correspondence to Dr. Potter, we are proposing to designate approximately 55 miles of motorized trail [33 miles of singletrack for motorcycles, 8 miles for ATV (less than 50 inches wide) and 14 miles for full-size off-road vehicles]. Most of this trail system currently exists, with only one or two short connections between existing routes proposed for construction.

RPAC response: Part 20 identifies an unpaved roadway as an 'unpaved route traveled by a motorized vehicle', therefore, unpaved paths and trails traveled by a motorized vehicle are subject to Part 20.

Your response addresses our question/concerns satisfactorily.

7. 20.11.20.2.C.(4)NMAC: In conditional exemption 4, unpaved roadways on National Forest System lands are conditionally exempt only if the public does not have motor vehicle access to the roadways. In the existing regulations, this exemption is for all roads on National Forest System land greater than ¼ mile from an occupied residence. There is no clear reason for the change in the exemption to include all open National Forest System roads given relatively low use on National Forest System roads and limited emission of fugitive dust. The proposed change increases the mileage of National Forest System road not covered in this exemption from approximately 12 miles to 49 miles.

RPAC response: The committee has re-visited this sub-paragraph and has decided to retain the original language from the March 2004 version of Part 20 for Forest Service and Department of Interior park service lands. Therefore, only those roads within ¼ mile of an occupied residence would be subject to requirements for permitting (through a fugitive dust programmatic permit).

We appreciate the change as this has less of an impact on the National Forest while still hopefully addressing the issue of fugitive dust in Bernalillo County. We still have some concerns about the need for an annual fee under a programmatic permit, but we are willing to accept it as a necessary part of working with the City-County.

8. 20.11.20.12 E. NMAC: The requirement for stockpile height is inappropriate. Stockpile is defined as a “bulk material” and could include many things, including stones or boulders which would not necessarily produce fugitive dust. It seems the control of dust from stockpiles should be regulated, rather than height.

RPAC response: The definition of “bulk material” includes the requirement that the material be ‘capable of creating fugitive dust’. Therefore, limiting the height of stockpiles as defined in Part 20 is an appropriate control limitation for fugitive dust.

Your response addresses our question/concerns satisfactorily.

9. 20.11.20.16 NMAC: Amendments made to 20.11.20.16 NMAC High Wind Event require mandatory control measures even on “inactive disturbed surface areas.” A possible interpretation of the definitions of “inactive disturbed surface area,” “disturbed surface area,” “active operations,” and “anthropogenic,” would be that unpaved roads are an “inactive disturbed surface area.” If this interpretation stands, it would not be feasible to require the Forest Service to implement control measures during high wind events on all existing roads and trails. Meeting this requirement alone would impose an unacceptable financial burden on the Cibola National Forest and Grasslands and the federal taxpayer. We do not have the funding, equipment or personnel needed to comply with this part of the regulations as written. As stated above, the Forest Service recognizes that it must comply with state and local “requirements” related to the control and abatement of air pollution, in the same manner and to the same extent as any non-governmental entity. However, proposed 20.11.20.16.NMAC goes beyond this standard and attempts to regulate federal land use. As such, 20.11.20.16.NMAC may not be enforceable on National Forest System lands. As currently proposed, 20.11.20.16 NMAC would not fit the waiver at 42 U.S.C. 7418 and, as such, federal immunity would not be waived. Clarification is needed in the regulation.

RPAC response: In addition to our response above regarding federal immunity and equal application of the requirements of Part 20 to federal agencies, individuals and corporations, please note that the definition of “inactive disturbed surface area” means an area where activities have been suspended. Activities have not been suspended on an unpaved roadway just because there is not a constant amount of traffic on the road. ‘Suspended’ would mean, as an example, if referring to a roadway, a new unpaved road

being constructed (active operation) that was then purposely left 'inactive' (put out of use) until completion of an activity or project. Part 20 requires unpaved roadways on Forest Service lands that have been identified and 'controlled' within a programmatic permit (those within ¼ mile of an occupied residence) to have sufficient measures in place as calming measures to abate particulate emissions.

For the most part your response addresses our question/concerns. We do wonder how roads closed to public access and roads closed to all use fit under 20.11.20.16 NMAC. They are not 'suspended' from construction activities but they are suspended from active use.

10. 20.11.20.19 A.NMAC: Proposed 20.11.20.19 A.NMAC attempts to regulate federal land use. As such, 20.11.20.19 A.NMAC may not be enforceable on National Forest System lands. As currently proposed, 20.11.20.19 A.NMAC would not fit the waiver at 42 U.S.C. 7418 and, as such, federal immunity would not be waived. Finally we would recommend adding a definition of "reconstruction" to the code.

RPAC response: Please see our response above regarding federal immunity and equal application of the requirements of Part 20 to federal agencies, individuals and corporations. Once a programmatic permit has been issued to the Forest Service for unpaved areas subject to permitting, 20.11.20.19 NMAC provides that a programmatic permit can be amended to add additional unpaved roadways. Again, this would only apply to those areas within ¼ mile of an occupied residence. 20.11.20.19 NMAC also requires use of reasonably available control measures, if necessary, on all unpaved roadways and unpaved parking areas even if the area does not require a permit, as provided in the general provisions (20.11.20.12 NMAC). 20.11.20.19 NMAC also provides for an application to the board for a variance.

The term 'reconstruction' in relation to sources of air contaminants means an expenditure of monies that would exceed fifty percent of the total cost of a full replacement. In other words, general maintenance of an unpaved roadway would not be considered 'reconstruction'. For the purpose of Part 20, however, changes to the dimension of the unpaved roadway (widening or lengthening) may be considered a reconstruction if the action would cause an increase in the total acreage previously permitted.

We would like to include language to clarify issues surrounding unpaved parking lots. It appears that these would fall under the conditional exemption for unpaved roadways given our parking lots are primarily very small (<2 acres) and most are gravel surfaced (still unpaved). We would like to have unpaved parking lots added to the conditional exemption for USDA Forest Service lands (1/4 mile from an occupied residence)

11. 20.11.20.21 NMAC: The requirements for Greenwaste material, as written, prohibit normal activities on National Forest System lands, including construction of fire breaks near residential areas and mulching of disturbed surface areas. We believe the intent of this section is to prohibit greenwaste material depositions on traveled roadways. As written, it prohibits deposition of greenwaste anywhere on public land. Proposed 20.11.20.21 NMAC attempts to regulate federal land use. As such,

20.11.20.21 NMAC may not be enforceable on National Forest System lands. As currently proposed, 20.11.20.21.NMAC would not fit the waiver at 42 U.S.C. 7418 and, as such, federal immunity would not be waived.

RPAC response: This was addressed by comments received from another stakeholder and has been re-written to clarify the intent of requiring prompt removal of greenwaste that has been deposited on publicly-owned real property to prevent greenwaste from becoming ground up by the abrasive action of tires.

As there is always the potential for greenwaste to be driven on during off-road forestry activities we would like to see if wording could be added so that this only applicable on roads and on areas not conditionally exempt (<1/4 mile from an occupied residence).

12. 20.11.20.24 NMAC: It does not seem appropriate to include native grass seeding and mulching specifications in this regulation when they are merely a reference.

RPAC response: Native grass seeding is not a required control measure. This method of control is not often utilized on projects in Bernalillo County. However, since it is not widely used, and there may be companies that offer this type of service that are not local and may not be familiar with local requirements, the committee regards inclusion of the information in the regulation as appropriate and helpful. Also, its inclusion provides a guideline for certain reporting requirements to the department when this method of control is used and also allows for referencing citations within this section to be included in a permit application.

Your response addresses our question/concerns satisfactorily.