



Legal Updates

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EPA Proposes More Stringent National Ozone Standard

On Jan. 7, 2010, EPA issued a proposal to reduce the National Ambient Air Quality Standard (NAAQS) for ozone. EPA proposed a more stringent primary air quality standard to protect human health, as well as a more stringent secondary standard to protect the environment. Both proposals are offered as a range. If adopted, the proposed rule will increase the number of non-attainment areas that will require reductions in emission standards, require offsets in order to develop new sources, and require continued focus on reducing auto emissions.

Notably, if EPA adopts final regulations at the lower end of the proposed range, states will have a very difficult time achieving sufficient reductions of pollutants, primarily NO_x, to meet the requirements. Many expect EPA will have to issue significant new national rules addressing stationary and mobile sources to help states comply. Although it will be several years before states and EPA begin to assess new rules to generate reductions, the proposed new standards will introduce even greater uncertainty and potential costs for industrial and commercial sources.

EPA's proposal reconsiders and revises the ozone rule issued by the previous administration in March 2008. The environmental community criticized EPA's 2008 action for failing to follow the advice of an EPA science advisory board, and for adopting identical primary and secondary standards.

The D.C. Circuit validated these criticisms when it remanded EPA's particulate NAAQS for these exact reasons in February 2009 (*American Farm Bureau v. EPA*, 559 F3d. 512; see McGuireWoods Alert for 3/3/2009). As a result, EPA advised the court that was hearing a challenge to the 2008 ozone rule that it essentially agreed with the concerns and intended to revise the rule accordingly.

In issuing this proposal, EPA stressed its decisions were based solely on the science regarding the health impacts of ozone, and that it intended to set a standard as stringent as necessary to protect public health. The preamble reviews numerous studies regarding health impacts and sought to synthesize the results in order to develop the new standard. Even with this intense review, EPA issued the proposal based on a potential range of standards from .060 ppm to 0.070 ppm based on an eight-hour average. EPA took a similar approach to evaluating numerous studies regarding vegetative impacts of ozone levels in proposing a standard based on cumulative seasonal average expressed in a concentrated weighted form expected to be within a range from 7 – 15 ppm-hours.

While the impact of this rule is potentially enormous, the rule will not result in localized regulations for a number of years. Once it establishes the ozone NAAQS, EPA will identify counties not in attainment with the standards and issues guidance for states to establish State Implementation Plans (SIPs) to bring those areas into attainment. SIPs are likely to include a mix of controls on NO_x and VOCs from industrial sources, as well as controls on uses of consumer VOC sources such as paints.

States will have to rely upon EPA to control mobile source emissions for cars and off road engines. In addition, in non-attainment areas, businesses will be unable to build new facilities without obtaining offsetting reductions for any VOC or NO_x planned to be emitted by the new source. The new rule will also rekindle the debate surrounding the interstate transport of ozone and ozone precursors, and will likely require further reductions in upstream states to allow downstream states to achieve attainment, again placing a premium on EPA action.

Finally, many counties have already achieved EPA's prior ozone standard at the cost of extensive reductions and establishment of stringent controls. Within current technologies, states will be hard pressed to find the additional reductions needed to meet the more stringent standards. EPA predicts nationwide compliance costs in the range from \$50 million to \$90 million. These changes and costs will be in addition to the current uncertainty regarding carbon controls. As a result, planning for large combustion sources such as power plants will continue to be challenging.

Once published in the Federal Register, the proposal initiates a 60-day comment period. EPA also scheduled three hearings in early February to take further comments. EPA states that it will issue the final rule by Aug. 31, 2010. Companies concerned regarding the potential impact of the rule should plan to participate in the rulemaking either by testifying at the public hearings or by submitting formal comments.

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