



EPA Proposes to Strengthen Ozone Standards

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On January 19, 2010, the United States Environmental Protection Agency (“EPA”) published a proposed rule to strengthen the national ambient air quality standard (“NAAQS”) for ground-level ozone,¹ also known as smog. *See* 75 Fed. Reg. 2938. As discussed in this article, this proposed rule will have a sweeping regulatory impact on industry and state regulators. Industry will see increased costs of compliance, additional permitting requirements, and be subject to more offset requirements. EPA is also accelerating the schedule for this rule to implement the new NAAQS as quickly as possible. Written comments on the proposed rule are due March 22, 2010.

This action is a result of the agency’s review of the 2008 final rule that established the “primary” ozone standard at 0.075 ppm measured over eight hours (the “8-hour Primary Ozone NAAQS”)², and the EPA’s uncertainty as to whether that rule satisfied the requirements of the Clean Air Act (“CAA”) in light of the scientific evidence. *Id.* at 2943. Specifically, EPA has raised concerns as to whether 0.075 ppm provides an adequate margin of safety and meets the CAA’s requirement to protect the public health. *See* 75 Fed. Reg. 2943; 42 U.S.C. § 7409(b)(1).

By this rulemaking, EPA is seeking to adjust the 8-hour primary ozone NAAQS, designed to protect human health, to a level between 0.060-0.070 ppm. 75

¹ Ground-level ozone forms by a chemical reaction between oxides of nitrogen (“NO_x”) and volatile organic compounds (“VOC”) in the presence of sunlight. Mobile sources, industrial processes, and electrical power generation are the largest sources of human-made NO_x and VOC emissions. 75 Fed. Reg. 2941.

² 73 Fed. Reg. 16436 (March 27, 2008). This rule was quickly challenged in federal court. *See State of Mississippi, et al v. EPA* (No. 08-1200, D.C. Cir. 2008).

Fed. Reg. 2938. The proposed rule goes further to set a cumulative seasonal "secondary" standard designed to protect sensitive vegetation and ecosystems including forests, parks, wilderness areas and wildlife refuges. The secondary standard will be set at a level within a range of 7-15 ppm-hour. 75 Fed. Reg. at 3018.

The exact standards within the proposed ranges for both the primary and secondary standards have not yet been determined, and EPA is seeking comments on the ranges as well as on the appropriate weight to place on the various types of available evidence, analysis upon which the proposed standards are based, exposure and risk assessment results and the uncertainties and limitation related to this information, as well as the benefits to the public welfare.

These changes to the ozone NAAQS will have a broad regulatory impact for both industry and regulators. Compared to today's 0.075 ppm primary ozone NAAQS, a standard set within the range of 0.060-0.070 ppm will throw approximately 650 more counties in the United States into nonattainment for the primary ozone NAAQS. In Colorado, Arapahoe, Boulder, Denver, Douglas, El Paso, Jefferson, Larimer, Montezuma and Weld counties would all become nonattainment. Adoption of the secondary ozone NAAQS is predicted to result in approximately 200 additional counties across the United States to fall into nonattainment. This would lead to a massive redesignation of counties in the United States, and trigger states to revise their state implementation plan ("SIP"). States will also have to revise, and likely make stricter, the specific requirements for issuing permits to individuals who intend to modify or construct major pollution sources located in nonattainment areas. More facilities will find themselves operating in a nonattainment area and subject to additional permitting requirements as contain in the SIPs. Under the CAA, a state's SIP must provide that a permit to construct or operate in nonattainment areas may be issued *only* if the permitting agency determines that (1) the increase in emissions will be offset by emission reduction from other sources; (2) all other sources of the operator in the state are in compliance with the CAA; and (3) the source is required to comply with the lowest achievable emissions rates. 42 U.S.C. §§ 7502-7503.

EPA estimates the cost of reducing ozone to within proposed range of 0.060-0.070 ppm is between \$19 billion to \$90 billion per year. The annual control technology costs of implementing known controls to attain a standard in the

proposed range of 0.060-0.070 ppm (in the year 2020) is estimated to be approximately \$3.3 billion to \$4.5 billion.

To implement change rapidly, the EPA is proposing the following accelerated schedule under the proposed rule:

- January 2011: States to make recommendations for areas to be designated as attainment, nonattainment or unclassified.
- July 2011: EPA to make final area designations.
- August 2011: Designations will be effective.
- December 2013: SIPs due to the EPA that will outline how states will reduce pollution to meet the new standards.
- 2014-2031: States required to meet the primary standard.

Written comments on this proposed rule are due March 22, 2010.

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