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Three Obstacles to EPA's O_3 Rule: Industry Opposition, Implementation, and Congressional Oversight

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The U.S. Environmental Protection Agency (EPA) recently proposed revising the national air quality standard for ozone, the key pollutant in smog and regional haze. EPA acknowledges that the rule will cost billions of dollars each year to implement. Industry fears the additional regulatory costs, and environmentalists assert the rule does not restrict ozone enough. Select jurisdictions with high levels of background ozone, particularly Western states, will find it more difficult to reach attainment, and current mechanisms to account for naturally-occurring ozone spikes may prove inadequate. Republican leaders in the House and Senate have signaled their intention to oppose the rule in legislation. The EPA must navigate these complex issues as it prepares to finalize the rule by October 1, 2015.

Ozone: EPA's Next Big Thing

Although much of the EPA's efforts lately have focused on climate change, the agency is moving forward with a proposed regulation to lower the National Ambient Air Quality Standard (NAAQS) for ground-level ozone. Under the Clean Air Act (CAA), EPA is required to review such standards every five years, and EPA has not updated the ozone standard since 2008. EPA quietly released its proposed regulation on the eve of Thanksgiving 2014, and it was published in the Federal Register on December 17, 2014.

This is the second ozone proposal put forth by the Obama Administration. In 2011, EPA published a proposal of 65 parts per billion (ppb), which was met with fierce industry opposition. Keenly aware of election year dynamics and the danger of handing his Republican opponents an anti-economy issue, President Obama ultimately pulled the proposal, embarrassing his EPA Administrator and frustrating environmental groups.

EPA's current proposal sets an ozone standard within a range of 65 to 70 ppb, and the agency is accepting comment on whether to adopt a lower standard of 60 ppb. The new ozone standard would phase in for most of

the country by 2025, with some smog-prone regions of California phasing in through 2037. EPA is accepting comments on the rule through March 17, 2015. The agency will hold three public meetings on the rule in January 2015.

EPA's ozone proposal would not impose a specific burden on any industry sector or company. Instead, it would establish a national standard that would have to be met in each state or area within a state called an "air quality management district" or "AQMD." Once the standard is finalized in October 2015, EPA will then determine which local areas meet it and which do not. According to EPA's data from 2011-13, 358 counties currently would violate a standard of 70 ppb, and an additional 200 counties currently would violate a standard of 65 ppb. However, EPA projects that by 2025, without needing to take any additional actions, only nine counties outside California would continue to violate the 70 ppb standard and an additional 59 counties outside California would violate a 65 ppb standard.

For those nonattainment areas, the state or local governments will need to develop plans to cut the emissions that become ozone. Each state or AQMD ultimately would decide which mix of regulatory measures to undertake to meet the standard. These measures could include things such as requiring additional controls to reduce smokestack emissions, subsidizing mass transit, or converting municipal bus fleets to cleaner fuels. They could also mean reducing energy-intensive economic activity, which could have substantial impacts on regional and state economies. States or AQMDs that are unable to comply with the new standards on time would also face harsh economic sanctions, too. No new industrial activity could open in that state or AQMD unless the state or AQMD was first able to obtain even greater emission reductions elsewhere.

EPA maintains that its proposal is based on a large body of science and is readily achievable. The Agency also asserts that the rule will prevent 750 to 4,300 premature deaths as well as thousands of hospital visits and hundreds of thousands of asthma attacks. For EPA, the monetized health benefits of the proposed rule—between $6.4 and $13 billion annually for a 70 ppb standard and between $19 and $38 billion for a 65 ppb standard—will far outweigh the costs.

The new standards will mean substantial costs to industry. EPA's conservative assumptions estimate the costs will range between $3.9 billion for a 70 ppb standard and $15 billion for a 65 ppb standard. Industry estimates of the cost of EPA's rule are several orders of magnitude higher – as much as $270 billion, according to the National Association of Manufacturers. Areas with oil and gas production in the West could see restrictions on their ability to expand operations.

The actual costs matter in terms of policy arguments, but for a legal challenge, they actually do not. The Supreme Court has long interpreted the Clean Air Act to prohibit the Agency from considering costs when it evaluates which pollutant standards are sufficiently protective of human health and welfare. EPA may consider costs only in helping states develop strategies to meet the standards. That reality begs the question of why the Agency would prepare a 575-page Regulatory Impact Analysis for its ozone proposal. As EPA acknowledged in its proposal, "although an RIA has been prepared, the results of the RIA have not been considered in issuing this proposed rule."

Background Ozone Levels May Cause Implementation Problems

Ozone resides both in the protective ozone layer in the Earth's stratosphere and closer to ground-level, where it forms harmful smog or regional haze. This rule only applies to concentrations of ground-level ozone. Ground-level ozone is created by the interaction of sunlight with nitrogen oxide and volatile organic compounds from manmade sources such as cars, power plants, manufacturing plants, and oil and natural gas refineries, as well as from natural sources such as wildfires and intrusions of ozone from the stratosphere. Natural precursors to ozone, as well as ozone migrating from cross-border pollution sources, are infrequent but can affect daily ground-level ozone concentrations in select areas.

Determining concentrations of ground-level ozone is complex but relatively uncontroversial. More challenging is quantifying and addressing exceedance of an ozone standard that is caused by background ozone. The problem becomes especially acute because 40 percent of the U.S. population lives in areas that are already fail to meet the existing 75 ppb standard established by the Agency six years ago.

A standard set as low as 65 ppb would mean that large swaths of the United States, particularly mountainous Western states, would be deemed in noncompliance, triggering additional economic penalties and consequences. EPA recognizes the significance of the situation, and it has recently released two documents addressing background ozone. One document argues that the average background ozone levels across the United States will not exceed the proposed standard. The other document emphasizes that under the Clean Air Act, states are not responsible for reducing emissions from sources outside their control, and that the agency will revise its guidance to allow flexibility for "exceptional events." Without knowing the details of the to-be-revised guidance, neither provides adequate comfort to regulated entities.

Under a complex formula, areas become nonattainment when the three-year average of the fourth-highest annual maximum daily value exceeds the standard. EPA stressed that "on most days and at most U.S. locations, the background influence on observed ozone concentrations is expected to be much lower than the NAAQS levels that EPA proposed on November 25, 2014." That may well be true, but attainment is not based on the everyday average but rather on the smaller sample size of the highest emission days. Thus, ozone concentration spikes on a handful of days can impact the average and nonattainment status.

EPA Amending Guidance to Account for Ozone-Spiking Exceptional Events

In the two documents mentioned above, EPA has highlighted to stakeholders three tools to reassure states that it will incorporate some level of flexibility into the compliance regime.

First, EPA in 2007 issued its Exceptional Events Rule, which allows a state to petition EPA to exclude data associated with a naturally-occurring NAAQS exceeding event. So, for example, if a state can provide data that a wildfire contributed to abnormally high ozone during a particular period, EPA will exclude that data for the purposes of calculating attainment.

Second, Section 179B of the CAA allows EPA to approve an ozone attainment plan for a nonattainment area, if that area can demonstrate that international transport of ozone precursors is preventing attainment. EPA said it is working to better understand potential international sources of ozone.

Third, Under Section 182(h) of the CAA, EPA can designate certain rural areas without significant emissions sources as "rural transport areas," triggering less stringent requirements. Such a designation could help rural areas with high background ozone concentrations more easily comply.

Nevertheless, the refrain that EPA will use its discretion does not necessarily reassure industry or regulated entities. The current process for excluding exceptional events is time consuming and burdensome. Only three states have submitted an application to EPA under the Exception Events Rule to exclude ozone NAAQS data. EPA approved all three requests—two for wildfire events and one for stratospheric ozone intrusion—but the states' submissions contained hundreds of pages of technical data, charts, and modeling. EPA has stated it will streamline its Exceptional Events Rule, and that proposal could be released by mid-2015.

Ascendant Republican Congress Prepares To Push Back

The reaction to the proposed rule from Congressional Republican leaders has been swift and visceral. Rep. Fred Upton (R-Mich.), chairman of the Energy and Commerce Committee, said in a statement that "[t]his

proposal threatens to slam the door on new economic growth and job creation and stop our energy and manufacturing renaissance in its tracks."

Incoming Environment and Public Works Chairman James Inhofe (R-Okla.) agreed and told the White House that the costly proposal "will serve as one of the most devastating regulations" in EPA's history. Several senators have said they plan to use standalone legislation, the appropriations process, or the Congressional Review Act to resist EPA's action. Sen. John Thune (R-S.D.) is floating legislation that would effectively block the EPA from revising the ozone standard until 85 percent of the counties not meeting the current standard become compliant. Incoming Senate Majority Leader Mitch McConnell's (R-Ky.) office and Republican Sens. Roy Blunt (R-Mo.) and John Barrasso (R-Wyo.) have said they support Thune's approach, but Senator McConnell has not yet provided a time frame for moving legislation to counter EPA's proposal.

So far, November's electoral wins for Republicans have not translated to immediate leverage in rolling back EPA's ozone regulation. The passage of an omnibus spending package in the post-election session of Congress did not contain any amendments limiting the ozone rule. The appropriations package was probably the best near-term legislative vehicle for such a rider. Nevertheless, Republicans likely will redouble their efforts in the new Congress. The December 17 Senate Environment and Public Works Committee hearing on the ozone rule was probably the last time a senior EPA witness faced a friendly chairman, as Sen. Inhofe is expected to assume the gavel in January.

The chances of success for the GOP are far from certain. Republican leaders may lack the votes needed for passage. Although Republicans have openly opposed the Agency's decisions in combatting climate change, which is a far-reaching and inherently international problem, Republicans and Democrats generally respect EPA's judgment in determining what is necessary to protect the nation's health. President Obama could also veto any effort to block the rule. With new Republican gains in Congress, legislative tactics through the appropriations process and other means could nevertheless pressure the Agency to adopt an ozone standard on the high end of the proposed range and provide a more extended and forgiving schedule for compliance.

All of these elements—disputes over the appropriate standard, the cost and benefit of the rule, the flexibility mechanism for background ozone, and Congressional opposition to EPA—create an atmosphere of uncertainty for potentially regulated parties.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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