

Alerts

EPA Proposes More Restrictive Ozone Standards

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Hinshaw Alert

The U.S. Environmental Protection Agency (EPA) proposed important new National Ambient Air Quality Standards (NAAQS) for ozone (O₃) on January 6, 2010. If adopted, the tightened standards will result in increased restrictions on emissions of hydrocarbon and other precursors of ozone from stationary and mobile sources. Affected businesses could include those in a wide range of industries, including automotive manufacturers and vehicle fleet owners.

In a companion move, the EPA postponed until March 2011 the deadline for designating the areas of the United States that are in ozone attainment and non-attainment. Information from the EPA indicates that about 322 counties around the country currently violate the 2008 O₃ standard, whereas as many as 650 counties (nearly all monitored counties) violate the most stringent standard now proposed by the EPA. However, the EPA believes that generally expected air quality improvement would lessen the future number of areas in violation.

The EPA proposes to modify primary and secondary standards from those set in March 2008. Claiming that the change is needed to protect public health and welfare, the EPA proposes that the level of the eight-hour primary standard, which was set at 0.075 parts per million (ppm) in the 2008 final rule, should instead be set at a lower level within the range of 0.060 to 0.070 ppm to provide children and other “at risk” populations with increased protection against an array of O₃-related adverse health effects, which range from decreased lung function and increased respiratory symptoms to serious indicators of respiratory morbidity such as emergency department visits and hospital admissions for respiratory causes. The agency cites evidence of possible cardiovascular-related morbidity as well as total non-accidental and cardiopulmonary mortality.

The secondary standard is intended to protect “public welfare.” For a new secondary standard, intended to provide increased protection against O₃-related adverse impacts on vegetation and forested ecosystems, the EPA proposes a cumulative seasonal standard expressed as an annual index of the sum of “weighted two hourly concentrations” that are cumulated over 12 hours per day during the three worst consecutive months of an O₃ season, with the maximum index value set at a level within the range of 7 to 15 ppm-hours. The current secondary standard is identical to the revised primary standard adopted by the 2008 final rule.

Under Title I of the Clean Air Act, NAAQS may only be adopted after a study of

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“all relevant science” has been conducted. The EPA opened a 60-day window for comments, and will have two public hearings on the proposal. In its 2006 Criteria Document, the agency concluded that the asthma panel studies indicate a positive association between ambient concentrations and respiratory symptoms and increased medication use in asthmatics. The George W. Bush administration was reported to have thereafter pressured the EPA not to make the standard as stringent as the agency’s science panel recommended.

The EPA’s press release for the new proposal indicates that in September 2009, EPA Administrator Lisa Jackson announced that she would reconsider the existing ozone standards. The agency stated that as part of its reconsideration, the EPA conducted a review of the science that guided the 2008 decision, including more than 1,700 scientific studies and public comments from the 2008 rulemaking process. The EPA also reviewed the findings of the independent Clean Air Scientific Advisory Committee, which recommended standards in the ranges proposed last week. The Proposed Rule is accompanied by a 446-page explanation by the EPA, which in turn references a large volume of data and information.

The new proposal is expected to be controversial, in that industry groups have noted that the number of asthma cases have increased in recent years despite reductions in ambient air ozone concentrations during the same time period. Some epidemiologic criticism turns on whether the criteria for designating cases of asthma have changed historically, and whether the observed bronchial sensitivity in the affected populations might in fact be due to other factors. Additionally, some question whether bronchial tissue reaction is evidence of a health threat, or is instead as natural as eye blinks on a windy day. Another criticism is that the standards are so low that even Mother Nature is sometimes out of compliance, i.e., whether there is a particularly hot summer in a given city can spell the difference between compliance and non-compliance. The practical effect of a tightened standard would be to return many important urban areas to a non-compliant status, which in turn would place additional burdens on permitting of new sources and expansion of existing sources.

Under the Clean Air Act, states have the primary responsibility for adopting standards to come into and assure continued compliance with NAAQS. In doing this, the states submit “implementation plans” for federal review and approval. Thus, the process of change to new standards takes years. Nevertheless, the importance of the underlying O3 standard cannot be overstated. Industry trade groups, environmental groups and other interested parties that wish to do so should contribute additional comment and evidence now, while the record is open, because the underlying standard generally cannot be challenged in the later stages of the regulatory process, when individual industry emission rules changes may be proposed.

Additional information is available from the EPA website (<http://www.epa.gov/groundlevelozone/>).

For further information, please contact Harvey M. Sheldon or your regular [Hinshaw attorney](#).

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