Emily Schilling

Partner
801.799.5753
Salt Lake City
ecschilling@hollandhart.com

EPA Proposes More Stringent Ozone NAAQS of 65-70 ppb

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Today EPA released a proposed primary National Ambient Air Quality Standard (NAAQS) for Ozone of 65-70 parts per billion (ppb) (annual fourth highest daily maximum eight-hour concentration, averaged over three (3) years). The proposed NAAQS is more stringent than the previous ozone NAAQS of 75 ppb. The change has been anticipated for months and was compelled by a Sierra Club lawsuit in the Northern District of California. The proposed NAAQS has already been denounced by various groups as too stringent, too lenient, or too costly. Gina McCarthy is staunchly defending the proposed standards, and EPA is taking comments on a standard as low as 60 ppb. The comment period is open for 90 days, commencing when the proposed rule is published in the Federal Register.

While EPA proposes a more stringent secondary Ozone NAAQS that aligns with the primary NAAQS (65-70 ppb), EPA uses a complicated metric to establish and justify the requisite level of protection for the public welfare (the seasonal W126 metric of 13-17 ppm-hours 3-year average). The Clean Air Act defines the secondary standard as “requisite to protect the public welfare from any known or anticipated adverse effects.” CAA § 109(b)(2). The Act also provides that the public welfare includes “effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.” CAA § 302(h). Since the D.C. Circuit Court remanded the 2008 Ozone NAAQS to EPA to provide more analysis and justification for its decision not to set a separate secondary standard, EPA has assembled studies and analyses (at §§ 5.6 and 5.7) to support the more stringent secondary Ozone NAAQS and associated claims that the more stringent standard is necessary to protect “sensitive vegetation and ecosystems in federally protected Class I and similar areas.” (at 5-88). The secondary NAAQS has elicited considerable concern, especially from western states, where, based on current measurements, the standard will result in large areas designated as nonattainment.

One of the chief underlying concerns for both the primary and secondary standards is the background or “natural” ozone level, which is especially high in the mountain west. Background ozone levels are meant to convey the ozone level that could be obtained with no anthropogenic emissions in the area being measured. However, EPA's definition has changed over time. Background ozone levels between 55 and 65 are common in several mountain areas in the west, including some national parks and Class I areas. Because government-mandated area pollution controls would be ineffective in reducing background levels of ozone, many groups are demanding further study of and accounting for background levels before

the new NAAQS is finalized.

Holland & Hart has been following these developments closely and is currently analyzing EPA's proposed rule, which will have significant implications for industry and energy companies operating in the Mountain West. We will send more detailed analysis at the beginning of next week.

For questions or further information, please contact Marie Bradshaw Durrant (mbdurrant@hollandhart.com) or Emily Schilling (ecschilling@hollandhart.com) at Holland & Hart.