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New Ozone Standard Will Disproportionately Impact the Intermountain West

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On October 1, 2015, EPA finalized the new primary National Ambient Air Quality Standard (NAAQS) for Ozone at 70 parts per billion (ppb); the new standard is more stringent than the current 2008 Ozone NAAQS, which was 75 ppb. At 70 ppb, approximately 32 of 63 counties in the Intermountain West would currently fail to meet the new standard, including counties in Utah, New Mexico, Colorado, and Nevada. The lower Ozone NAAQS is of particular concern to western states, communities, and businesses – where it will be difficult to attain the lower standard due to high levels of "background ozone," which in some places approaches the 70 ppb standard.

Background ozone can be caused by elevation, types of vegetation, wildfire, international transport, or when atmospheric ozone is pushed to ground level through weather events, a phenomena known as "intrusion." The Intermountain West is also home to large, sparsely populated counties with few sources of emissions that can be controlled through state permits or rules. While EPA acknowledges that the high background levels of ozone in the Intermountain West pose unique problems for compliance with the new standard, the final rule offers few meaningful options to address the impacts of background ozone.

States have one year to identify those counties, or partial counties, that should be designated as "nonattainment" for the new standard. Designation of an area as nonattainment triggers additional emission restrictions for new and expanding businesses, as well as the likelihood of requirements for additional control technology for existing sources. EPA expects to finalize nonattainment designations in 2017 or, at the latest, 2018.

States have three years from issuance of the new standard to develop and submit to EPA their State Implementation Plans (SIPs), which are a set of rules designed to assure compliance with the standard. In the event of a nonattainment designation, the states have 36 months from the designation to develop and submit a nonattainment SIP designed to bring an area back into attainment. One difficulty for developing a nonattainment SIP in many areas of the rural Intermountain West is that there are few emission sources that can be controlled through permits or rules; in other words, high ozone levels may not be susceptible to local controls.

Acting EPA Air Chief Janet McCabe has said that EPA will work with states "to carry out the duties of ozone air quality management in a manner that

maximizes common sense, flexibility and cost-effectiveness while achieving improved public health expeditiously and abiding by the legal requirements [of the Clean Air Act]." However, the timing of nonattainment designations and SIP development will make the development of practical solutions difficult at best. See more at:

<http://www.natlawreview.com/article/epa-lowers-ozone-ambient-air-standard#sthash.lDX6zAnu.dpuf>.

The implementation process of the new standard will rely on stakeholder participation. For example, in developing the SIP, states will model emission sources and determine the cost of reduction per ton of pollution. Proposed solutions to implement the SIP are vetted through public comment. For counties already designated as nonattainment for other pollutants, such as PM 2.5 or PM 10, the state will evaluate the current rules and modeling to determine if additional emission control rules are necessary to bring ozone levels down. For its part, EPA has promised to develop implementation guidance and a white paper with stakeholder input.

State plans will rely heavily on a state's ability to show appropriate local measures. Aside from local controls, states must rely on exclusions for "exceptional events" or demonstrate that pollution has been transported into the area. While the Clean Air Act provides for these exclusions, states have had difficulty getting EPA to approve such exclusions in a timely manner. Businesses located in nonattainment areas are subject to the restrictions associated with the nonattainment designation until the exclusions are accepted by EPA, or the area goes through the long and difficult process of being redesignated as in attainment with the standard. This means a business might have to implement an air quality reduction mechanism that may later be deemed unnecessary in the event that EPA accepts any proposed exclusions.

In light of the potential implications for businesses located in an ozone nonattainment area with few opportunities for emission controls, industry stakeholders should plan to participate in the EPA stakeholder process on background ozone and in the state SIP development processes.

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