

Looking At The EPA's Balance Of Interests In Ozone Rule

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On Oct. 1, the U.S. Environmental Protection Agency issued its revised National Ambient Air Quality Standards for ground-level ozone, lowering both the primary and secondary standards to 70 parts per billion, down from the 75 ppb standard in effect since 2008. The rule is contentious and is already under fire both from segments of industry and states that believe the standard is too stringent, and environmental and public health groups that insist it is too weak. The rule is all but certain to be challenged in the D.C. Circuit, most likely from both sides, once the rule is published in the Federal Register, likely in a matter of weeks.

The EPA estimates the new ozone standard will result in annual implementation costs of \$1.4 billion by 2025 (not including California), with annual benefits estimated at \$2.9 billion to \$5.9 billion by 2025 (not including California).[1] The EPA projects that benefits from lowering the standard will include avoidance of 28,000 missed work days and 230,000 asthma attacks among children. Depending on their degree of nonattainment and classification, nonattainment areas will have until 2020 to as late as 2037 to achieve compliance.



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Statutory Authority and Regulatory Background

The NAAQS program is central to the Clean Air Act's regulatory regime. See 42 U.S.C. § 7408. The EPA regulates air quality for six pollutants under the program: nitrogen oxides, sulfur dioxide, particulate matter, lead, carbon monoxide and ozone.[2] The EPA is required to establish primary and secondary air quality standards for each pollutant. Id. § 7409. Section 109(b)(1) defines the primary standard as one "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, [is] requisite to protect the public health." Id. § 7409(b)(1). The secondary standard must "specify a level of air quality the attainment and maintenance of which ... is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air." Id. § 7409(b)(2).

Notably, under U.S. Supreme Court case law dating to 2001, the EPA may not consider costs of implementation in establishing the NAAQS. Instead, the EPA must focus solely on what level of ozone is "requisite" to protect public health with an "adequate" margin of safety. *Whitman v. American Trucking Associations Inc.*, 531 U.S. 457, 468-71 (2001). This is contrary to most provisions of the Clean Air Act, which specifically permit consideration of costs in setting standards.

One question for the upcoming challenges is whether the preclusion of cost considerations will be challenged based on the Supreme Court's decision last term in *Michigan v. EPA*, No. 14-46 (Jun. 29, 2015), in which the high court held that it was unreasonable for the EPA not to consider costs in determining whether to regulate power plant emissions of hazardous air pollutants, despite statutory language directing the EPA to focus there on health considerations, as well.

The EPA is required to review the NAAQS every five years based on advice received from the Clean Air Scientific Advisory Committee. 42 U.S.C. § 7409(d)(1), (d)(2). The last EPA review was in 2008, which resulted in the 75 ppb primary and secondary standards. Those standards were challenged in the D.C. Circuit. While the court upheld the primary standard, it remanded the secondary standard to the EPA. *Mississippi v. EPA*, 744 F.3d 1334 (D.C. Cir. 2013). The EPA consolidated its review on remand with its five-year statutory review of both standards.

After abandoning in 2011 an effort to voluntarily reconsider the 2008 standard, the EPA then missed the 2013 statutory deadline for revising it. In April 2014, a California federal court ordered the EPA to promulgate a final rulemaking completing the five-year assessment by Oct. 1, 2015. *Sierra Club v. EPA*, No. 13-CV-2809-YGR (N.D. Cal. Apr. 30, 2014). The EPA issued a proposal on Nov. 25, 2014, contemplating a revised primary and secondary standard in the range of 65 to 70 ppb. Industry groups largely criticized the standard as unnecessary and too stringent, while environmental and public health groups generally sought a standard as low as 60 ppb.

In the final rule, the EPA asserts that, based on its scientific assessment, the new standard provides increased protection for children, older adults, people with respiratory diseases and other populations at-risk for various respiratory maladies. The EPA has already received pointed criticism of the "compromise" 70 ppb standard from both sides, and the rule is almost certain to be challenged in the D.C. Circuit by some petitioners who will argue that the EPA should retain the current 75 ppb standards and others arguing for even tighter standards. Any challenges must be filed within 60 days of the rule's publication in the Federal Register.

Next Steps

Now that the EPA has established a new NAAQS, current air quality must be assessed to determine whether areas in a state meet the new standards. Under the Clean Air Act, states first recommend the designation of areas within each state to the EPA. The Agency is then required to formally promulgate the designations within two years.

States must submit Section 110 implementation plans, known as infrastructure plans, within three years. State plans to implement the standards must meet several detailed requirements. Those areas that meet the standards must set forth procedures for ensuring maintenance of the area's air quality. States with nonattainment areas face additional requirements and must submit plans within three years of the designation of such areas as nonattainment areas. In these areas, the plans must specify programs and controls needed to address nonattainment conditions and must include a demonstration of when such areas will attain the NAAQS. States that fail to submit a plan, or that file an inadequate plan, are potentially subject to an EPA-imposed federal implementation plan.

The final rule contains several other adjustments to the implementation process, including specifying a longer ozone season for over 30 states. The EPA has also stated that it will issue "timely and appropriate implementation guidance" to states to assist them in developing their plans.

The EPA asserts in the final rule that several other regulations will contribute to achieving the requisite emission reductions, such as the NOx SIP Call, Clean Power Plan, Cross-State Air Pollution Rule, the Mercury and Air Toxics Standards, regulations controlling on-road and nonroad engines and fuels and other programs in effect or slated to take effect in the near future. Based on these, the EPA predicts that the majority of nonattainment areas will be able to achieve attainment by 2025 without additional action.

Implications

The NAAQS has the potential to seriously affect state and local economies in several ways. For example, under the Clean Air Act's pre-construction review program, new or modified major emitting facilities are permitted in different ways depending on whether they are to be located in areas in attainment or nonattainment for a NAAQS pollutant. Sources located in attainment areas are subject to less stringent emission controls than sources in areas of nonattainment. A lower NAAQS is likely to result in additional nonattainment areas, which could affect industry and local economies operating in those areas. Moreover, states must develop their implementation plans to include policies that will achieve and maintain NAAQS attainment. These plans may require controls far beyond large electric power plants and industrial facilities, and could affect everything from cars and trucks to commercial and residential buildings.

Litigation will likely focus on whether the EPA acted arbitrarily and capriciously in settling on a standard of 70 ppb. The key question will be whether the standard is "requisite" (i.e., sufficient without going too far) to protect public health with an "adequate" margin of safety. Other issues are likely to include achievability of the standard, particularly in areas in the Intermountain West, where some areas already exceed the 70 ppb standard based on naturally occurring events. The EPA has asserted that these areas are few in number and that other Clean Air Act provisions can address the issue. Finally, some may argue that health "dis-benefits" (such as loss of employment and associated declines in health), as well as health benefits, must be considered in determining whether a standard is protective of public health.

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[1] The EPA conducted a separate analysis for California, as that state has a number of areas with particularly poor air quality.

[2] Ozone is formed by chemical interactions involving solar radiation and precursor pollutants, most notably volatile organic compounds and NOx.