

## EPA TO TIGHTEN OZONE STANDARDS<sup>1</sup>

EPA has postponed issuance of updated national ambient air quality standards (NAAQS) for ozone previously set to be issued on July 29, 2011. The rule is expected to tighten the already more stringent standards set in 2008. The 2008 standards were, according to EPA, not as protective as recommended by EPA's Clean Air Scientific Advisory Committee.

### The Proposed Ozone Standard and the Schedule

Under the new proposed rule, the 8-hour "primary" ozone standard would be 0.060-0.070 parts per million (ppm). Additionally, EPA has proposed to establish a "distinct, cumulative, seasonal 'secondary' standard" to protect "sensitive vegetation and ecosystems" such as forests and parks within the range of 7-15 ppm-hours. Based on 2006-2008 air quality data, there are approximately 515 counties with monitors that violate the standard of 0.070 ppm, and 650 counties with monitors that violated the even more stringent standard of 0.060 ppm. Other counties that currently lack sufficient monitoring are also likely to become non-attainment areas. According to EPA, the new proposed standard is projected to cost industry in the range of \$19 to \$90 billion annually, with \$19 billion representing the more lenient standard of 0.070 ppm and \$90 billion representing the most stringent standard of 0.060 ppm.

### Industries and Transportation That Will Be Affected By the New Rule

Volatile organic compounds (VOCs) and nitrogen oxides (NO<sub>x</sub>) combine with sunlight in the atmosphere to create ozone. Thus, companies that shape, paint or coat metals; that print, coat or dye anything from fabrics to packaging and advertising materials; or that make or use paints, solvents, inks, degreasers or plastics (and hence emit VOCs) will be affected. Public transportation (cars and buses) and companies that have on-site boilers or furnaces (and hence emit NO<sub>x</sub>), are also likely to be affected by the new rule. In addition to being more difficult to comply with, tighter standards will place more counties in nonattainment status, and result in smaller companies being affected. Although the final compliance dates will be set when the rule is promulgated in July, it is likely that "non-attainment" designations immediately limiting expansion of any facility emitting VOCs or NO<sub>x</sub> will be phased in as early as 2012 and 2013.

---

<sup>1</sup> This Memorandum is for general information purposes only and is not intended to provide legal advice. It may be considered Attorney Advertising under New York ethical rules. Prior results do not guarantee a similar outcome.

## **Civil and Criminal Enforcement**

Companies or communities that violate Clean Air Act standards will be subject to a fine of up to \$37,500 per day, per source. Criminal penalties can be imposed for willful violations. Enforcement is typically by either state attorneys general or by the U.S. Department of Justice.

## **Consequences of Nonattainment Status**

Businesses and local governments located in a county designated as a nonattainment area face several consequences. First, as soon as nonattainment status is determined it will become very difficult in those counties for printers, manufacturers and others to obtain a permit to either modify an existing facility or to build a new facility of a type that emits VOCs or NO<sub>x</sub> because the county itself is not attaining the new standard. Second, affected manufacturers in nonattainment counties will over time have to implement stringent VOC and NO<sub>x</sub> containment and destruction technologies or make significant process changes to reduce emissions. Finally, counties will be forced to impose transportation restrictions because NO<sub>x</sub> is a by-product of combustion and is emitted from cars and buses.

Under the proposed schedule, EPA estimated that states would be required to submit new State Implementation Plans (SIPs) to EPA by December 2013 that will mandate adoption of these controls. (It is uncertain as to whether that schedule will be revised in the final rule). Once approved by EPA, the SIP is enforceable by the State and/or EPA and the Justice Department. The goal is to bring each county nationwide into compliance with the new ozone standards with the specific deadlines depending on the severity of the problem. Since under the Clean Air Act neither costs nor technical feasibility are to be considered in determining NAAQS, job losses and forced closure of facilities will result when it is not economically or technically practical to achieve the more stringent limits.

Technologies that EPA expects to be employed to try to control VOC emissions include requiring the manufacturing facilities to install incinerators to destroy organics and for printing to be conducted in a "permanent total enclosure" intended to capture 100% of VOC emissions coupled with incinerators to destroy the captured emissions. EPA admits that permanent total enclosure will raise OSHA issues regarding worker safety. In order to adequately reduce VOC emissions companies that paint or coat surfaces may have to switch to ultra low solvent or powder based paints. With respect to NO<sub>x</sub>, the technologies EPA expects industry to use include catalytic converters (which can be expensive to install and operate) and low NO<sub>x</sub> burners coupled with flue gas recirculation or selective catalytic reduction. For non-attainment counties, transportation restrictions will have to be implemented.

### **What Can Be Done?**

First, companies including both large and middle market companies need to begin considering the cash flow implications of the capital, energy, and operation and maintenance costs of installing and operating pollution control devices, as well as the implementation of process modifications for painting, coating, printing and degreasing processes. For the printing industry, the potential work place safety problems of attempting to conduct operations in a permanent totally enclosed structure also need to be considered. During proposed mergers and acquisitions, business valuation models need to be revised to consider the operational and cash flow implications of these regulations on businesses likely to be impacted by the new VOC and NO<sub>x</sub> standards.

Second, counties likely to be designated as nonattainment have a window of opportunity to change that potential designation, particularly if they are the victims of non-representative sampling or statistical lumping with adjacent communities.

Third, any challenge to the final ozone standards must be filed in the United States Court of Appeals for the D.C. Circuit within sixty days after publication of the final standards in the Federal Register. The D.C. Circuit maintains a mandatory mediation procedure for all such challenges whether by businesses (typically claiming standards are too strict) or by environmental groups (claiming the standards are not strict enough). Only issues not resolved in the mediation process are actually briefed and argued to the Court. Thus, if one wants a seat at the table when the proverbial “deals are being cut” during the mediation process, a one page petition to review must be filed with the D.C. Circuit within sixty days after publication of the final standards in the Federal Register.

If you would like assistance in planning, cost analysis, business valuations, or filing a petition to review the new ozone regulations, please contact our office at [www.nwblc.com](http://www.nwblc.com).

Norman W. Bernstein & Paige Reidy