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EPA's Lower 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), which is more stringent than the current 2008 Ozone NAAQS of 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 because of the difficulty in attaining the standard due to high levels of "background ozone," which in some places has been monitored at, or near, the 70 ppb standard.

Background ozone can be caused by elevation, types of vegetation, wildfire, international transport, or atmospheric 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. EPA acknowledges that high background levels of ozone in the Intermountain West will pose unique problems for compliance, but the final rule offers few meaningful options to address the impacts of background ozone on attainment of a standard set near those levels.

The states have one year to recommend to EPA those counties, or partial counties, that should be designated as not attaining the new standard. EPA expects to finalize nonattainment designations in 2017 or, at the latest, 2018. Once an area is designated as nonattainment, it means additional emission restrictions for new and expanding businesses will be required, as well as the likelihood of additional control technology for existing sources. For example, in August of 2015, EPA proposed emission controls that could be required for existing oil and gas operations in ozone nonattainment areas, depending upon their classification.

States will begin the implementation planning process immediately. The states have three years from issuance of the standard to develop and submit to EPA their State Implementation Plans (SIPs), which are a set of rules designed to assure maintenance of the standard, and 36 months after a nonattainment designation to develop and submit a nonattainment SIP designed to bring an area back into attainment with the standard. 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 and regulated through permits or rules. High ozone may be due largely to factors outside of local control.

EPA promises to address these issues through implementation guidance and a white paper with stakeholder input. Acting EPA Air Chief Janet McCabe asserts 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]." See more at: http://www.natlawreview.com/article/epa-lowers-ozone-ambient-air-standard#sthash.ldX6zAnu.dpuf. The timing of nonattainment designations and SIP development, however, will make practical solutions difficult.

The implementation process of the new rule at the state level relies on stakeholder participation. For example, the state develops the SIP through modeling of emission sources and analyzing the cost of reduction per ton of pollution. Proposed solutions 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 rule structure and modeling to determine if additional emission control rules are necessary to bring ozone levels down.

State plans will rely heavily on a state's ability to show appropriate local measures. Aside from that, states will use exclusions such as "exceptional events" or demonstrations that pollution has been transported into the area. While the Clean Air Act provides for these exclusions, states have had difficulty in the past with EPA approving these exclusions in a timely manner. Additionally, these exclusions are not beneficial for areas with high levels of background pollution because they have to be applied or "proven" after an area is designated as nonattainment based on monitoring values. Therefore, businesses located in nonattainment areas are subject to the restrictions of a nonattainment designation unless and 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 if the EPA accepts the 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.

Learn more about how the lowered ozone NAAQS may impact your industry. Join Utah air quality regulators and Holland & Hart attorneys to get practical advice that will help you navigate this highly technical area and learn about opportunities to have your concerns heard.