

EPA Floats Overhaul Of National Ozone Limits Review

By **Keith Goldberg**

Law360 (May 10, 2018, 5:35 PM EDT) -- The U.S. Environmental Protection Agency on Thursday said it will overhaul how it reviews national ozone limits by considering a range of adverse effects including economic and energy-related ones, following President Donald Trump's demand that the agency make it easier for states and industries to comply with national air emissions standards.

EPA Administrator Scott Pruitt signed a memorandum kicking off the agency's review of the latest National Ambient Air Quality Standards for ozone, established in 2015 with the aim of finalizing a decision to reconsider, modify or maintain the NAAQS within the five-year window mandated by the Clean Air Act. The current ozone NAAQS stands at 70 parts per billion.

That review will weigh heavily on the input of the EPA's independent Clean Air Scientific Advisory Committee, and Pruitt, who controversially overhauled the advisory board last fall, wants the committee to provide advice on a broad swath of adverse effects that could result from efforts to attain and maintain the ozone NAAQS.

That includes public health, welfare, social, economic or energy effects, according to Pruitt's memo. He also wants CASAC to provide input on the influence of background or naturally occurring ozone pollution, a major gripe among industry groups and states that claim the current NAAQS are unachievable and prohibitively expensive.

"The principles laid out in this memorandum will reform the process for setting national air quality standards in a manner consistent with cooperative federalism and the rule of law," Pruitt said in a statement on Thursday. "Getting EPA and its advisers back on track with Clean Air Act requirements, statutory deadlines and the issuance of timely implementation rules will ensure that we continue the dramatic improvement in air quality across our country."

The memorandum comes a month after Trump, in a presidential memorandum, directed the EPA to ensure "efficient and cost-effective implementation" of the NAAQS program for ozone, nitrogen oxide and other pollutants by reducing burdens for states that want to create their own compliance plans instead of being forced to use a federal plan and consider international emissions when calculating a state's compliance with a particular standard, among other things.

In a nod to industry complaints that some standards have become too hard to meet due to factors beyond a facility or state's control, the memorandum directed the EPA to consider those external

factors in its decision-making processes.

But incorporating any input about cost impacts into actual decisions on setting the ozone NAAQS would run headlong into the U.S. Supreme Court's 2001 decision in *Whitman v. American Trucking Associations Inc.*, which concluded that the EPA couldn't consider costs when setting NAAQS.

"It's very clear that the factor EPA must consider is the impact of the pollutants on people's health and welfare," Earthjustice staff attorney Seth Johnson, who frequently works on ozone issues, told Law360 on Thursday. "That's it. If EPA tried to incorporate cost considerations into a NAAQS, the Supreme Court has already said that would be illegal."

Pruitt admitted as much in his memorandum, although he said that "the court did note that CASAC's 'advice concerning certain aspects of "adverse public health ... effects" from various attainment strategies is unquestionably pertinent' to the NAAQS rulemaking record and relevant to the standard-setting process."

Bracewell LLP partner Jeff Holmstead, a former EPA air administrator during the George W. Bush administration, said having CASAC share all the potential tradeoffs of the current or revised ozone NAAQS could at least make a difference in the court of public opinion.

"Even if EPA can't take all those factors into account when it sets the NAAQS, that's important in the debate over the Clean Air Act," Holmstead told Law360 on Thursday. "There's people like me, who think Congress should take a look at revising the CAA and how the NAAQS should be set."

Congressional critics of the ozone NAAQS program who have initiated attempts to amend the CAA to in order to relax the NAAQS requirements cheered Pruitt's memorandum.

"I applaud the EPA for taking this common sense step to fix our broken process for setting and implementing ozone standards, which has caused confusion and stifled investment and job creation throughout the country," Sen. Shelley Moore Capito, R-W.Va., said in a statement on Thursday. "I am encouraged that the EPA reforms are taking an approach similar to that in legislation that I have championed, the Ozone Standards Implementation Act."

--Additional reporting by Juan Carlos Rodriguez. Editing by Stephen Berg.