

EPA Proposes Expansive New Clean Air Act Regulation of Wide Array of Industrial Facilities

MARCH 22, 2022

EPA is proposing to impose stringent new “Good Neighbor” regulations under the Clean Air Act. These changes are proposed to help downwind states meet the 2015 Ozone National Ambient Air Quality Standards (“NAAQS”). These strengthened controls on nitrogen oxide (“NO_x”) emissions will apply to power plants as well as other large industrial facilities located in 26 states. Beyond fossil fuel-fired power plants, EPA is proposing NO_x emissions limitations for facilities in the following industries: pipeline transportation of natural gas; cement and cement product manufacturing; iron and steel mills; ferroalloy manufacturing; glass and glass product manufacturing; chemical manufacturing; petroleum and coal products manufacturing; and pulp, paper, and paperboard mills.

Clean Air Act Background

NO_x emissions are a key contributor to ground-level ozone. EPA established the current Clean Air Act NAAQS for NO_x in 2015. Once EPA sets a NAAQS, states must develop a State Implementation Plan (“SIP”) that provides for the implementation, maintenance, and enforcement of each primary or secondary NAAQS. The SIP is submitted to EPA for review and approval. Each state must make this new SIP submission within three years after promulgation of a new or revised NAAQS.

One of the requirements for SIPs is known as the “good neighbor” provision.^[1] Under this section of the Clean Air Act, a state’s SIP must contain adequate provisions to ensure that sources of air emissions from within the state do not contribute significantly to nonattainment or interfere with maintenance of any NAAQS in other states. These other states are commonly referred to as “downwind states.”

Where EPA finds that a state has not submitted a SIP, or if the EPA disapproves a state’s SIP, EPA must issue a Federal Implementation Plan (“FIP”) within two years.^[2] A FIP is to ensure that the good neighbor provision is enforced and downwind states are protected.

EPA’s Proposed Good Neighbor Plan

On February 28, 2022, EPA Administrator Michael Regan signed a proposed FIP rulemaking to help states attain and maintain the 2015 NAAQS.^[3] The proposed FIP is also known as the “Good Neighbor Plan.” It is the most recent in a string of prior federal interstate transport rules by which EPA has sought to enable states to comply with the Clean Air Act’s good neighbor provisions. In this proposal, EPA seeks to require 26 states to achieve additional NO_x

emissions. The proposed Good Neighbor Plan addresses the strengthened 2015 ozone NAAQS, which prior federal transport rules have not addressed.

For this proposed Good Neighbor Plan, EPA utilized modeling to identify downwind receptors that are expected to have problems attaining or maintaining the NAAQS, determine which states contribute significantly to these downwind receptors' problems, and identify pollution reduction measures and other emissions reduction requirements necessary to meet the good neighbor requirements.^[4] EPA is proposing a two-pronged approach to reduce ozone pollution.

First Prong: Fossil Fuel–Fired Power Plants

First, EPA proposed creating NO_x emissions budgets for electric generating units at fossil fuel–fired power plants in 25 upwind states. If the rulemaking is finalized as proposed, these plants will be required to participate in an allowance-based emissions trading program during ozone season. The emissions trading program for these power plants would begin in 2023. The proposed emissions budgets would initially be set at the level of reductions achievable through already available measures. Then, starting in 2026, the budgets would be set at levels achieved by the installation of selective catalytic reduction controls at the large coal-fired power plants in the covered states that do currently have such controls in place. Included among the 25 upwind states that would be subject to the rule, if finalized, are four new states not previously a part of the Cross-State Air Pollution Rule trading program: Delaware, Nevada, Utah, and Wyoming.^[5]

Second Prong: Emissions Units at Other Industrial Facilities

Second, EPA's proposal establishes NO_x emissions limitations for certain stationary sources at industrial facilities in 23 upwind states. The 23 states are those for which EPA has not approved an ozone transport SIP. EPA evaluated air quality modeling information, annual emissions, and information about potential controls to determine which industries could have the greatest impact on improving ozone air quality in downwind states. Based on this review, the emissions units subject to the proposed FIPs include the following:

- high-emitting, large boilers in basic chemical manufacturing; petroleum and coal products manufacturing; and pulp, paper, and paperboard mills;
- reciprocating internal combustion engines in pipeline transportation of natural gas;
- kilns in cement and cement product manufacturing;
- boilers and furnaces in iron and steel mills and ferroalloy manufacturing; and
- furnaces in glass and glass product manufacturing.

The emissions limitations for these industrial stationary sources would begin in 2026.^[6]

This Good Neighbor Plan is not yet final. The public has an opportunity to comment on the proposal. The date for the public hearing has not been set as of the date of this publication.^[7] In addition, EPA is accepting comments on the proposed Good Neighbor Plan. Comments may be submitted for 60 days after the rulemaking is published to the Federal Register.

Key Takeaways:

- Fossil fuel-fired power plants—as well as certain stationary sources of emissions at natural gas pipelines; large manufacturing facilities; and steel, iron, and paper mills—are to be subject to more stringent emissions controls under EPA's proposed Good Neighbor Plan.
- The proposed rulemaking is not yet final. Interested parties can submit public comments on the proposal for 60 days after it is published in the Federal Register and/or participate in the upcoming public hearing.
- If EPA finalizes the proposed FIPs, states will still have the option to replace its requirements by developing and submitting SIPs that fulfill the good neighbor requirements for EPA's review and approval.

For further information or questions about the proposed Good Neighbor Plan and its impact on your business, please contact Jonathan D. Brightbill (partner, White Collar, Regulatory Defense, and Investigations/Environmental Litigation), Madalyn Brown (associate, Environmental), or your Winston relationship attorney.

Please note that government orders on the federal, state, and local levels are changing every day, and the information contained herein is accurate only as of the date above.

[1] 42 U.S.C. § 7410(a)(2)(D)(i)(I).

[2] *Id.* § 7410(c)(1).

[3] Prepublication copy available at https://www.epa.gov/system/files/documents/2022-03/nprm_transport-fip_2060-av5_prepublication.pdf.

[4] EPA, Fact Sheet: Proposed Good Neighbor Plan for the 2015 Ozone NAAQS (Mar. 2, 2022), available at https://www.epa.gov/system/files/documents/2022-03/fact-sheet_2015-ozone-proposed-good-neighbor-rule.pdf.

[5] *Id.*

[6] *Id.*

[7] See <https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs> for further information on the public hearing.

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