Articles + Publications | February 15, 2024

Locke Lord QuickStudy: EPA’s New Particulate Rule: A ?Particular Issue for Industry

Locke Lord LLP

WRITTEN BY

Gerald J. Pels | Elizabeth Phillips Corey

RELATED OFFICES

Houston

I. Background.

On February 7, 2024, EPA issued a final rule lowering the annual health-based air quality standard for fine particulates (pm 2.5) to 9 ug/m^3 from 12 ug/m^3. The Rule will impact industries and many industrialized counties (or areas) in the United States, requiring states to implement regulations to bring these areas into “attainment” with the new particulate standard. Fine particulates or “soot” are common emissions from many industrial processes, combustion sources, construction activities, vehicle usage, gas and diesel engines, and even wildfires. In addition, “soot” is also generated from atmospheric reactions between certain emissions from power plants and similar sources.

EPA asserts that the rulemaking will create public health benefits of about $46 billion by 2023 and save lives. Conversely, some industry groups suggest that about 569 U.S. counties could be deemed to be out of compliance with this new air quality standard and as many as 300,000 manufacturing jobs lost based on, among other things, plant shutdowns or curtailment of operations. In addition to lowering the annual standard, the Rule makes changes to EPA’s air quality monitoring network to, in EPA’s words, “enhance protection of air quality in communities overburdened by air pollution.” This is an effort by the federal administration to advance “environmental justice” by ensuring that more local data is included in air quality reviews.’

II. Effect.

The Rule’s effects will be significant. Procedurally, EPA will evaluate the means for designating areas of non-attainment. Then, states with areas of non-attainment will need to implement rules as part of their State Implementation Plan (SIP) to achieve the new standard within 6 years after the non-attainment designation. There will be a flurry of state rulemaking affecting industries in non-attainment areas. And, after the Rule’s effective date, air permit applications and facility construction of a major source (or implementing a major modification) will need to undertake a detailed air quality analysis taking into account the new standard. SIPs will assuredly require the same or similar analysis for many minor sources in non-attainment areas. In particular, in non-attainment areas, existing sources should anticipate rulemaking that will require heightened controls to lower emissions. Air dispersion modeling in non-attainment areas will become more challenging when taking into account the impacts of neighboring facilities. Thus, not only new permits, but also permit amendments and renewals will potentially

become more expensive and challenging to secure, *e.g.*, changes in controls, changes in overall emissions and/or rates of emissions, new or additional controls, stack adjustment, and other limits may be required to allow dispersion modeling to forecast compliance with the new standard.

Further, in these new non-attainment areas, generally new major sources (and major modifications) should be subject to more stringent emission control standards known as LAER (or the Lowest Achievable Emission Rate) rather than BACT (Best Available Control Technology). LAER is generally the most stringent emission limitation in the SIP of any state, which can be achieved in practice. This is important because unlike BACT, LAER does not really consider cost in determining the appropriate control for the source at issue, unless the source operator can demonstrate the limitation at issue is not achievable.

III. Big Picture.

The Rule will in all likelihood be judicially challenged. In March 2023, about 21 state attorneys general sought EPA's reconsideration of the proposed rule. In their letter to EPA, the AGs laid out a number of legal arguments against the proposed rule's promulgation, including that it exceeded EPA's authority under the Clean Air Act and that EPA did not garner enough scientific evidence to justify the more stringent standard. Regardless of any challenge, the Rule and its impacts clearly show the challenges U.S. industry (and the U.S. economy) will face in the coming years. While strong public policy suggests the country should strive for heightened "on-shoring" of manufacturing, that goal (and U.S. industry) will face challenges posed by the impacts of more stringent and expensive controls and/or curtailment of operations. The potential loss of jobs could challenge the manufacturing/industrial sector of our economy. In all events, businesses with facilities in areas not meeting the new standard should begin now to review permits and availability of emission controls that will allow for compliance with the new standard, taking into account dispersion modeling. This will be especially important for operational planning and budgeting. That is, it is possible that plant expansion or an increase in operations could, at a minimum, be more costly, and at worst, back-burnered in light of this rulemaking.

RELATED INDUSTRIES + PRACTICES

- Corporate
- Energy
- Environmental + Natural Resources
- Real Estate