

EPA Proposes Transport Rule to Address Interstate Air Pollution

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July 13, 2010

On July 6, 2010, the United States Environmental Protection Agency (“EPA”) released a proposed rule designed to address the transport of certain air pollutants across state boundaries. Once finalized, the proposed rule, dubbed the “**Transport Rule**,” would replace the Clean Air Interstate Rule (“CAIR”), promulgated in 2005. Although still in effect, in 2008 CAIR was remanded to EPA by the U.S. Court of Appeals for the District of Columbia Circuit in *North Carolina v. EPA*. EPA anticipates that the Transport Rule will be finalized in the late spring of 2011.

Basis for the Transport Rule

Section 110(a)(2)(D)(i)(I) of the Clean Air Act requires states to prohibit emissions that contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any primary or secondary air pollution standard (NAAQS). The Transport Rule would limit emissions of sulfur dioxide (SO₂) and nitrogen oxides (NO_x) in 31 states in the eastern portion of the United States and the District of Columbia which contribute significantly to nonattainment in or interfere with maintenance by downwind states with respect to one or more of the annual average 1997 PM_{2.5} standard, the 2006 24-hour average PM_{2.5} standard and the 1997 ozone standard. SO₂ and NO_x contribute to the formation of fine particulate (PM_{2.5}) pollution and NO_x contributes to the formation of ground level ozone. According to EPA, the Rule would help most areas in the eastern part of the country come into attainment with the 1997 PM_{2.5} and ozone standards and would take steps towards helping states address nonattainment with the 2006 24-hour average PM_{2.5} standard.

Applicability

The Transport Rule proposes enforceable Federal Implementation Plans (FIPs) to achieve emission reductions in each state by requiring emission reductions from the power sector. Specifically, the Rule would apply to fossil fuel fired electric generating units (EGUs) with a nameplate capacity of greater than 25 MWe producing electricity for sale in the covered states, with certain exemptions for cogeneration units and solid waste incineration units. Certain non-covered units would also be permitted to opt into the program. Each state has the option of replacing the FIP with a State Implementation Plan (SIP) to achieve the required emissions reductions, and may choose which types of sources to control.

Approaches Selected for Consideration

One of EPA’s goals in developing the Transport Rule was to respond to the Court’s remand in *North Carolina v. EPA*. That Court found that CAIR was fatally flawed because, among other reasons, EPA could not show that the regional trading programs and state budgets established to implement the trading programs would eliminate emissions within each state that significantly contribute to nonattainment or interfere with maintenance in other states. As the Court noted, under CAIR, a source in State A which contributes to nonattainment in State B would not need to reduce its emissions, but rather could purchase enough allowances to cover its current emissions, resulting in no change in State A’s contribution to State B’s nonattainment. By placing limits on interstate trading, EPA has attempted to address the Court’s concern.

The proposed Rule sets forth EPA’s preferred approach and seeks comment on two alternative approaches. Each of the approaches would set a pollution limit (or budget) for each state and would obtain the reductions from power plants. Each state’s emissions budget would represent the quantity of emissions that would remain in that state from covered sources after the portion of each state’s calculated

significant contribution and interference with maintenance had been eliminated (before accounting for the inherent variability in power system operations).

EPA's preferred approach would allow intrastate trading and some interstate trading among power plants but would, through an "assurance provision" assure that each state would meet its emissions budget. The preferred approach would establish four interstate trading programs: two separate trading programs for annual SO₂ (one for sources in states EPA has determined must make aggressive reductions ("Group 1") and another for sources in states requiring less stringent reductions ("Group 2")); one for annual NO_x; and, one for ozone season NO_x. EPA would distribute to covered sources in each state a number of emissions allowances equal to the state emissions budgets for SO₂, NO_x and ozone season NO_x, with a three percent set-aside for new units. Allocations for retired units would eventually be allocated to the new unit set-aside.

Each source would be required to hold an allowance for each ton of SO₂ or NO_x emitted by EGUs at the source during the compliance period. Sources would be allowed to bank and trade allowances, and allowances issued for one state for a trading program could be used in any of the states included in the respective trading program. However, interstate trading would be limited by the "assurance provision", under which total emissions from each state would be limited to an amount equal to the state's budget plus that state's "variability limit" (calculated on both a one-year and three-year rolling average). An exceedance of the state limit plus the variability limit would trigger an allowance surrender requirement by owners whose units' emissions exceeded the owner's share of the state budget with the variability limit.

The two alternatives on which EPA is seeking comment would allow only intrastate trading or would specify the allowable emission limit for each power plant and allow some averaging of emission rates.

Compliance

Once final, the proposed rule would take effect quickly. An initial phase of emissions reductions would be required by early 2012. A second phase of reductions would be required by early 2014. EPA projects that implementation of the proposed Transport Rule, combined with other state and EPA actions, would reduce 2005 emissions from electric generating units in the covered areas by 6.3 million tons of SO₂ per year and 1.4 million tons of NO_x per year, including 300,000 tons of NO_x during ozone season. According to EPA, these reductions would constitute a 71% reduction in SO₂ and a 52% reduction in NO_x emissions from 2005 levels of emissions from power plants in those areas. Under the Transport Rule, in 2014 SO₂ emissions would be limited to 2.6 million tons per year annually and NO_x emissions would be limited to 1.3 million tons per year (with ozone season NO_x emissions being limited to 600,000 tons per year) in the areas covered by the Rule.

To meet the proposed Rule, EPA anticipates that affected power plants will:

- operate already installed control equipment more frequently;
- use lower sulfur coal; or,
- install pollution control equipment such as low NO_x burners, Selective Catalytic Reduction, or scrubbers.

EPA has indicated that the annual direct costs to the power sector of complying with the proposal will be approximately \$2.8 billion, while the benefits, which are largely public-health related, will range between \$120-\$290 billion in 2014.

Further Regulatory Initiatives Noted

The proposed rule is the first of several rules EPA intends to issue over the next several years that will impact the power sector. Indeed, in the preamble to the proposed Rule, EPA made clear that additional reductions in pollution transport may be needed to assist certain areas in meeting the 1997 ozone NAAQS, and that EPA intends to proceed with additional rulemaking to address that issue as quickly as possible.

EPA also noted that additional reductions in pollution transport may be needed to address any revised or new NAAQS. As the rule includes an approach for EPA to determine each upwind state's control responsibility that can be applied to any revised air quality standard, when NAAQS are changed, if interstate pollution transport contributes to an air quality problem, EPA will be able to use the approach to evaluate whether emission reductions will be required from upwind states. As EPA is scheduled to reconsider its NAAQS for ozone and PM in the next two years, additional reductions may be required. EPA has not ruled out the possibility that such reductions may be required of source categories other than EGUs.

Additional items that EPA it would act on in the coming years include hazardous air pollutant standards (NESHAPs) for coal- and oil-fired utility units, New Source Performance Standards (NSPS) for steam EGUs and energy efficiency initiatives, as well as certain non-air office regulations which are also likely to impact the power sector.

Individuals in the power sector, as well as other source categories, are advised to keep aware of developments related to the Transport Rule and other related actions. Three public hearings will be held on the Transport Rule, and EPA will take public comment during the 60 day period following publication in the Federal Register.

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