

KIRKLAND ALERT

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EPA's Proposed Transport Rule Under the Clean Air Act — The First in a Series of Expensive Rules

On July 6, 2010, the Environmental Protection Agency (“EPA”) released its proposed Transport Rule¹ which would replace the EPA’s Clean Air Interstate Rule (“CAIR”).² The proposed Transport Rule is expected to be finalized in the late spring of 2011 and would require 31 eastern states and the District of Columbia to reduce power plant emissions that contribute to ozone and fine particle pollution in other states. The proposed Transport Rule will have a dramatic effect on SO₂ and NO_x allowance trading and the EPA estimates that power plants will incur an estimated \$2.8 billion in annual costs to comply with the proposed rule.

A cap-and-trade method for emissions reduction has been endorsed by the EPA as the preferred approach for emissions reductions, but they provided two alternative methods for comment. The EPA’s preferred method allows for intrastate trading and certain interstate trading with limits set on a state-by-state basis. The proposed Transport Rule is more stringent than CAIR. Three new states are placed under regulation of the proposed rule (Nebraska, Oklahoma, and Kansas) and compliance is required in a shorter amount of time for the proposed Transport Rule. CAIR was meant to reduce SO₂ by 57% and NO_x by 61% by 2015. According to EPA estimates, by 2014 the proposed Transport Rule would reduce SO₂ emissions from 2005 levels by 71% and NO_x by 52%.

Comments on the proposed rule will be accepted by the EPA for 60 days following publication of the proposed rule in the *Federal Register*. The EPA will also hold three public hearings on the proposed rule; the dates, times, and locations are to be announced separately. We invite you to contact us with any questions about the matters addressed in this Alert or if you are interested in submitting comments to the EPA on the proposed Transport Rule.

Background Information

The Clean Air Act³ requires the EPA to issue national ambient air quality standards (“NAAQS”) for substances contributing to air pollution and states are required to develop plans in order to attain those standards. Furthermore, the Act requires that states limit their emissions that can contribute significantly another state’s nonattainment.

In 2005, the EPA designed CAIR which placed limits on how much NO_x and SO₂ each of 28 states and the District of Columbia can emit. The rule was designed primarily to address problems downwind states experience due to upwind pollution. In July 2008, the U.S. Court of Appeals for the District of Columbia Circuit decided *North Carolina v. EPA* which struck down CAIR.⁴ The court found several flaws including the EPA’s decision to regulate emissions on a regional basis instead of state-by-state and the EPA’s failure to design measures to guarantee that upwind states would actually reduce their emissions.

Although the court struck down CAIR, it subsequently decided to allow CAIR to remain in place until the EPA was able to develop a replacement rule. The proposed Transport Rule is the EPA’s response to *North Carolina v. EPA* and is intended to replace CAIR.

The Transport Rule

The Transport Rule applies to electric generating units 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. The proposed rule requires compliance with three air quality standards already developed by the EPA:

- Annual average PM_{2.5} NAAQS promulgated in 1997
- 24-hour average PM_{2.5} NAAQS promulgated in 2006
- Ozone NAAQS promulgated in 1997

Along with the proposed rule, the EPA has proposed federal implementation plans (“FIPs”) but states are still permitted to develop their own state implementation plan (“SIP”) to achieve the required reductions. The EPA developed FIPs on a state-by-state basis and the requirements for each state vary based on a detailed analysis of each upwind state’s contribution to downwind states’ noncompliance.

The EPA has announced a preferred method for reducing emissions but has also provided two alternative methods for comment:

- The EPA’s preferred approach is to set a pollution limit or budget for each of the 31 states and the District of Columbia. This approach allows intrastate trading and limited interstate trading among power plants.
- In the first alternative, the EPA is proposing to set a pollution limit or budget for each state but would allow trading only among power plants within the same state.
- In the second alternative, the EPA would set a pollution limit or budget for each state and specify emission limits for each power plant. A company would be allowed to average the emissions at its units within each state to meet the specified state limits. This approach does not allow for any trading.

The EPA proposed two compliance phases in order to assure that reductions are made as expeditiously as practicable. Sources will be required to comply with the annual SO₂ and NO_x requirements by January 1, 2012 and January 1, 2014 for the first and second phases, respectively. Similarly, sources will be required to comply with ozone season NO_x requirements by May 1, 2012, and by May 1, 2014. To meet the proposed rule’s requirements, 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.

The EPA has announced that the Transport Rule is just the first in a series of important air regulations that will require significant investments by the regulated community. These upcoming rules include:

- Ozone NAAQS Reconsideration: Final rule expected August 2010
- Utility Boiler New Source Performance Standards (“NSPS”) and Maximum Achievable Control Technology (“MACT”): Proposal expected March 2011; Final rule expected November 2011
- Transport Rule II (NO_x): Proposal expected summer 2011; Final rule expected summer 2010
- PM NAAQS: Proposal expected February 2011; Final rule expected October 2011.

¹ For access to the proposed rule, see Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, available at <http://www.epa.gov/airtransport/pdfs/TransportRule.pdf> (last visited July 13, 2010).

² 70 Fed. Reg. 25,162 (May 12, 2005).

³ 42 U.S.C. § 7401 et.seq. (2006).

⁴ 531 F.3d 896 (D.C. Cir. 2008).

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