JONES WALKER

Energy, Environment & Natural Resources Client Alert

LDEQ Considering Rulemakings in Anticipation of EPA's Revision of Ozone Standard

In anticipation of the Environmental Protection Agency's (EPA) revision of the National Ambient Air Quality Standards (NAAQS) to lower the primary and secondary ozone standard from 0.075 parts per million (ppm) to a level within the range of 0.065 to 0.070 ppm, the Louisiana Department of Environmental Quality (LDEQ) is considering three rulemakings regarding Emission Reduction Credits (ERC) banking. These LDEQ rulemakings are important because without new sources of ERC, a more stringent ozone standard will have a serious impact on industrial projects in Louisiana. The rulemakings should therefore be welcomed by industrial sources wishing to locate or expand in certain areas of the state.

The Clean Air Act (CAA) requires EPA to review, and if appropriate, make revisions concerning the NAAQS at least every five years.[1] The last time this was done was March 12, 2008, when the primary and secondary eight-hour ozone standard was set at 0.075 ppm.[2] In 2010, EPA began to fulfill this 5-year review,[3] but President Obama stopped EPA in its tracks on September 2, 2011, citing reducing regulatory uncertainty and the recovering economy. EPA then laid out a new schedule to review and propose a new standard by September 2013 and issue a final rule in June 2014.[4] The interim milestones or necessary actions were not met by EPA to the satisfaction of the Sierra Club, American Lung Association, Environmental Defense Fund, and the National Resources Defense Council, who filed suit in federal district court in the Northern District of California on June 19, 2013, seeking to compel EPA to fulfill its "non-discretionary duty to review and adopt overdue national ambient air quality standards for ozone pollution."[5]

---

[1] 42 USC 7409(d)(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 and national ambient air quality standards . . . and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate. . . .The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

[2] 73 Fed. Reg. 16434 (Mar. 27, 2008)

[3] 75 Fed. Reg. 2938 (Jan. 19, 2010)

[4] Integrated Review Plan for the Ozone National Ambient Air Quality Standards. EPA 452/R-11-006. (April 2011). http://www.epa.gov/ttn/naaqs/standards/ozone/data/2011_04_OzoneIRP.pdf

[5] *See* Complaint for Declaratory and Injunctive Relief filed June 19, 2013, in *Sierra Club v. EPA,* No. 13-2809. *(*N.D. Cal.)(unpublished)

On April 29, 2014, the district court, in granting a motion for summary judgment in favor of the above-mentioned groups, ordered the EPA to issue a proposed rule based on its review of the NAAQS for ozone no later than December 1, 2014, and issue a final rule based on such review not later than October 1, 2015. Under the authority of the CAA but pursuant to the court order, EPA proposed to revise the primary and secondary NAAQS for ozone in the range of 0.065 to 0.070 ppm on December 17, 2014.[6]

If the 2014 ozone standard is set at 0.070 ppm, the Baton Rouge Non-attainment Area[7] (BRNA) will again be in non-attainment for ozone, along with other parts of the state including the New Orleans-Metairie-Kenner, Houma-Bayou Cane-Thibodaux, and Shreveport-Bossier City areas. As the standard goes down from there, more areas of the state may be pulled into non-attainment, including the Lafayette and Lake Charles areas.

One of the many concerns for industrial sources of being located in an non-attainment area is the Non-attainment New Source Review (NNSR) permitting program. Generally speaking, a new major source, or an existing source that undergoes a major modification, located in a non-attainment area for a particular pollutant whose emissions of that same pollutant are above certain threshold values, could be subject to NNSR requirements.[8] For example, Volatile Organic Compounds (VOCs) and Nitrogen Oxides (NO_X) are the precursor pollutants of concern for ozone. If a facility wishes to locate in an area that is designated as non-attainment for ozone, and its emissions of VOCs or NO_X are in excess of the threshold values, NNSR will be applied in permitting those emissions.

The two major requirements triggered by the heightened NNSR permitting process are Lowest Achievable Emission Rate (LAER) and offset requirements. Under NNSR, a major source in a non-attainment area will have to apply the LAER for each applicable emission source. LAER is the most stringent emission limitation that is achieved in practice by that type of source or facility and does not allow the facility to eliminate a control technology for economic reasons, i.e., because it is too expensive. However, a technology can be eliminated for technical infeasibility. Sometimes the control technology the facility was already planning to use qualifies as LAER, in which case the challenge under NNSR is offset.

The offset provisions under NNSR require the increase in emissions associated with the project be offset by greater reduction in emissions of the same pollutant. For marginal non-attainment, this ratio is 1:10 to 1.[9] So every ton increase in VOCs must be offset with a 1:10 ton decrease in VOCs. This can be achieved by reductions at the source or by purchasing ERCs generated in the same non-attainment area through an emission reduction banking program. In the BRNA and Houston areas, VOC credits are limited and thus expensive if not exhausted, as all the "low- hanging fruit" has been picked and without

[6] 79 Fed. Reg. 75233 (December 17, 2014)

[7] East Baton Rouge, West Baton Rouge, Iberville, Ascension, and Livingston referred to as the Baton Rouge Non-attainment area (BRNA)

[8] *See* LAC 33.III.504.L Table 1—Major Stationary Source/Major Modification Emission Thresholds.

[9] *See Id.* Offset Ration Minimum. For greater degrees of non-attainment, such as moderate, severe, serious, or extreme, greater offsets are required.

a new source of emission reduction credits, any new facility wishing to locate or expand in this region will experience difficulties in finding credits.[10]

Therefore, LDEQ is considering proposing the following three rulemakings that should help industrial sources meet the NNSR offsets requirement in the event that EPA's new ozone standard is in fact promulgated and becomes law.

Interpollutant Trading

Currently, trading of pollutants is not allowed by LDEQ rules for offsets under the NNSR permitting program. For example, if a facility wants to increase emissions of VOC, it must obtain credits (offsets) in the form of emission reductions of the same pollutant, VOC.[11] However, this potential rulemaking would allow a facility to offset increases in VOC emissions with decreases or credits in NO_X emissions or vice versa. The exact number of tons that can be traded will be dependent on site-specific photochemical modeling, subject to LDEQ and EPA approval. In order to be approved, the ratio must be no less stringent than the current Offset Ratio Minimum ratios found in LAC 33:504.L. This is currently allowed in Texas and the final LDEQ rule and guidance will likely be similar.[12] The draft of this rule will amend LAC 33:III.504.F and is currently being edited in-house at LDEQ by the regulatory development group under the identifier AQ354. Look for this rulemaking before the end of 2015.

Emission Credit Banking in Attainment Areas Not Meeting NAAQS

Currently, in order to participate in the emission banking program (i.e., to bank credits), the emission reductions must be from a facility in a non-attainment area. Currently, the 59 parishes outside of the BRNA cannot bank credits as they are either designated as in attainment or unclassifiable for ozone. In the event that the new EPA ozone standard becomes effective, some of these parishes will no longer meet the new standard. However, the process to officially designate these parishes as non-attainment can take a significant period of time—perhaps up to three years. With the awareness that emission reduction projects do not happen overnight, and with the goal of sparking reductions, LDEQ is considering making changes to Chapter 6 of the Air Quality Regulations to allow facilities in these parishes to bank their emission reductions that are achieved on or after the new EPA standard is finalized and before the parishes are officially designated as non-attainment. For example, if the new EPA ozone standard is set at 0.070 ppm and a particular parish has a designated value of 0.071 ppm, the parish will not be attaining the new standard but may not be officially designated as non-attainment for several years. If the LDEQ rule is promulgated as intended, a stationary source in that parish may be able to begin banking reductions in NO_X or VOC achieved after the EPA rule is finalized and before the actual

[10] According to the Minutes from the Houston-Galveston Area Emission Reduction Credit Organization Board of Directors Meeting. November 12, 2014. In the Houston-Galveston area, the average emission credit price market for VOCs is $236,447. and $146,504 for NO_X. http://www.h-gac.com/taq/airquality/aerco/documents/February%2011%202015/11%2020%202014%20Meeting%20Minutes.pdf

[11] LAC 33:III.504.F.1 allows an exception to this general rule allowing direct $PM_{2.5}$ emissions or $PM_{2.5}$ precursors may be offset by direct $PM_{2.5}$ emissions or $PM_{2.5}$ precursors if the offsets comply with provisions in the SIP for the particular non-attainment area.

[12] See 30 Texas Administrative Code (TAC) 101.302(a) for Emission Credits (EC) trading and 101.372 (a) for Discrete Emission Credits (DEC) trading of NO_X and VOC. See also "Guidance on the Inter-Pollutant Use of Credits for Non-attainment New Source Review Permit Offset Requirements" http://www.tceq.texas.gov/assets/public/implementation/air/banking/guidance/inter-pollutant.pdf

designation of the parish as non-attainment. This would also apply to the BRNA, as it likely will not meet a lower ozone standard but will not be designated as a non-attainment for some time under the new standard. The proposed LDEQ rule would amend LAC 33:III.603. It has been drafted and is also currently being edited in-house at LDEQ by the regulatory development group under the identifier AQ353. Look for this rule in 2015 as well.

Mobile and Nonroad Source Emission Reduction Credits

Currently, only stationary sources are able to participate in the emission banking program. LDEQ is considering expanding the universe of sources of emission credits to mobile sources, such as cars, light and heavy trucks, buses, and motorcycles, and as well as nonroad sources, such as marine vessels, construction equipment, and locomotives. This is authorized in Texas.[13] The emissions must be enforceable, permanent, quantifiable, real, surplus when created and used, and, importantly, must be included in the Emissions Inventory used in the State Implementation Plan (SIP).[14] This protects not only the state in its SIP but also the industrial source wishing to use the emission credit generated by the source. LDEQ has indicated that it intends to propose this rulemaking after it addresses the interpollutant trading and the ERC Banking banking rules.

These LDEQ rulemakings are timely and an important step in ensuring industrial projects can continue in the event a lower ozone standard is promulgated by EPA and survives the legal challenges it will surely attract. Until then, if a permit is issued by LDEQ before the new EPA standard is promulgated, the facility will only have to comply with the standard that is in place when the permit was issued.

Also of note is that once the official designations are made as to which geographic areas will be designated as non-attainment (the basins). LAC 33:III.504.F.9 already allows inter-basin trading if the other area has an equal or higher (worse) non-attainment classification and the emissions from the other area contribute to a violation of the NAAQS in the area of the facility. Therefore, no new regulations will need to be drafted to allow a facility in one non-attainment area (basin) to obtain emission credits generated in another non-attainment area if the conditions of 504.F.9.a and b are met.

Any comments on EPA's proposed lowering of the ozone NAAQS must be received by EPA by March 17, 2015, unless the comment period is extended by EPA, under Docket ID No. EPA-HQ-OAR-2008-0699. Instructions on how to comment on the proposed EPA rule can be found at 79 Fed. Reg. 75233.

[13] 30 TAC 101.302 & 101.304.

[14] 30 TAC 101.302(c)(2)

For further information, contact Alex Prochaska or Boyd Bryan.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

Alex P. Prochaska
Special Counsel, Jones Walker LLP
600 Jefferson St
Lafayette, LA 70501
aprochaska@joneswalker.com
337.593.7616 *tel*

Jones Walker Energy, Environment, & Natural Resources Practice Group
www.joneswalker.com

Boyd A. Bryan
Partner, Jones Walker LLP
8555 United Plaza Blvd
Baton Rouge, LA 70809
bbryan@joneswalker.com
225.248.2134 *tel*

Jones Walker Energy, Environment, & Natural Resources Practice Group
www.joneswalker.com