



FEDERAL ISSUE BRIEF – POTENTIAL PERMIAN BASIN OZONE NONATTAINMENT AREA

FEDERAL ACTION: The U.S. Environmental Protection Agency (EPA) is considering a discretionary redesignation of certain Permian Basin counties in southeast New Mexico and West Texas as ozone nonattainment areas under the 2015 National Ambient Air Quality Standard (NAAQS). EPA has not yet formally initiated this process.

IMPORTANCE: An ozone nonattainment redesignation would immediately increase the time and expense of obtaining air permits for some projects. Operators must obtain air permits before constructing or modifying (expanding) oil and gas facilities. If the area is redesignated, burdensome “nonattainment New Source Review” permitting requirements will apply to new “major sources” and major modifications of existing major sources.

Redesignation would trigger a multi-year process for each state to revise its ozone “state implementation plan” (SIP). For multi-state areas, the states must coordinate substantively and procedurally, to include any ozone modeling. Depending on the area’s classification (severity) and future ozone levels, additional control measures are likely. Ozone SIPs often regulate upstream and midstream operations, including but not limited to storage tanks, pneumatic controllers, leak detection, engines, compressors, dehydrators, and combustor performance.

New Mexico’s General Construction Permit for Oil and Gas cannot be used in nonattainment areas. On June 28, 2022, the New Mexico Air Quality Bureau Chief expressed her intent to remove this restriction if EPA designates an ozone nonattainment area. Environmental groups are nearly certain to oppose such a revision.

NEXT STEPS: Operators should consider engaging with state and federal agencies, either individually or through trade organizations, to prevent or delay redesignation. Operators may seek to influence key variables such as the nonattainment area size, classification, and whether it covers parts of New Mexico, Texas, or both. Doing so likely requires photochemical modeling of regional emissions, meteorology, and each county’s ozone contributions.

TIMING: *If EPA reaches a decision to proceed in September 2022, as indicated on its regulatory agenda, the redesignation would take effect approximately 300 days later, in July 2023.*

LEGAL BACKGROUND: EPA designated southeast New Mexico and West Texas as “attainment/unclassifiable” in 2017. Violations were subsequently recorded in Eddy and Lea Counties, NM. Ozone levels have fallen in Lea County, but Eddy County remains in violation. There are no nearby ozone monitors in Texas. Nonattainment areas may include regions that lack monitors, based on emissions, meteorology, topography, and jurisdictional borders.

Ozone areas are classified as Marginal, Moderate, Serious, Severe or Extreme, with progressively more stringent requirements. Areas that fail to timely attain the NAAQS are reclassified to a higher level. The New Mexico data suggests a Marginal classification, but the lack of West Texas monitors makes the classification uncertain.

EPA has discretion to redesignate areas based on air quality data and related considerations. EPA initiates the process by notifying the governor, who submits a response. EPA will provide a public comment opportunity.

States have some discretion over which regulations to include in a SIP. New Mexico would likely draw from the “Oil and Gas Sector – Ozone Precursor Pollutants” regulation that was finalized on June 26, 2022, but any SIP revisions must go through a state rulemaking process.

Please contact [Chris Colclasure](mailto:ccolclasure@bwenergylaw.com) at ccolclasure@bwenergylaw.com for more information.