

Oil Industry Outrage Won't Stop New EPA Gas Standard

By **Sean McLernon**

Law360, New York (April 05, 2013, 7:04 PM ET) -- Oil industry groups have pledged to battle the U.S. Environmental Protection Agency's plan to dramatically cut the sulfur content in gasoline, but experts say they will struggle to succeed, given that the proposal has already won support from automakers and many states.

The most controversial portion of the EPA's so-called Tier 3 emissions proposal, which was issued late last month and could be finalized before the end of the year, requires sulfur content in gasoline to be cut from 30 parts per million to 10 ppm by 2017.

The proposal instantly sparked outrage from the oil industry, which described the proposal as an unfair burden that will harm consumers at the pump and provide minimal environmental benefits. But the EPA's plan received the backing of auto manufacturers, who were pleased to see that federal standards would be harmonized with sulfur-content requirements already in place in California.

Several states have also come out in favor of the rule, which will help them meet stringent federal air pollution standards without spending a dime or placing new burdens on power plant operators. While other EPA actions have caused vocal opposition at the state and local level, this proposal was answered with either silence or praise from state officials.

Former EPA regional administrator and current Schiff Hardin LLP partner Francis X. Lyons said that the split among the private sector leaves the oil industry without critical allies in its high-stakes fight against the proposal.

"This is not one of those situations where industry is standing united against an environmental regulation going forward," Lyons said. "There is a difference of opinion even among industry in terms of whether or not this rule is a positive development, which I think strengthens the administration's position."

The oil industry has been fighting this long-expected rule for years, and seemed to earn a small victory last year when President Barack Obama decided to hold off on issuing the proposal until after the heated presidential election campaign, according to Lyons. Now, with a more favorable political climate, the White House decided to dive in.

"There's no time like the early part of a second presidential term to propose something that is not without controversy," Lyons said.

It also helps to have the support of the auto industry on top of full-throated endorsements from environmental and health advocates. The Obama administration received praise from the National Resources Defense Council, the Environmental Defense Fund and the American Lung Association, among other groups.

The EPA is justifying the decision to issue the proposal by touting health benefits from the proposal thanks to the cut in vehicle emissions.

Lowering sulfur content by two-thirds will allow catalytic converters in cars to run more efficiently and result in an 80 percent reduction in smog-causing volatile organic compound and nitrogen oxides as well as a 70 percent drop in particulate matter, according to the EPA. With so much less air pollution, the U.S. will experience \$23 billion in health benefits by 2030, with yearly reductions of 2,400 premature deaths and 23,000 cases of respiratory illness in children, the agency said.

The EPA is also claiming that the rule will only increase gas prices by about 1 cent per gallon, but the American Petroleum Institute released a study claiming the cost to consumers will go up nine times that amount. The American Fuel & Petrochemical Manufacturers noted that the industry already spent billions of dollars to reduce sulfur content by 90 percent a few years ago, and claimed that the new requirements will require another \$10 billion in new infrastructure and \$2.4 billion in yearly operating costs.

Those arguments are not likely to sway the EPA in the industry's favor during the ongoing comment period, when the agency will consider the public's views on the proposal before issuing a final rule. Chances are the government is well aware of these costs estimates, and they still believe that the proposal is worth it, according to Lyons.

"There was a lot of consideration of different factors from different representative groups that went into development of the rule," Lyons said. "I anticipate that many of the points made during the comment period have already been raised to the EPA."

It certainly won't stop the oil industry from trying. Morgan Lewis & Bockius LLP partner Christopher B. Amandes said the industry has little choice but to fight tooth and nail against this proposal because of the substantial capital investment needed for new equipment to cut out the sulfur as well as fewer gas guzzlers on the road.

It amounts to a "double whammy" for refiners, according to Amandes, but it still won't likely be enough to convince the EPA to back down from standards that are currently in place in California and in many other parts of the world.

"EPA is commanded by the Clean Air Act to set auto emissions standards according to technical achievability, taking into account a variety of considerations," Amandes said. "Admittedly, gas costs a lot higher in Europe and even in California than it does in the rest of the U.S., but the standards already being in effect elsewhere shows that they are technically achievable."

Automakers have been making that argument for the EPA. The industry group Global Automakers said in a statement supporting the proposal that manufacturers have made adjustments for the California standard and are glad the new rule will allow them to sell the same cars throughout the country.

The EPA has also earned praise from state officials — including the governors of Maryland, Connecticut and Massachusetts — claiming the rule will help them meet air pollution targets. Many states struggle to comply with Clean Air Act emissions requirements, and have generally complained about their inability to target emissions from vehicles, according to Amandes.

"Every time EPA passes a standard that lowers mobile source emissions, it makes it easier for them to get attainment," Amandes said.

Without support from states or automakers, the oil industry is already appealing to consumers with claims that the proposal will hit their wallets hard. Amandes said that argument is not a new one, however, as regulated groups have consistently challenged EPA cost estimates over the years. Plus, 9 cents doesn't go nearly as far as it used to.

"No one wants to spend more for gas, but all of us have lived in the last few years with much more volatility in gas prices than the numbers that are being thrown around here," Amandes said. "It is not uncommon to go to gas station and discover that the price is 9 cents more than last time. There's a time when it could count as a lot of money, but it doesn't have the same force today."

University of California, Los Angeles law professor Sean Hecht, who serves as executive director of the school's Environmental Law Center, said the proposed standard will likely look very close to the finalized version because the EPA is seeking uniformity with California. Once the rule is finalized, oil industry groups will have a major uphill battle if they take on the EPA in court.

"It's very well established that the agencies like the EPA have wide discretion to use modeling and estimation techniques that are deemed reasonable," Hecht said. "The fact that someone else might come to a different result using different assumptions is not enough to get it overturned. The EPA's decision has to be so out of bounds that it defies reason."

It's possible that the agency might suffer a critical misstep along the way and open the door for a viable challenge, Hecht said. It's happened before, when courts have found that an agency failed to use high-quality data when creating a new rule, but Hecht said that winning such an argument is still a long shot for Tier 3 opponents.

"My guess is that situation is pretty unlikely here, considering the science and methodologies involved, even though there are differences of opinion," Hecht said.

The API, AFPM and other groups are still not showing any signs of backing down.

"The stakes are high enough that clearly they have made a calculation that it's worth fighting the proposal — at least for now," Hecht said.

--Editing by Sarah Golin and Katherine Rautenberg.