

Industry Has Edge Over Enviros To Fight EPA Ozone Rule

By Keith Goldberg

Law360, New York (October 1, 2015, 8:48 PM ET) -- Successful legal challenges to the tighter national ozone standards unveiled by the U.S. Environmental Protection Agency on Thursday will be tall tasks, though experts say courts will be more receptive to industry arguments over whether the standards can be achieved than to environmentalists' arguments that the standards aren't low enough.



(Credit: Law360)

The EPA lowered the national ambient air quality standards, or NAAQS, for ground-level ozone from 75 parts per billion to 70 parts per billion, and neither industry nor environmental and public health groups are happy. While industry groups had urged the agency to keep the 75 parts per billion standard in place, environmental and public health advocates pushed for a standard as low as 60 parts per billion.

However, courts have historically given the EPA free rein when it comes to setting NAAQS, experts say.

“There's deferential standard whenever a government agency makes a scientific decision, the courts don't overturn that decision unless there's a clear abuse of discretion,” Gardere Wynne Sewell LLP environmental partner Scott Deatherage said. “So for those challenging the standards, the courts are going to be pretty deferential to the scientific analysis of the EPA.”

Just last fall, the U.S. Supreme Court refused to consider an electric utility group's bid to overturn the 2008 NAAQS of 75 parts per billion. In upholding the standards in 2013, the D.C. Circuit held that the EPA had reasonably explained how scientific evidence had changed since the previous 80-parts-per-billion standard was enacted in 1997 and that it wasn't the court's duty to “referee” battles among

scientific experts, but rather to evaluate the rationality of the EPA's decision making.

It will be especially difficult to convince a court to force the EPA to revise the standards to lower levels since the 70-parts-per-billion standard was within the range of levels **originally recommended** by the agency's Clean Air Scientific Advisory Committee, said Crowell & Moring LLP partner Thomas Lorenzen, a former assistant chief of the U.S. Department of Justice's environmental division.

"The environmental groups that argue that EPA should have set a lower standard will have to overcome the reluctance of the court to second-guess the agency on those sorts of scientific reviews," Lorenzen said.

Yet Earthjustice managing attorney David Baron noted that the CASAC also concluded that adverse health effects would still occur at a 70-parts-per-billion level and lower levels would provide greater margins of safety.

"Under the law, the EPA can't set the standard at a level where adverse health effects are likely," Baron said. "EPA certainly does get some deference from the courts on these decisions, at the same time, it has to confront science in a rational and nonarbitrary way. In our view, they didn't do that here."

Industry groups have decried the costs of complying with the new standard, which the EPA pegs at \$1.4 billion annually. But that'll be a tough sell in court, thanks in part to the Supreme Court's 2001 decision in *Whitman v. American Trucking Associations Inc.*

"It held unequivocally that the standard must be solely based on what is requisite to protect public health, the consideration of economic impacts and costs is prohibited at the standards-setting stage," Baron said.

However, Lorenzen says the high court's ruling earlier this year that the EPA had to consider costs when crafting its rule limiting mercury and other toxic emissions from power plants could open the door to a court considering how it applies to the *Whitman* decision or in the context of the EPA setting NAAQS.

"You've got two decisions that seem at odds with each other," Lorenzen said. "I think the courts are going to have to grapple with how to reconcile those two decisions in this context."

However, experts say the strongest legal argument that industry could make is that the EPA has set an unattainable standard. In many regions, natural background ozone levels may be above the 70-parts-per-billion mark.

"The question is if you hit a background level, can EPA have a standard that is at or below the background level?" Deatherage said. "Because in essence, you'll never achieve it."

Even if natural background ozone levels are below the 70-parts-per-billion-level, Deatherage said regions could be faced with making drastic, unrealistic emissions cuts if ozone levels are close enough to the limit.

The nonattainment issue "is something that I suspect that industry will go hard on," Akin Gump Strauss Hauer & Feld LLP partner Paul Gutermann said. "It's got a common-sense appeal."

It's also why industry groups might have a better shot at convincing a court to overturn the 70-parts-per-

billion-standard than environmental groups have, according to Lorenzen.

“The environmental and health concerns are tied more closely to questions of EPA's technical and scientific judgment, where the courts have given the EPA broad deference,” Lorenzen said.

But while the courts' deference to the EPA may be broad, it's not limitless.

“EPA generally gets a pretty wide berth in setting NAAQS, though in recent years, the D.C. Circuit has become more skeptical of the EPA's [justifications],” Gutermann said. “And the Supreme Court has been willing to give a more searching look than in the days where EPA simply waved Chevron [deference] and the court went along.”

--Editing by Jeremy Barker and Kelly Duncan.

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