

## New Ozone Rule Poses Additional Compliance Challenges

By Juan Carlos Rodriguez



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*Law360, New York (October 1, 2015, 9:34 PM ET)* -- The U.S. Environmental Protection Agency's stricter ozone rule poses a new set of compliance headaches, including emission offset requirements and costs, both for areas that struggled with the last round of standards and those that have not yet had to worry about reducing the greenhouse gas.

Lowering the National Ambient Air Quality Standard for ozone from 75 parts per billion to 70 ppb was not as tough a change as environmentalists had hoped for, but industry experts said even that much of a difference will have a far-reaching impact on communities and businesses. In comments to the EPA before the rule's unveiling, industry groups seized on the annual EPA-estimated compliance costs of \$3.9 billion to get to 70 ppb.

Michael J. Carroll, a partner at Latham & Watkins LLP and global co-chair of the firm's energy and infrastructure project siting and defense practice group, said the next step in the process will be determining which parts of the country don't meet the 70 ppb standard. That process must be finalized by Oct. 1, 2017, he said, and while it might seem like a bit of breathing room before measures are put in place, a lot will be happening in the meantime.

"Two years can go by pretty quickly," Carroll said. "I think that many parts of the country are going to be surprised at how much more difficult it is to operate and, in particular, construct new and modified facilities."

He said companies will inevitably begin considering whether to plan a new facility in a certain area, knowing that by the time the project reaches the permitting phase, there could be additional new requirements.

"Those of us who practice in California [and] have been dealing with extreme ozone nonattainment areas for a long time know all too well, and facilities that operate out here know all too well, the difficulties associated with some of

the requirements that kick in once an area is designated a nonattainment area,” Carroll said.

In particular, Carroll highlighted emission offsets, an EPA program for nonattainment areas that, in order to avoid increases in emissions, requires proposed emissions increases from new or modified facilities to be balanced by equivalent or greater reductions from existing sources.

He said that as an area’s manufacturing base shrinks, as it has in California, an area has fewer big facilities that are shutting down. So as the regulations become more stringent, it becomes more difficult to generate credits, making new projects or even facility upgrades tough to complete.

Companies that want to expand may be faced with a situation in which they simply can't afford the cost of emission credits and walk away from projects altogether, Margaret Caravelli, a partner at Balch & Bingham LLP said.

“It becomes an economic decision and an economic impact in the area because companies won't move forward with projects,” she said.

Caravelli said states and localities have problems of their own. They have been attempting to come into compliance with the last standard, and some of them have just reached that goal. Some of those places may also comply with the new standard as a result of their efforts, but others may not. And when other new rules such as the Clean Power Plan are factored in, state and local governments are faced with layers of new regulations that strain their resources.

“Putting together and offering up a state implementation plan is a lot of work and it’s a lot of expense,” she said. “States and localities are going to have to make sure they can provide for continued growth even though they’re having to reduce emissions. That’s a delicate balance.”

In a call with reporters on Thursday, EPA Administrator Gina McCarthy said she believes implementation will be achievable. She touted the agency’s partnerships with state and local governments and said there is “plenty of time and flexibility” for states to plan for and meet the new standards. She said the agency expects that all but a few areas of the country will meet the new standard by 2025.

“We only estimate that about 14 counties outside of California, which we all know has unique challenges, would actually be in nonattainment in 2025,” McCarthy said.

Paul Cort, an attorney at Earthjustice, said compliance concerns are a “red herring.” He said the EPA should have implemented a standard closer to the 60 ppb, which was the strictest of the options considered by agency because it would have saved 5,000 lives per year and millions of asthma attacks.

Cort said Earthjustice commissioned a study of compliance costs and found that industry estimates had mistakes, and that when those errors were corrected, the cost numbers were even lower than the EPA’s projections.

“Over and over again, we’ve seen that we can protect public health, that it actually in many ways stimulates new industries and that GDP continues to grow. These are not job killers,” he said.

--Editing by John Quinn and Mark Lebetkin.