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4 Takeaways From New EPA Vehicle Emissions Rule

By **Keith Goldberg**

Law360 (April 13, 2023, 9:43 PM EDT) -- The U.S. Environmental Protection Agency's ratcheting up of greenhouse gas emissions standards for vehicles reflects the Biden administration's push to electrify the automotive sector, but the agency's aggressive approach will raise legal and practical questions.

The new standards proposed by the EPA on Wednesday contemplate a world where electric cars and light trucks make up as much as 67% of the U.S. market by 2032. Experts say that's a significant shift that could invite eventual legal challenges to the standards once they're finalized, as well as challenges to rapidly build out the supply chains and charging infrastructure to support that shift.

"We have this overarching theme of trying to promote this policy of EV development and deployment in the U.S.," said Morgan Lewis & Bockius LLP partner Levi McAllister, head of the firm's electric vehicles working group and energy commodity trading and compliance working group. "The real questions are: Is it feasible? Is it achievable, particularly in the aggressive time frame the EPA has set?"

Here are four key takeaways from the EPA's proposal.

EPA Uses Congress and States to Make Its Case

The EPA's proposed rules would require lower GHG emissions year-over-year for cars and light trucks between model years 2027 and 2032 and heavy-duty vehicles, including many large trucks and school buses, between model years 2028 and 2032.

Not only are the proposed rules more stringent than the current standards that run through the 2026 model year, but the current ones are also largely undoing rollbacks by the Trump administration, said Meredith Hankins, a senior attorney at the Institute for Policy Integrity at New York University School of Law who focuses on air quality and transportation.

"They're really starting from the ground up. They're building a whole new rule," Hankins said of the EPA's new proposed standards. "It's their first chance to put forward the Biden administration's goal for transportation emissions."

To help justify the new standards, the EPA heavily cites both the bipartisan Infrastructure Investment and Jobs Act and the Inflation Reduction Act, and the billions of dollars worth of incentives the laws make available for electric vehicles and related infrastructure. Hankins said that's important because the Clean Air Act requires the agency to grapple with technological feasibility and lead time for automakers

when crafting emissions standards.

"Because Congress has directed all this additional funding ... they're changing the equation about what is feasible," Hankins said.

The EPA also noted in the proposals that several states have already set their own zero-emission vehicle targets, including California, New York and Illinois. California also has a CAA waiver to set its own vehicle emissions standards, which several other states have opted to follow.

"That's a huge part of the baseline that EPA is looking at in determining where to set the [emissions] targets in these proposals," said Alice Henderson, the Environmental Defense Fund's director of transportation and clean air policy.

Charging Challenge Will Create Regulatory Headaches

Automakers are already fretting over whether they'll have adequate supply chains to handle the massive increase in electric vehicles that the new EPA standards forecast. But experts say an equally thorny question is whether there will be sufficient charging infrastructure to handle all the new EVs.

"Automakers, they can roll EVs off their assembly lines all day long, but if there's no way to charge them, nobody's going to purchase them," McAllister of Morgan Lewis said.

That's going to force regulators aside from the EPA to get involved and be more proactive, experts say. For starters, McAllister said state utility regulators need to figure out how to design retail electricity rates to account for the intermittent but peak levels of demand that vehicle charging creates at varying locations on the grid.

"There doesn't seem to be a standard emerging for the best way to ensure that utilities are recovering their cost of service, but mitigating the impact of demand charges," McAllister said. "That's an impediment to siting."

And siting and building charging infrastructure itself involves state and local permitting laws, not to mention any needed expansion of electricity distribution grids.

States such as California have programs in place to encourage the build-out of charging infrastructure, but they still haven't quite figured out how to encourage development in lower-income or rural areas that will be crucial to the widespread EV adoption that the EPA's standards envision, said Vinson & Elkins LLP partner Michael Joyce, who focuses on renewable energy finance that includes the development of EV infrastructure.

"It's a hodgepodge of different things, focused on where people do business, but not where they live," Joyce said. "How do we ensure that the folks that we need to tip the scales come into this market?"

Buckle Up for Litigation

Given that the EPA's current vehicle emissions standards, as well as the agency's restoration of California's CAA waiver authority, are currently being challenged in court, experts say it's a fairly safe bet that the finalized version of the latest standards will be challenged as well.

Opponents of the EPA's current vehicle emissions moves have invoked the major questions doctrine, which says large-scale regulatory initiatives that have broad impacts can't be grounded in vague, minor and obscure provisions of law. The doctrine was used by the U.S. Supreme Court last year to limit the scope of the EPA's authority to regulate GHG emissions from the power sector in West Virginia v. EPA.

They'll likely point to the 67% market share of electric cars and light trucks by 2032 projected by the EPA as an economywide shift that triggers the major questions doctrine. But Henderson of the Environmental Defense Fund said the EPA hasn't stepped outside the regulatory lane it has used to craft emissions standards.

"They follow the same regulatory structure they have for decades," Henderson said. "Those projections of EV deployment, expected to comply with emission limits that EPA has set ... are based on modeling that EPA has done that looks at cost-effective compliance pathways."

And Hankins of NYU's Institute for Policy Integrity, whose organization filed an amicus brief supporting the EPA in the litigation over the current standards, said the passage of the Inflation Reduction Act helps rebut claims that the vehicle electrification the EPA's proposed standards would accelerate was never contemplated by Congress.

"We have Congress just last year saying, 'We want more electric vehicles. We want EPA to do this. This is what we intend,'" Hankins said.

What to Watch for Next

As the EPA gets feedback on the proposed standards and works to finalize them, Hankins said a legal elephant in the room could be any further Supreme Court invocation of the major questions doctrine. That could occur in the fights over the current vehicle emissions rules or other cases involving major federal rules that are currently before the justices.

"Whatever the Supreme Court says in those cases is going to have a bigger influence on this rulemaking than anything else," Hankins said.

Rulemaking matters aside, McAllister of Morgan Lewis said automakers will be focused on outstanding guidance from the U.S. Department of the Treasury on EV-related tax credits under the Inflation Reduction Act, including what determines a "foreign entity of concern" in terms of EV battery components that could affect their eligibility, as well as guidance on tax credit transferability between EV dealers and buyers.

McAllister said charging infrastructure companies will closely watch how states tackle rate design, as well as how the federal and state governments distribute the Infrastructure Investment and Jobs Act's $7.5 billion that's earmarked for charging infrastructure development.

Building out a national network of electric vehicle charging infrastructure makes up $5 billion of that total, while the remaining $2.5 billion will fund discretionary grants for states to build out their EV and zero-emission vehicle infrastructure.

"When you look at the EPA's proposed rule ... they talk about developing 500,000 chargers. That's supposed to be developed pursuant to these two programs," McAllister said. "If I'm the charging station developer, owner or operator, I'm going to be looking at how these programs are being rolled out on a

state-by-state basis, because I want to make sure I can qualify."

Joyce of V&E said another aspect to watch is how much the EPA's proposed rules will embolden shareholders of automakers to press the companies to firm up their own climate change pledges. Simply setting broad, carbon-neutral targets may no longer cut it with investors, Joyce said.

"The goalposts were moved and cemented in," Joyce said. "It's like, 'You might have had your plan. Now this is the plan you need to have, and it's non-fungible.'"

--Additional reporting by Juan Carlos Rodriguez and Linda Chiem. Editing by Jay Jackson Jr. and Jill Coffey.
