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Government Gone Wild! Another First-Of-Its-Kind Regulation Targets the Logistics Industry

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Authors: Marc S. Blubaugh, Reed W. Sirak

The early days of the Biden Administration have given commercial users and providers of transportation and logistics services a lot to consider. In the first week of his presidency alone, President Biden signed 22 executive orders as well as numerous presidential proclamations and memoranda, far more than any past president. These presidential actions were primarily designed to address the COVID-19 pandemic, climate change, immigration, and undoing various policies implemented by the Trump Administration. Likewise, new political appointments to federal agencies such as the U.S. Department of Transportation will undoubtedly begin to exert influence on overall policy direction.

While these federal executive actions, as well as those yet to come, will certainly bring new challenges for the providers and users of the transportation and logistics industry, the industry must also remain vigilant about developments at the state and local level. After all, creative state regulators have a history of implementing rules that target the users and providers of transportation and logistics services in various ways, ranging from worker classification to data privacy.

California's South Coast Air Quality Management District (SCAQMD or District) Proposed Rule 2305 - Warehouse Indirect Source Rule (Indirect Source Rule or Proposed Rule) provides a vivid example of a new state regulatory encroachment that will detrimentally affect owners and operators of warehouses and distribution centers. Retailers, distributors, and logistics companies that operate warehouses or distribution centers in California should take notice.

Background

The South Coast Air Basin, which is regulated by the SCAQMD, is home to approximately 17 million people who reside in Los Angeles, San Bernardino, Orange, and Riverside counties. This area is also home to some of the worst smog in the country. The South Coast Air Basin is consistently out of compliance with both state and federal ambient air quality standards for ozone and particulate matter.

To address nonattainment in the South Coast Air Basin, the District developed the Air Quality Management Plan (AQMP) in 2016. The AQMP identified nitrogen oxides (NO_x), a precursor to formation of ozone or smog, from mobile sources as the main cause of smog in the South Coast Air Basin.

The 2016 AQMP identified five Facility-Based Mobile Source Measures to reduce indirect sources of NO_x emissions, including emissions from warehouses and distribution centers tied to the massive growth of e-commerce. The SCAQMD then developed the proposed Indirect Source Rule pursuant

to its authority under California Health and Safety Code Sections 40716(a)(1) and 40440(b)(3) to regulate emissions from trucks while idling at warehouses or distribution centers. Warehouses and distribution centers are themselves relatively clean operations except for the air emissions from trucks that enter such facilities.

The District has traditionally regulated air pollution from stationary sources, like factories. It does not have the authority to regulate directly the emissions from mobile sources like trucks. Authority to regulate such emissions rests with US EPA and the California Air Resources Board.

The Indirect Source Rule represents the first time that the District has attempted to regulate truck emissions from warehouses indirectly as facility-based sources of ozone and particulate matter emissions.

Overview of the Proposed Indirect Source Rule

The stated purpose of the Indirect Source Rule "is to reduce local and regional emissions of nitrogen oxides and particulate matter, and to facilitate local and regional emission reductions associated with warehouses and the mobile sources attracted to warehouses in order to assist in meeting state and federal air quality standards for ozone and fine particulate matter." The Proposed Rule would apply to owners and operators of new and existing warehouses located in the South Coast Air Basin "with greater than or equal to 100,000 square feet of indoor space in a single building that may be used for warehousing activities by one or more warehouse operators."

The Indirect Source Rule purports to achieve its purpose by instituting a fairly byzantine regulatory scheme. More specifically, the rule would impose a "Warehouse Points Compliance Obligation" (WPCO) on warehouse operators. Operators would then be allowed to satisfy the WPCO by accumulating "Warehouse Actions and Investments to Reduce Emissions Points" (WAIRE Points) in a given 12-month period. WAIRE Points would be awarded by implementing measures to reduce emissions listed on the WAIRE Menu, or by implementing a custom WAIRE Plan approved by the District.

The WAIRE Menu currently awards WAIRE Points for acquiring zero-emission (ZE) or near-zero-emission (NZE) trucks, the number of ZE or NZE truck trips to the operator's warehouse, or for acquiring ZE or NZE yard trucks. The WAIRE Menu also awards WAIRE Points to warehouse owners and operators for installing onsite electric charging stations and hydrogen fueling stations, installing onsite solar panels, and installing air filtration systems in the community.

The WPCO is calculated based on the weighted annual truck trips (WATTs) multiplied by a "Stringency" factor and an "Annual Variable." Although the Stringency factor and the Annual Variable are unknown in the Proposed Rule, this formula is weighted to reflect varying emissions from trucks used to transport goods from a given warehouse. The Proposed Rule would also provide a default formula based on the size of the warehouse and number of operating days for warehouse operators that do not have enough data to determine the warehouse's WATTs.

WAIRE Points would be transferable. The operator of a warehouse could transfer excess WAIRE Points from one warehouse to another warehouse that it controls. The warehouse owner could also transfer WAIRE Points it earns to the operator of the same warehouse. However, the Proposed Rule

does not allow WAIRE Points to be transferred between owners of different warehouses, or between unaffiliated operators.

Warehouse operators that do not accumulate enough WAIRE Points would be able to come into compliance with the Proposed Rule by paying a Mitigation Fee in the amount of $1,000 for each unearned WAIRE Point. The Proposed Rule, however, does not specify the factors needed to calculate the annual number of WAIRE Points an operator must acquire to satisfy the Proposed Rule.

Outlook

The final Indirect Source Rule is expected to be released this spring. If approved, large warehouses over 250,000 square feet would be required to comply with the initial reporting obligations by August 2, 2022. Warehouses over 150,000 square feet would have comply with the initial reporting obligations by August 1, 2023, and warehouses over 100,000 square feet would have to comply with the initial reporting obligation by July 31, 2024. Benesch will continue to monitor the Indirect Source Rule.

In the meantime, retailers, distributors, and logistics companies that own or operate warehouses and distribution centers in Southern California should make their voices heard. Moreover, those who own or operate warehouses in other jurisdictions should keep in mind that other states often look to California for regulatory inspiration of their own.

Marc S. Blubaugh is Co-Chair of Benesch's Transportation & Logistics Practice Group. You may reach Marc at (614) 223-9382 or mblubaugh@beneschlaw.com.

Reed W. Sirak is an associate in Benesch's Environmental Practice Group. You may reach Reed at 216-363-6256 or rsirak@beneschlaw.com.