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South Coast Air Quality Management District to Regulate Distribution Warehouses, Part 2

The South Coast Air Quality Management District ("SCAQMD") is pursuing a new rule to regulate distribution warehouses. The SCAQMD's focus is not on emissions generated by the warehouses or their equipment. Rather, its focus is on emissions from the trucks that make deliveries and pickups at these facilities.

Proposed Rule 2305 is known as an "indirect source" rule, because it regulates facilities which are indirect sources of air pollutants. They are called "indirect sources" because they do not emit the air pollutants, but instead attract cars and trucks which emit the pollutants.

In Part 1 of this article I discussed the requirements of Proposed Rule 2305. In this Part 2 I address some legal issues concerning indirect source rules in general and this proposed rule in particular.

Federal Law on Indirect Source Rules

Air quality is regulated under a combination of federal and state law. The federal Clean Air Act establishes programs under which the U.S. Environmental Protection Agency ("US EPA") develops air quality standards. The federal act requires each state to adopt and obtain US EPA approval of its State Implementation Plan ("SIP"), which creates the framework within which the state will achieve the US EPA's air quality standards.

Section 110 of the federal Clean Air Act provides that any state may include in its SIP an "indirect source review program." 42 U.S.C. § 7410(a)(5)(A)(i). The Clean Air Act defines "indirect source" as "a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution." 42 U.S.C. § 7410(a)(5)(C). The act defines an "indirect source review program" as "the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect

source will not attract mobile sources of air pollution . . .” 42 U.S.C. § 7410(a)(5)(D).

Pursuant to this provision of the federal Clean Air Act, the SCAQMD has included potential indirect source rules in its portion of the State’s SIP. The SCAQMD’s 2016 Air Quality Management Plan (“AQMP”) includes potential indirect source rules among its strategies for meeting the US EPA’s 8-hour ozone standard under the federal Clean Air Act. These potential indirect source rules include rules targeting commercial marine ports, railyards and intermodal facilities, commercial airports, and distribution warehouses.

Although the federal Clean Air Act allows states to include indirect source rules in their SIPs, and although California has included a potential warehouse indirect source rule in its SIP, the SCAQMD’s authority to adopt an indirect source rule and the propriety of Rule 2305 must also be evaluated under California law.

California Law on Indirect Source Rules

The California Legislature has enacted laws giving air quality management districts the ability to adopt indirect source rules under certain circumstances. The California Clean Air Act provides that, in carrying out its responsibilities under the act, an air quality management district may adopt regulations to “[r]educe or mitigate emissions from indirect or areawide sources of air pollution.” Health & Saf. Code, § 40716. The law specifically addresses the SCAQMD’s authority to adopt indirect source rules. It provides that the SCAQMD may “provide for indirect source controls in those areas of the south coast district in which there are high-level, localized concentrations of pollutants or with respect to any new source that will have a significant effect on air quality in the South Coast Air Basin.” Health & Saf. Code, § 40440(b)(3).

A primary concern about indirect source rules is that they can interfere with local regulation of land use. See *National Ass’n of Homebuilders v. San Joaquin Valley Unified Air Pollution Control Dist*., 627 F.3d 730, 737-738 (9th Cir. 2010). Therefore, although the federal Clean Air Act allows states to adopt indirect source rules, it expressly prohibits the US EPA from mandating the imposition of indirect source rules in a state’s SIP. 42 U.S.C. § 7410(a)(5)(A)(i). Likewise, California law provides that the California Air Resources Board (“CARB”) may not require “any indirect source review program or other land use control measures” in the SCAQMD’s AQMP. Health & Saf. Code, § 40468. Further, the California law authorizing the SCAQMD to adopt indirect source rules expressly provides that it shall not “be interpreted as providing

or transferring new authority over [] land use to either the south coast district, the Southern California Association of Governments, or the state board [i.e., CARB]." Health & Saf. Code, § 40414. California law also prohibits air quality management districts from including indirect sources within any market-based incentive program. Health & Saf. Code, § 40440.1.

Legal Issues Affecting the Validity of Proposed Rule 2305

The validity of Rule 2305 could turn on many different factors. A few of the more likely legal hurdles the rule may face are: (1) Whether SCAQMD has authority to adopt the rule; (2) Whether the rule is an illegal tax; and (3) Whether the rule is arbitrary and capricious.

The SCAQMD's Authority

Under California law, government agencies have no authority beyond that which is delegated to them by the Legislature. In determining whether an agency is acting within the scope of its statutory authority, the courts exercise their "independent judgment." *Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist*. (2015) 235 Cal. App. 4th 957, 963. "[T]he proper interpretation of a statute is ultimately the court's responsibility." *Ibid*.

As discussed above, the Legislature has delegated to the SCAQMD authority to adopt indirect source rules. But that delegated authority has limits. Among other limits, the statute authorizing the SCAQMD to adopt indirect source rules specifically provides that the rule must be limited to those areas of the South Coast district in which there are high-level, localized concentrations of pollutants *or* with respect to any new source that will have a significant effect on air quality in the South Coast Air Basin. In its current form, however, the SCAQMD is proposing that the rule apply to all distribution warehouses greater than or equal to 100,000 square feet irrespective of where they are located within the South Coast Basin, and irrespective of whether they are new or existing.

Additionally, the rule may also be challenged on the ground that it exceeds the scope of an "indirect source review program," as defined in the federal Clean Air Act. The federal Clean Air Act defines an "indirect source review program" as "the *facility-by-facility review* of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a *new or modified indirect source* will not attract mobile sources of air pollution . . ." 42 U.S.C. § 7410(a)(5)(D) (emphasis added). Rule 2305 does not involve any "facility-by-facility review" and is not limited

in scope to "new or modified" indirect sources. Thus, the rule is arguably a direct regulation of mobile sources, rather than a true "indirect source" rule.

Legality of Taxes

Rule 2305 might also be challenged as an illegal tax. As explained in Part 1 of this article, the rule allows warehouse operators to satisfy their obligations by either adopting certain technologies (primarily by the purchase and use of zero-emission or near-zero-emission trucks or infrastructure for the same) or paying the SCAQMD a "mitigation fee." If the zero-emission and near-zero-emission technologies are not commercially available on a scale enabling warehouse operators to satisfy their collective compliance obligation, they will have no option but to pay the fee. The SCAQMD concedes in its AQMP that "additional research and demonstration are needed to commercialize zero- and near-zero emission technologies for the heavier heavy-duty vehicles (with gross vehicle weight ratings greater than 26,000 pounds). [AQMP at 4-24.] Moreover, the SCAQMD concedes in its staff report that some of the WAIRE menu technologies (including zero-emission class 8 trucks) are not currently technically feasible.

The SCAQMD estimates that there are about 750,000,000 square feet of warehouse space that will be covered by this rule. An individual warehouse operator's compliance obligation will depend on actual truck trips to and from its warehouse. However, a typical warehouse can expect the mitigation fee to cost it about $1 per square foot per year. Thus, warehouse operators might collectively pay the SCAQMD hundreds of millions of dollars per year in mitigation fees under Rule 2305 alone. For comparison, the SCAQMD's entire budget last year was $173 million.

The SCAQMD states that it will use the mitigation fees to subsidize the purchase of zero-emission and near-zero emission trucks and electric charging infrastructure. But again, if there are not enough zero-emission and near-zero-emission trucks to satisfy the warehouses' collective WAIRE Points obligation, there won't be clean trucks available to subsidize. Rule 2305 may bring in far more revenue for the SCAQMD than it can spend reducing NOx and DPM from truck emissions.

In general the SCAQMD lacks legal authority to issue taxes. It may impose regulatory fees. But regulatory fees must be limited to the costs required to administer a regulatory program and may not be levied for unrelated revenue purposes. See Health & Saf. Code, § 40522.5(a). The SCAQMD is proposing a separate regulatory fee in a companion rule (Rule 316) to cover its costs of administering Rule 2305. Under

proposed Rule 316 the SCAQMD is proposing an additional regulatory fee of 6.25% of the amount of the mitigation fee. But the mitigation fee imposed by Rule 2305 is far more than a regulatory fee.

Thus, the mitigation fee imposed by Rule 2305 is arguably a special tax requiring approval by a two-thirds majority of the voters within the south coast district. Cal. Const., art. 13A, § 4; Govt. Code, § 53722; see also *Santa Clara County Local Transp. Authority v. Guardino* (1995) 11 Cal.4th 220, 231-233.

Is Proposed Rule 2305 arbitrary and capricious?

When reviewing a rule adopted by an air district, the court's review "is limited to determining whether the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair." *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control District* (2009) 178 Cal. App. 4th 120, 129. While this is a deferential standard of review, it is not a rubber stamp on the agency's action. Under this standard "the agency must act within the scope of its delegated authority, employ fair procedures, and be reasonable. 'A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.'" *Ibid*. In technical matters requiring experts and the study of scientific data, "courts will permit agencies to work out their problems with as little judicial interference as possible." *Ibid*.

A number of aspects of Rule 2305 could be scrutinized to determine whether they have a reasonable foundation rationally connected to the rule's purpose. The SCAQMD's stated purpose for the rule is to assist in meeting state and federal air quality standards—principally the US EPA's 8-hour ozone standard. Yet many aspects of Rule 2305 appear disconnected from this purpose.

First, the SCAQMD has not quantified—indeed, has not even attempted to quantify—the reduction in ambient ozone and particulate matter concentrations that it expects to achieve with the rule. Thus, it is unclear what, if any, air quality improvement will result from this rule. To the extent that the zero-emission and near-zero-emission trucks are not available on a scale to satisfy the industry's collective WAIRE Points obligation, operators will be required to either: (1) adopt other technologies such as installing on-site electrical truck charging or hydrogen fueling infrastructure, solar panels, or air filtration systems in local residences, schools, daycares, hospitals, or community centers; or (2) paying the SCAQMD the mitigation fee. Of course, if the zero-emission and near-zero-emission trucks are not widely available, installing

charging and fueling infrastructure for them won't reduce any emissions. Nor will installing solar energy panels or indoor air filters do anything to significantly reduce truck emissions or ambient ozone concentrations. Regarding the mitigation fee, the SCAQMD does not yet have any written plan for spending the money, and it is not clear when, if ever, it will have such a plan. It states that it will use the mitigation fee proceeds to subsidize the acquisition of zero-emission and near-zero-emission trucks. But again, if those trucks are not widely available there is no assurance as to how much, if any, benefit the mitigation fee will have on air quality.

Conclusion

The SCAQMD has not attempted to quantify the benefits that this novel rule will have on ambient ozone or particulate matter concentrations, leaving uncertainty as to what, if any, air quality improvement will be realized. One thing is certain--the rule will impose significant costs and fees on warehouse operators, estimated to be approximately $1 per square foot per year. The rule is scheduled for consideration and possible adoption by the SCAQMD Governing Board on April 2, 2021.

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