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Client Alert
Commentary

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California and Key Stakeholders Join Warehouse Regulation Lawsuit

The State and eNGOs seek to defend an emissions rule that trucking and airline trade groups are challenging in federal court.

On October 13, 2021, the State of California, on behalf of the Office of the Attorney General and the California Air Resources Board (CARB, and together, the State), filed a motion to intervene in a federal lawsuit challenging the South Coast Air Quality Management District (SCAQMD or the District) adoption of Rule 2305. Rule 2305 is the Warehouse Indirect Source Rule (ISR) – Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program. Plaintiff, the California Trucking Association (CTA), filed a complaint in the US District Court for the Central District of California on August 5, 2021, to which the District filed an answer on October 7, 2021.[1] In addition to the State, Airlines for America filed a motion to intervene as a proposed plaintiff, while a group of environmental NGOs seek to intervene as proposed defendants. Each proposed intervenor is discussed further below.

The case was brought by CTA, an association "devoted to advancing the interests of its motor-carrier members, which include warehouse owners and operators, who provide transportation services in California."[2] CTA brings this lawsuit on behalf of its members, who it claims would be irreparably harmed if Rule 2305 is allowed to take effect, and seeks declaratory relief that Rule 2305 (and the related Rule 316 governing administrative fees) is invalid and unenforceable, as well as a preliminary and permanent injunction barring SCAQMD from implementing Rules 2305 and 316.

As described in Latham's previous reporting on the rulemaking[3] and adoption[4] of Rule 2305, the regulation applies to warehouses in the South Coast Air Basin[5] of 100,000 square feet or more and aims to reduce regional nitrogen oxide (NOx) emissions and local diesel particulate matter emissions. Beginning in 2022, applicable warehouses will accrue a WAIRE Points Compliance Obligation (WPCO), which is calculated based on the weighted annual number of truck trips to the warehouse. WAIRE Points may be earned to meet the WPCO in several ways, including: (1) taking actions defined in the WAIRE Menu (Table 3 of Rule 2305); (2) implementing an approved Custom WAIRE Plan; or (3) paying a mitigation fee. The WAIRE Menu lists action items that a warehouse operator may take, and the corresponding number of Points that such actions will earn. The Point values are determined based on the cost of the action, the regional emission reductions achieved (NOx), and the local emission reductions achieved (DPM). Any combination of WAIRE Menu items, a Custom WAIRE Plan, and the mitigation fee may be used to meet the WPCO.

The CTA complaint alleges that Rule 2305 is designed solely to accelerate the transition of truck fleets to zero-emission (ZE) and near-zero-emission (NZE) trucks, and that this regulation of mobile sources is

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outside the authority of SCAQMD. CTA claims that Rule 2305 is preempted by federal law, not authorized by state law, and is an unlawful tax. On these bases, CTA brings four primary claims.

1. Rule 2305 is preempted by the Federal Clean Air Act

CTA alleges that Rule 2305 is preempted by the Clean Air Act (CAA) section 209(a) because it imposes an emission standard on trucks. CAA section 209(a) prohibits any state or political subdivision from adopting or enforcing "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." CTA claims that, effectively, warehouse operators have only one economically viable option to comply with Rule 2305, which is to acquire, directly or indirectly (through contracting), new ZE or NZE trucks.[6] As a result, CTA claims, the District is forcing an accelerated transition of truck fleets to ZE and NZE, thereby setting an emission standard for trucks.

CTA's claim appears to be based on the District's estimated costs of compliance, which assume a warehouse utilizes only one means of compliance to satisfy its entire WPCO.[7] CTA claims that the cost of compliance through directly acquiring and using ZE/NZE vehicles is $0.19 per year per square foot, while the cost of compliance through "non-acquisition" pathways (such as installing solar panels or paying the mitigation fee) is $0.85 per year per square foot.[8] Based on these estimates, CTA argues that the acquisition and use of ZE/NZE trucks is the only economically feasible pathway.

2. Rule 2305 is preempted by the Federal Aviation Administration Authorization Act of 1994

CTA alleges that Rule 2305 also is preempted by the Federal Aviation Administration Authorization Act because it is a law "related to a price, route, or service of any motor carrier…with respect to the transportation of property." CTA claims that warehouse owners/operators, freight forwarders, brokers, and truck owner/operators "will be required to change their prices, routes, and services in order to comply with Rule 2305 and will be required to offer services which the market does not compel."[9]

CTA bases this argument on its assumption that the only economically viable way to comply with Rule 2305 and avoid paying the mitigation fee is to acquire (either directly at the warehouse, or through contracting with non-owned fleets) ZE and NZE trucks, which will cause an increase in prices (due to the higher cost of ZE/NZE trucks) and a change in routes (due to charging infrastructure availability).

3. Rule 2305 is a violation of state law because the District lacked authority

CTA alleges that the District lacks the authority to adopt an ISR related to ***existing*** indirect sources. CTA cites CAA section 110(a)(5), which allows states to adopt ISR programs related to "new or modified" sources in their State Implementation Plans.

California law authorizes air districts to adopt and implement regulations to "[r]educe or mitigate emissions from indirect and areawide sources of pollution," without specifying that the sources must be new or modified.[10] However, CTA alleges that this authority is limited by a different statute, which refers to the District's authority to adopt regulations for indirect sources "with respect to any ***new*** source that will have a significant effect on air quality in the South Coast Air Basin."[11]

CTA further alleges that Rule 2305 is in excess of the District's statutory authority because it infringes on the authority of cities and counties to plan and control land use. CTA claims that because Rule 2305 applies to all existing warehouses over 100,000 square feet in the South Coast Basin, it infringes on local land use authority.

4. Rule 2305's mitigation fee is an unconstitutional tax under state law

CTA alleges that Rule 2305's mitigation fee is an unlawful tax in violation of Article XIII C, § 1(e) of the California Constitution (Proposition 26). CTA claims that in order to avoid being classified as an unlawful tax, the District must prove that the mitigation fee is a "regulatory fee" by demonstrating: (1) the amount of the fee does not exceed the reasonable costs of providing the services for which it is charged; (2) the fee is not levied for unrelated revenue purposes; and (3) the amount of the fee bears a reasonable relationship to the burdens created by the fee-payers' activities or operations.

CTA argues that the District cannot make this showing. Specifically, CTA claims that the District cannot demonstrate that the mitigation fee is not established for general revenue purposes, that it attempts to raise money to generally control emissions in the South Coast Basin, and that there is no nexus between the mitigation fee and a warehouse's indirect emissions.

In a letter delivered to District Counsel before adoption of Rule 2305, the District's outside counsel asserted that a "tax" under Proposition 26 must be imposed by the local government on a party.[12] Rule 2305 technically does not require payment of the mitigation fee. Rather, the mitigation fee is one of several compliance options from which warehouse owners and operators may choose to comply with a WPCO.

CTA's arguments that the mitigation fee is a "tax" under the State Constitution will need to address this threshold question of whether and how the mitigation fee is imposed on warehouse owners and operators — particularly in light of CTA's claims above, which contend that warehouse owners/operators have only one economically viable option for compliance, which is to directly or indirectly acquire ZE/NZE trucks (and thereby avoid payment of the mitigation fee).

The District's answer

The District's answer on October 7, 2021, generally denies the allegations (except certain factual allegations that the District admits) and presents eight affirmative defenses that generally fall into two buckets: (1) CTA's claims are improper; and (2) CTA's own actions (or lack thereof) preclude the suit.

In the first bucket, the District asserts that CTA fails to state a claim upon which the court can grant relief, and that the claims are not yet "ripe" because neither CTA nor any of its members has yet suffered an injury due to Rule 2305. The District also argued that CTA lacks standing to challenge Rule 2305 because CTA has not demonstrated that it or any of its members will be required to implement any of the compliance options challenged in the suit. The District also asserted that the district court lacks jurisdiction to hear a challenge to Rule 2305, because if the US Environmental Protection Agency (EPA) approves the rule as part of California's State Implementation Plan, original jurisdiction to challenge the rule will lie in the US Court of Appeals for the Ninth Circuit.

In the second bucket, the District asserts that CTA's claims are barred because CTA failed to exhaust its administrative remedies in the rulemaking, CTA failed to assert its claims in a timely fashion (laches), and CTA has waived its claims or is estopped from asserting them.

Attorney General's motion to intervene

The State of California, through the Office of the Attorney General and CARB, has filed an unopposed motion to intervene in this case to defend Rule 2305. The State asserts that it has an interest in defending the District's regulation because Rule 2305 will result in emissions reductions necessary to achieve state and federal ambient air quality standards, and CARB is tasked with protecting public health and ensuring all air districts are meeting such standards. Further, the State asserts that CTA has advanced interpretations of state and federal law that are improper and, if adopted, would unduly limit state regulatory authority. The motion outlines how the State meets federal requirements for intervention in this case by right, and alternatively requests the court grant permission to intervene.

The State simultaneously filed a proposed answer, which it requested to be deemed filed should the motion to intervene be granted. The proposed answer presents eight affirmative defenses that align with the District's described above.

Airlines for America's motion to intervene

On October 19, 2021, Airlines for America (A4A), a trade group representing US commercial airlines, also moved to intervene in the case as a plaintiff in opposition to Rule 2305. A4A asserts that A4A members own, lease, maintain, and operate warehouse facilities and vehicles at commercial airports in the South Coast Air Basin that are regulated by Rule 2305. A4A's motion argues that intervention is warranted because the interests of A4A and its members would be harmed if Rule 2305 is allowed to remain in effect, and their interests are not adequately represented in this litigation by CTA. A4A's simultaneously filed complaint-in-intervention raises the same claims as CTA, and also claims that the rule violates the federal Airline Deregulation Act because it relates to a price, route, or service of any air carrier. A4A alleges that Rule 2305 is therefore federally preempted because it would affect pricing, routes, and services of trucking and warehouse activities related to air carrier transport operations.

NGOs' motion to intervene

Most recently, on October 28, 2021, a group of NGOs moved to intervene in the case as defendants in support of Rule 2305. The NGOs include East Yard Communities for Environmental Justice, People's Collective for Environmental Justice, Sierra Club, Communities for a Better Environment, Natural Resources Defense Council, and Environmental Defense Fund, all of which advocate for environmental causes in the South Coast Air Basin. The NGOs argue that their motion to intervene is warranted because they have a significant, protectable interest in improving air quality in the South Coast Air Basin and in protecting the health of their members, and they were actively involved in the development of Rule 2305. The NGOs also argue that their interests are not already adequately represented in this case because the NGOs often advocate for more stringent regulations and emissions reductions than the District or the State adopts, and they have a narrower and more focused set of interests that diverge from those of the District and the State. The NGOs' proposed answer, also filed October 28, presents seven affirmative defenses that align with the District's (only differing in not raising the defense of laches).

Latham & Watkins is closely following this case and will provide further analysis as the case progresses.

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Endnotes

[1] Case No.: 2:21-cv-6341.

[2] Complaint at ¶ 13.

[3] Latham Clean Energy Law Report, "Air District Targets Southern California Logistics Industry," November 25, 2019, available at: https://www.cleanenergylawreport.com/california/air-district-targets-southern-california-logistics-industry/#more-2252.

[4] Latham Clean Energy Law Report, "Air Regulators Tackle Trucking at Southern California Warehouses," June 1, 2021, available at: https://www.cleanenergylawreport.com/california/air-regulators-tackle-trucking-at-southern-california-warehouses/.

[5] The South Coast Air Basin includes all of Orange County, and the non-desert portions of Los Angeles, Riverside, and San Bernardino counties. A map of the District's jurisdiction is available at: http://www.aqmd.gov/docs/default-source/default-document-library/map-of-jurisdiction.pdf.

[6] Complaint at ¶ 86.

[7] *See* Staff Report at Table 20.

[8] Complaint at ¶¶ 65-67.

[9] Complaint at ¶ 94.

[10] Health & Saf. Code § 40716(a).

[11] Health & Saf. Code § 40440(b)(3) (emphasis added).

[12] Memorandum from Shute, Mihaly & Weinberger, LLP to SCAQMD, re: Responses to comments submitted by the California Taxpayers Association, April 1, 2021, available at: http://www.aqmd.gov/docs/default-source/planning/fbmsm-docs/legal-response-to-caltax-letter.pdf?sfvrsn=8.