

EPA To Watch And Learn As Calif. Freight Plan Takes Shape

By **Juan Carlos Rodriguez**

Law360, New York (May 11, 2016, 10:42 PM ET) -- California bolstered its reputation as an environmental trailblazer when it recently unveiled an ambitious freight emissions reduction proposal that could serve as a model for future national regulations, but experts say the U.S. Environmental Protection Agency will scrutinize the state program's successes and failures before following in its footsteps.

A slew of state agencies led by the mighty California Air Resources Board unveiled on May 3 their Sustainable Freight Action draft plan, touted as a road map for modernizing the state's multibillion-dollar freight transportation system, which includes components from deep-sea ports to long-haul trucks. The agencies have their sights set on the long term, with milestones set in 2030 and 2050.

The draft plan comes as the EPA gets set to release separate truck emissions standards of its own and could give the national agency a sense of what the future may look like the next time it develops regulations for the entire country, years down the road.

And the federal agency is likely to carefully watch how the plan unfolds before it makes any decisions about pursuing similar measures, Pillsbury Winthrop Shaw Pittman LLP partner Matt Morrison said.

"I think EPA will be looking at the success or failure of the California program, and it will consider adopting the things that are successful. A key word in the EPA plan is achievability, nationally, and they're going to be watching how the program evolves," Morrison said.

The draft plan was spawned from a July executive order issued by Gov. Jerry Brown calling for a more efficient and cleaner freight transport system, and its goals include improving freight system efficiency 25 percent by 2030 and deploying over 100,000 zero-emission freight vehicles like long-haul trucks by 2020.

According to CARB, California's freight system is the most extensive and interconnected in the U.S., comprising several deep-water seaports, cargo airports, border crossings and a "vast" warehousing and distribution sector, all connected by over 11,000 miles of railroad track and interstate and state highways.

The EPA and California share the climate change goals that have spurred regulations for the freight industry, and the EPA will be learning from the state about what could work on the national level, according to Robert Meyers, senior counsel at Crowell & Moring LLP.

"I think all the sides have a shared interest in having national, integrated standards so that a vehicle in one part of the country is legal to drive everywhere. You don't want to bifurcate and balkanize the vehicle market," Meyers said.

He said looking at the heavy-duty truck market shows the difficulty the state could face in reaching its goal of 100,000 zero-emission vehicles by 2030 and what the EPA might face from a national perspective. Currently, there isn't much penetration of hybrid technology for long-haul trucks; it exists, and there are systems that could be deployed now for those vehicles, but it doesn't make economic sense for companies to pursue that path yet, Meyers said.

He added that the areas where hybrids have come into the heavy-duty space is largely in urban transit: hybrid buses that cities use and can fund with subsidies or other programs.

"But in the larger commercial market where people are just moving goods, where if the price of diesel goes up 10 cents, it makes an impact, the commercial case has been difficult," Meyers said. "There have been early adopters, but I think that's a market that I don't think anybody would say is currently there."

Other elements of California's plan are so ambitious that the state will need a Clean Air Act waiver to be able to stray from federal regulations and implement its own, according to Gail Suchman, special counsel at Stroock & Stroock & Lavan LLP. The CAA allows California to seek a waiver of preemption, which prohibits states from enacting emission standards for new motor vehicles, but the EPA must grant a waiver before California's rules may be enforced.

Suchman said there is a history of California obtaining such waivers.

"California has always been in the forefront of pushing for climate change measures, and even before that, pushing car efficiency and emissions standards. That's what California does, and they do it very well," she said.

While those waivers may allow California to move forward, the state will be very interested in getting other states to buy into its approach as they may ask the EPA for permission to follow California's standards. If California doesn't see much buy-in, it may show the EPA that scaling up the state's program nationally would be problematic.

"California obviously has an incentive to involve other states so that if those other states adopt it, then its freight industry remains competitive," Morrison said.

Industry's response to the state plan is another factor to consider, according to Sean Sherlock, a partner at Snell & Wilmer LLP. He said that response will depend on how the plan is implemented, and if the objective is to modernize the freight transport system and improve its capacity and efficiency, the industry would "welcome" those improvements.

There are open questions that will inform the various industries' responses to the plan, Sherlock noted. Like any set of regulations, they could be subject to litigation after promulgation, he said.

"There's a lot of discussion in the plan about making the system cleaner, and of course, everybody wants a clean environment, but that's where industry gets a little nervous," he said. "Are we talking about imposing a lot of new regulations? The lack of detail and specifics in that regard means it remains

to be seen whether the industry is going to support it.”

But Morrison said despite the potential hurdles, the EPA will have to give California’s plan a serious look.

“There’s a definite respect for CARB and its ability to push the envelope. They have an enormous mobile source group that, I think, is as big as the federal mobile source program, so when CARB does something, the EPA listens to them and respects their views,” he said.

--Editing by Christine Chun and Philip Shea.

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