



MCCV * PO Box 1564 * Modesto, CA 95353 * 209.523.0886
CLFP * 1755 Creekside Oaks Drive St 250 * Sacramento, CA 95833 * 916.640.8150

Joint Comments from MCCV & CLFP Employer-Based Trip Reduction Rule (9410)

September 28, 2009

The Manufacturers Council of the Central Valley (MCCV) and California League of Food Processors (CLFP) appreciate the opportunity to provide additional comments on the revised version of the District's Proposed Rule 9410. We acknowledge that the District has considered a few of the issues raised regarding the previous draft of the rule; however, it is disappointing that the District has not adequately addressed a number of the fundamental problems with the draft rule that have been raised by MCCV, CLFP, and other groups over the last six months. MCCV and CLFP would like the District to consider the following points:

Rule Implementation Options and Incentive Funding

This rule was initiated largely due to 2003 state legislation¹ and the District's 2007 Ozone Plan. Regarding the development of a trip reduction rule, the District indicated in the Ozone Plan that it would; "*through incentive funding, encourage voluntary employer-based transportation programs.*"² There seems to be a significant difference between what was included in the Ozone Plan presented to stakeholders and what is currently under consideration with Rule 9410. The proposed rule is *not* voluntary for many large employers, and the draft rule text makes no provisions for incentive funds to help defray the costs incurred. Given the uncertainties associated with the potential emissions reductions that might be achieved, the level of employee participation that may be possible, and limited mass transit infrastructure in the San Joaquin Valley, should the District pursue a voluntary program at this time rather than the proposed rule? If the District does proceed with the proposed rule, does the District have any plans to develop a pool of incentive funds or credits as recommended in the Ozone Plan? These issues are central to the discussion and warrant further consideration.

The District Should Ensure That Other Organizations Take an Active Role in this Issue

The proposed rule has a laudable goal—to reduce vehicle air emissions in the San Joaquin Valley. However, once again it will be large stationary sources that bear the brunt of the compliance costs even though they generally have no significant influence regarding

¹ AB 2522 (Arambula, 2008), and SB 709 (Florez, 2003)

² 2007 Ozone Plan, appendix page I-134

whether local governments provide mass transit options or bike lanes in the community, urban growth patterns that affect the location of affordable housing, and where their workers choose to live. Local planning and transit agencies and other key change agents with respect to commuting choices and regional growth patterns do not seem to have an active role in this rule. MCCV and CLFP suggest that a more comprehensive strategy be developed by the District, as it will generate more effective long-term results.

The District Should Not Ignore Cumulative Cost of Environmental Regulation on Large Employers

Food processing and manufacturing companies along with many of their suppliers are currently incurring, or will incur in the next few years, significant compliance costs associated with a host of regional, state, and federal air quality environmental regulations, that include but certainly are not limited to:

- Increasingly stringent boiler NOx emissions standards
- New emissions standards for LSI forklifts
- New emissions standards for off-road equipment
- New emissions standards for diesel trucks
- Higher fuels costs associated with ARB's proposed Low Carbon Fuel Standard
- Greenhouse gas stationary source reporting and verification costs (state and federal)
- Potential greenhouse gas emissions offset/allowance compliance costs
- Higher energy costs due to provisions of AB 32 and other environmental regulations
- New GHG CEQA reporting requirements
- New ARB requirements for industrial HFC/CFC refrigeration systems

In addition, various permit fees and other environmental compliance costs have been increasing, along with the high cost of obtaining air emissions offsets. To cope with this situation a number of MCCV and CLFP members must devote staff positions to managing environmental compliance issues. All of these factors contribute to the high cost of doing business in California during an extended economic downturn. The cumulative cost of environmental compliance is rarely considered by government agencies during rulemakings, but it is an issue of great concern to our members, other businesses, and the communities that rely on them for economic development.

Food processors care about the environment and their community and work hard to comply with the letter and spirit of all regulations. Nonetheless, manufacturers located in the San Joaquin Valley must compete in the global marketplace. It is essential that the various public agencies focus on the long-term economic consequences of the cumulative impact of their rulemakings. Given current economic conditions, a voluntary approach would seem to be the most appropriate and would be consistent with the 2007 Ozone Plan.

The District's emissions reductions associated with the implementation of this draft rule require much further discussion and refinement.

It is difficult to gauge the potential emissions reductions associated with the proposed rule based on the information presented by the District in Appendix B of the September 14, 2009 Staff Report. MCCV and CLFP suggest that further analysis and discussion focus on the following issues:

- The EDD data presented by the District indicates that about 36³ percent of Valley workers are employed at worksites with more than 100 employees. How many employees work at sites that are not located in incorporated cities, or cities with less than 10,000 residents? These factors could have a significant impact on the District's estimate that there may be 506,923⁴ workers potentially affected by the rule.
- The analysis provided in the Staff Report does not seem to account for workers on evening shifts, compressed schedule workers, and other factors that would greatly reduce the number of employees that could (or would) participate in the Trip Reduction Program.
- The District assumes that a 10 percent employee ETRIP participation rate can be achieved by 2014, and 20 percent by 2020⁵ based on US Department of Transportation analysis. This is an ambitious goal for a region with limited mass transit options in many areas, and few cities with a densely populated urban core that is more conducive to biking or walking to work.
- Employers subject to Rule 9410 will be required submit their ETRIP plan by September 1, 2011, and to fully implement the provisions by 2014. To achieve the District's 10 percent participation goal by 2014, *thousands* of workers across the Valley will make major changes their commuting habits in the next few years, many before the rule is fully implemented. Is this assumption realistic? Do regional transit and planning agencies agree with this assessment?
- To achieve the 2020 goal of 20 percent participation, what investments will likely need to be made in the Valley for mass transit systems, bike lanes, van pools, and other options? Who will pay for this additional infrastructure? These issues may require further economic analysis and discussion with stakeholders
- The analysis in the Staff Report regarding potential participation levels also does not account for workers who currently drive themselves to work because they have other stops that are necessary but not work related and difficult to incorporate into other commuting options. Obvious examples would be employees who drop off/pick up their children at various school or recreation sites. Quite simply, many workers may not want to carpool, ride bikes, or take the bus because it is not convenient for them.

³ Draft staff report, September 14, 2009, page B-2

⁴ Draft staff report, September 14, 2009, page B-4

⁵ Draft staff report, September 14, 2009, page B-3

- The commuting patterns related to a given worksite, city, and workforce may be very unique, and this is not captured in the analysis presented. It might be helpful to present some case studies for various sizes and types of workforces employed in large and smaller cities.
- The District uses U.S. Census data that indicates that workers travel at a national average of 14.3 miles⁶ one-way to work by car. Has this assumption been tested with surveys in the San Joaquin Valley?

The draft rule may offer a number of potential options for compliance, but many of those options are unavailable, infeasible, may violate existing labor contracts, or are not cost-effective for a number of businesses.

MCCV and CLFP appreciate that the District is providing a range of options for complying with the rule, and several years to decide which options might work best for their situation. However, many manufacturing employers will face significant problems with implementing the rule due to union contract provisions, work schedules, liability and privacy issues, production practices, and employment policies. The District appears to have performed no serious analysis of these important issues, and proposes to just leave it up to employers to find a way to “earn enough points” in each category to achieve ETRIP compliance.

With respect to the complicated labor issues the District states that *“Employers may want to introduce union-related menu options during contract negotiations so that these measures might be offered in the future. The revised draft rule phases-in ETRIP components over a period of three years to allow adequate time to negotiate issues with the unions.”*⁷ This is not an adequate response, as the District has no authority to suggest to employers what to negotiate in their union contracts. Further, adding these stipulations will likely generate new and problematic legal liabilities for both the employers and union members.

Although this point will not be proven until an incident occurs and a lawsuit is pursued, there is a very high likelihood that this rule will subject employers to additional legal liability. If a worker should be injured while a) riding an employer provided bike to work; b) in a crash where another employee is driving as part of the employer-promoted ride-share program; or c) say harassment occurs during the commute, will the employer be held liable? Our understanding is that the answer is most likely affirmative, because the employer has “benefitted” from the employee participating in the alternate commute method. The employer “benefits” because the participation, though the choice of the employee, has nonetheless helped the employer to comply with a regulatory mandate.

⁶ Draft staff report, September 14, 2009, page B-4

⁷ Staff Report, September 14, 2009, page A-7

The District stated that “Employers know their workforces and worksites the best, and employers are likely to be more credible with and familiar to their employees than the District.”⁸ MCCV and CLFP would certainly agree with that statement, but don’t believe that the current draft of the rule comes close to reflecting that reality nor does it allow employers the flexibility to select the best options for their facilities.

The rulemaking should not proceed until a range of labor and production logistics issues are fully addressed. As noted in our previous comments, every business is unique and what may work well in an office full of environmental engineers working the same schedule may not be practical for a 24/7 seasonal food processor with a range of work tasks and rules, or a year-round manufacturer with multiple classifications, bargaining units and rotating shifts.

MCCV/CLFP Questions Regarding Specific Provisions of the September 14 Revised Draft:

- **Section 2.1**—How did the District determine that 16 consecutive weeks (112 days) would be the appropriate cut-off point for seasonal employment, and how did the District determine that “employees who work for an employer more than 16 weeks should have the opportunity to incorporate ridesharing and alternative transportation into their routine.” Is there a basis for this conclusion? Why not use the 120-day cutoffs suggested previously by MCCV and CLFP based on Rule 2201?⁹ If 120 days defines seasonal equipment, why doesn’t it also define seasonality for the workers who operate or depend on that equipment for their employment? Consistency between the two rules would seem warranted.
- **Section 3.12**—In the revised draft the District reduced the Compressed Work Schedule participation level from 100 percent to 50 percent. The 100 percent threshold was not reasonable, but a 50 percent standard also seems arbitrary and more flexibility may be required. Some types of job functions may not be conducive to a compressed schedule. This section of the rule, and several others, tend to ignore the differences between exempt and non-exempt employees. Issues such as overtime costs, job duties, overlapping work responsibilities, and production schedules will affect who can, and cannot, work flex time at a given site. MCCV and CLFP suggest that employers have the options of setting different participation thresholds for exempt and non-exempt employees (see Section 5.0 for a more thorough discussion and an alternative approach.)
- **Section 3.47**—Why is the District defining what constitutes a “kitchen.” MCCV and CLFP suggest that the District should let the employer and employees decide what equipment is needed based on employee preferences.
- **Section 3.54**—How did the District ascertain that seven percent was the appropriate minimum portion of parking spaces to devote to carpools? MCCV and

⁸ Staff Report, September 14, 2009, page A-4

⁹ Joint MCCV-CLFP comment letter to the District, July 21, 2009

CLFP suggest that determination should be left up to the employer based on the work site and employee needs

- **Section 3.58**—Will the employer have to distribute the rideshare flyer to employees not working at the site during that quarter? (e.g. sending the December newsletter to seasonal workers who are only at the site from June to September). Why send them the information if they are not working at the site, and possibly may not return the next season?
- **Sections 3.65**—Similar to the last point, will the employer have to distribute the survey to employees not working at the site during that period? Why send them the survey if they are not working at the site, and possibly may not return the next season?
- **Section 6.43, 6.4.4**—The 90 percent survey response rate may not be achievable in many cases. What if employees won't complete the survey? What about employee privacy issues? Will employers have to make completing the form a condition of employment? If so, does the District have the authority for this mandate?
- **Section 5.0—5.2**--The ETRIP tier level targets, categories, and relative point values seem somewhat arbitrary and do not provide firms with sufficient compliance flexibility. As noted earlier in this text, the District has emphasized that "*Employers know their workforces and worksites the best.*"¹⁰ The District has also stressed that this rule is flexible and allows many options; however, because it requires a set number of points from each category, it is still a command and control style regulation. MCCV and CLFP suggest that the following revisions to the ETRIP tables would provide employers with the flexibility needed to comply with this rule:

❖ ***Rather than phasing in the categories, as the current draft proposes, MCCV and CLFP suggest the point total target be phased in and that firms be allowed to accumulate points by mixing and matching the measures that work best for their facility, provided that measures from at least two of the categories be included. An added incentive for diversification would be to award additional bonus points to those firms that include options from three or more of the categories.***

If an employer, due to the specific needs of their workers, would like to focus their activities on providing services and facilities rather than incentives, why should an arbitrary point system preclude them from pursuing that option?

Other suggested changes to the point schedule include:

- If an employer is located in an area with no bus or mass transit service near the facility, increase the point values for other options such as compressed and staggered work schedules, car pools, van pools, and other measures.

¹⁰ Staff Report, September 14, 2009, page A-4

Given the current economic recession and budget problems facing local government agencies expansion of public transit services in the next few years is uncertain. Employer transit subsidies are not practical if there is no bus to ride.

- Adjust the point schedule for varying levels of participation. Not all measures will work for all workers at a worksite, but may be well-suited to a particular group. If there were a sliding scale for participation, it would help employers customize their ETRIP truly meet the needs of their worksite. An example would be where the compressed work schedules, which may work for a portion of the employees at a site, but is unworkable for the remainder. Currently, if less than 50 percent participate, no points are earned. This seems arbitrary and unfair and certainly does not incentivize an employer to try various approaches. MCCV and CLFP suggest that the District consider the following proposal, as an example:

| <u>Percent of Eligible Employees on A Compressed Schedule</u> | <u>ETRIP Points</u> |
|---|-------------------------|
| 5 percent - 20 percent | 12 |
| 21 percent - 50 percent | 14 |
| 51 percent - 75 percent | 16 |
| 76 percent+ | 18 |

We would submit this approach would work in a number of other areas in the rule.

- Did the District conduct any traffic safety analysis regarding increased bicycle traffic on congested urban streets or rural highways? Rule 9410 is essentially a public health proposal, and reduced tailpipe emissions may result in more traffic accidents and deaths increased bike riding. On many days it is very dark at 6 a.m., and could be very hot at 10 a.m. Should companies encourage bikers to be on the road at those times? Many areas of the Valley, both urban and rural, are sadly lacking with respect to bike lanes and facilities.

Compliance Concerns

We have heard in the District's workshops that the enforcement of this rule is going to be focused on those who blatantly disregard the measure and make no attempt to comply. Because this is not explicitly stated in the rule, our members, with good reason, have concern. Our experience with previously adopted rules, is that once the rule is adopted and effective, compliance staff has applied enforcement based upon the plain language of the rule. If the survey result requirement is 90 percent and an employer attains 89 percent, they could be receive a notice of violation, or if an appliance is not working (such as a refrigerator), then compliance staff may actually write a NOV. This rule seems to be a new

regulatory frontier for the District, and we suggest that the implementation and enforcement standards reflect that reality.

Cost Analysis

The District seems to downplay the substantial compliance costs that will be incurred by participating companies. MCCV and CLFP contend that, for large organizations, the ETRIP coordinator will need to be a full-time position to coordinate activities, conduct the employees surveys, prepare and submit ETRIP reports for the District, market the internal program, resolve issues, and communicate with employees. In the Staff Report the District responded to these concerns by stating that “The costs cited by commenter’s appear excessive.”¹¹ MCCV and CLFP respectfully assert that the District has a long history of underestimating compliance costs for new rules, and we are concerned that this may be another example of that trend.

We asked an outside consulting firm to provide an estimate of what they would charge to help employers develop an ETRIP, register and provide documentation as needed, including the surveys and newsletters. The cost was estimated to be \$200 per site, plus \$25 per employee per year. The estimate basically covers creating an ETRIP plan, registering and providing documentation as needed (surveys, newsletters, etc.). It leaves implementation of the plan to the sites, such as the cost of installation of bike racks, kitchen facilities, etc. Services such as Ride Share Events and internal Ride Matching services would be additional.

As noted above, in addition to the ETRIP coordination costs, numerous other expenses may be incurred. Depending on the options chosen, companies may incur costs to provide bikes and bike repair equipment, bus passes, taxi fares, van pool subsidies, child care, marketing brochures, employee newsletters, meals, kitchen equipment, health facilities, and more. All of these things cost money, and affect the ability to focus on their core business of manufacturing products and competing in the global economy.

MCCV and CLFP are in the process of requesting data from member companies, but in the interim would like to provide these preliminary comments:

- The tables prepared by the District do not seem to account for all of the work site labor costs. The employer will likely have to pay their workers for the time spent completing surveys, attending ride share meetings, coordinating transportation options, participating in promotional events. If there are 500 eligible employees at the site, the costs would be significant.
- The District did not factor the cost of providing an External or Internal Guaranteed Ride Home Service into its economic analysis. In some rural communities there are no taxi services or rental car agencies, so the only option will be the use of an employer-owned vehicle. This will generate additional costs and may also create some logistics and liability issues.

¹¹ Staff Report, September 14 2009, page A-13

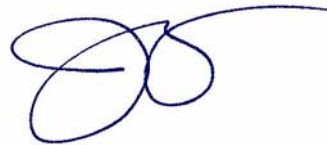
- MCCV and CLFP believe that the District underestimates the time and effort required by management to organize and market their program and report results. The task will be especially challenging for employers with a number of seasonal employees, multiple work shifts and production lines, and a mix of exempt and non-exempt employees. In some cases, firms may have to alter their employee attendance forms and computer payroll systems to accommodate the changes.

Recommendations

CLFP and MCCV believe that a number of important economic, legal, and logistics issues regarding the rule need to be addressed and that the District should refine its emissions reduction estimates. If the revised emissions reductions do not appear to be substantial or cost-effective, then further revisions, even beyond that which we have proposed in this letter, may be warranted. CLFP and MCCV look forward to working with the District to address these and other concerns with the rule. ***We would like to meet with District staff in October to further discuss the difficulties our members face in implementing the rule as currently drafted, as well as our proposed alternatives.*** We will be contacting you to discuss potential dates for that meeting.



Rob Neenan
California League of Food Processors
Valley



Jan Ennenga
Manufacturers Council of the Central