

**Geoff Tichenor's Testimony on HB 2396 Before the Oregon State Legislature, House
Committee on Climate, Energy & Environment
Wednesday, February 15th, 2023 at 3:00 pm**

Madame Chair, and Members of the Committee. Thank you for this opportunity to testify, in opposition, to HB 2396 and the -1 amendment.

My name is Geoff Tichenor. I am a partner with Stoel Rives law firm in Portland. I focus on air quality regulatory and permitting work. I am also a former adjunct professor at L&C Law School, where I taught the federal Clean Air Act (CAA).

As proposed, HB 2396 would require the Oregon Environmental Quality Commission (EQC) to adopt, by rule, a massive new regulatory program. This program would “control” air emissions associated with constructing and operating “indirect sources,” as defined under the federal CAA.

The CAA defines that term extremely broadly.

Simply put, the term indirect source means the places where we go by car or truck, including: fire and police stations, courts, hospitals, schools, stadiums, shopping centers, grocery stores, libraries, gyms, pools, affordable housing developments, warehouses, and ports.

So, we are talking today about regulating places, with limited exception, where all of us go to live our lives. We're talking about making the places we go responsible for emissions from the vehicles we use to get there.

In 2020, the Oregon Environmental Quality Commission considered a petition to conduct the very sort of rulemaking that HB 2396, as amended, would require. At the recommendation of the Oregon Department of Environmental Quality, the EQC voted unanimously to deny the petition.

On behalf of Associated General Contractors and its members, I'd like to share three observations that I hope will cause the Committee to take no further action on HB 2396, as amended.

First, the Oregon DEQ, EQC and the Legislature already have worked together to make Oregon a national leader in reducing transportation (gasoline and diesel) emissions.

- Other significant regulatory measures are already in place that will dramatically reduce vehicle emissions, including, to name just a few:
 - the Advanced Clean Car II rules, adopted by EQC in December 2022, which DEQ heralded as central to its efforts to reduce vehicle-related emissions statewide. Through the rules, Oregon adopted California's latest vehicle emission standards for light-duty vehicles and trucks. The standards include a Zero Emission Vehicle Program, requiring manufacturers of cars, SUVs and light-duty trucks to deliver 100% new zero (emission battery electric and plug in hybrid) vehicles by 2035. The standards also include a Low Emission Vehicle Program, setting strict tailpipe emission standards on gasoline and diesel vehicles sold in-state.
 - HB 2007 (passed in 2019 and heralded as among the toughest pieces of diesel legislation in the nation), which prohibits registration and titling old diesel engines in medium- and heavy-duty trucks;
 - the Clean Fuels Program, which regulates and, over time, reduces the carbon intensity of Oregon's transportation fuels, to achieve a 37% reduction by 2035; and
 - the Climate Protection Program, which regulates and sets a declining cap on greenhouse gas emissions from fossil fuels used throughout Oregon, including diesel and gasoline used in transportation, toward achieving a 90% reduction in statewide GHG emissions by 2050 (as against average emissions from 2017 to 2019).
- When, in 2020, DEQ asked the EQC to deny the indirect source rulemaking petition, DEQ explained more time is needed to assess the transportation-emissions control regulatory measures already being implemented in Oregon. The same is even more true today.

Second, there is legal risk in directing the EQC to adopt rules to, and I am quoting from the bill, “control the aggregate emissions from on-road vehicles and nonroad vehicles and engines associated with indirect sources.”

- Generally, EPA (and with EPA’s permission California) are responsible for regulating emissions from motor vehicles and other mobile sources like nonroad engines (construction equipment).
- States meanwhile have primary task of regulating stationary sources.
- Indirect sources fall somewhere in the middle – essentially a stationary source that may attract mobile sources.
- Although the federal CAA provides states some authority to regulate indirect source emissions, that authority is limited.
- What the CAA does not do is to authorize states (with limited exception for California) to directly regulate mobile sources of air pollution. States cannot set standards and requirements relating to the control of emissions from mobile sources (e.g., motor vehicles and nonroad engines).
- The CAA also authorize states other than California to adopt California’s standards in lieu of federal requirements. That is exactly what EQC did through the Advanced Clean Car II rules.
- Yet, proposed HB 2396 is plainly worded to require EQC to adopt rules to regulate and set standards to “control” emissions from mobile sources. And the -1 amendment specifically sets emission limits applicable to a wide array of construction nonroad vehicles, engines and equipment and for all manner of diesel-powered motor vehicles and engines.
- Accordingly, HB 2396, as amended, is in fundamental legal tension with the federal CAA.
- As HB 2396, as amended, would authorize EQC to set emission standards for on-road or nonroad vehicles, it is preempted by federal law. See 42 USC 7543(a) and (e).

Finally, HB 2396, as amended, isn’t a targeted or fair solution to any remaining problem resulting from vehicle exhaust.

- The bill’s broad directive would give EQC authority to regulate and require DEQ to issue permits to all variety of places, really most sorts of construction sites and many types of place accessible by diesel truck. It is not limited to warehouses or distribution centers. And it is not limited to the Portland metropolitan area.
 - In its staff report to the EQC on the rulemaking petition, DEQ advised EQC that more than 10,000 indirect sources with at least 20 employees existed in the state’s metropolitan areas alone.
 - Yet, unlike the petition DEQ was evaluating, this bill doesn’t apply in only state metro areas. So, this bill is even broader than the rulemaking petition before it.
 - The regulatory uncertainty inherent in this bill will exacerbate a problem identified in August 2022 by Governor Brown’s Semiconductor Competitiveness Taskforce. That Taskforce found that DEQ’s rules diminish Oregon’s competitiveness, concluding that:

“Historically, DEQ’s rules have been understandable and reasonable. However, new programs have made them complex and challenging. DEQ engages in periodic rule updates which upends the process for businesses who feel like they understand and can comply with current rules but rule updates provide uncertainty that they cannot easily adjust to. These also seem to come at random times.”
- And it’s not clear DEQ has the resources to implement whatever rules the EQC would adopt in response to HB 2396, as amended.
 - In its report to the EQC recommending denial of the indirect source rulemaking petition, DEQ detailed how it lacks the staff and resources to evaluate or permit all of the myriad places that would be swept up in indirect source rulemaking.

- DEQ's staffing levels in the air quality permitting program have been declining for years, making it difficult for the agency to timely issue and renew the air permits already required under its rules.
- Is now really the time to push a new regulatory program onto the agency, that one that it specifically declined to pursue?

In sum, HB 2396, as amended, presents a regulatory approach that, just a couple years back, the EQC found was not warranted in Oregon. Before moving forward, I ask the Committee to consider two questions:

- Is HB 2396 fair? Is it fair to make indirect sources widely responsible for others' use of cars, trucks and other fuel-burning equipment. What negative impacts might such a program carry?
- Is HB 2396 needed? DEQ previously advised EQC to wait on indirect source regulations until other the measures evolve and more information was available to assess the need for further action.

In my view, DEQ's advice applies equally today.

Before pursuing new legislation to address diesel emissions on the backs of places ill-suited to address those emissions, it would be better to wait until the regulatory measures already in place mature and until, if you deem it necessary, DEQ completes a study of those measures for this Committee and the EQC to evaluate.

Thank you for this opportunity to testify.