

Air Quality Bulletin

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New Smog Fees Target New Developments

by Alene Taber, Esq. & Kathryn Casey, Esq.

One of the largest air districts in California has decided to target new development as a means of reducing emissions from vehicles. The San Joaquin Valley Air Pollution Control District Governing Board adopted the District's proposed "indirect source rules" at a public hearing on December 15, 2005. The Rules (Rule 9510: Indirect Source Review and Rule 3180: Mitigation Fee) take effect on March 1, 2006, and will require developers to assess how much long-term air pollution their projects will indirectly cause and, in most cases, take steps to reduce, it as well as pay fees to the District. The District estimates that the new fees could add \$1,772 to the cost of each new residential unit. The District expects to collect about \$103 million dollars between 2006 and 2008 from developers under these Rules. The District's jurisdiction encompasses the counties of Fresno, Kings, Madera, Merced, Stanislaus, Tulare, and a portion of Kern.

What Are "Indirect Sources"?

The Rules target so-called "indirect sources" of air pollution -- land uses that do not pollute in and of themselves, but that are considered by regulators to attract or generate motor vehicle trips, and create some pollution-causing activities (e.g., landscape maintenance, fuel combustion in the use of consumer products such as barbecues and lawn mowers, and construction-generated emissions). Air agencies like the District are not permitted to directly regulate vehicle emissions. Instead, the District is tackling vehicle emissions indirectly through the Rules.

The goal of the Rules is to cut new emissions in the District by 4.1 tons per day of NO_x and 5.2 tons per day of PM₁₀ (particulate matter smaller than 10 microns) to assist the District in reaching air quality attainment standards. Over the next 10 years, the Rules are expected to reduce operational emissions (area and mobile sources) for NO_x by 33 percent and for PM₁₀ by 50 percent, and construction exhaust emissions for NO_x by 20 percent and for PM₁₀ by 45 percent (compared to statewide average emission rates).

What Types of Projects Must Comply?

Specifically, Rule 9510, as currently proposed, would apply to developments that meet any of these criteria:

- 50 or more residential units;
- 2,000 square feet or more of commercial space;
- 9,000 square feet or more of educational space;
- 10,000 square feet or more of government space;
- 20,000 square feet or more of medical or recreational space;
- 50,000 square feet or more of general office space; or,
- 100,000 square feet or more of heavy industrial space.

Transportation and transit projects are only subject to the Rules' construction emission reduction requirements. Reconstruction of a development rebuilt to the same use and intensity, or projects estimated to cause less than two tons of pollution per year, are exempted.

Otherwise, developers are required to submit an Air Impact Assessment application no later than applying for a final discretionary approval with the local government.

What Must Developers Do to Comply with the Proposed Rules?

Under the Rules, developers will be required to submit an extensive Air Impact Assessment application to the District, along with an application fee. The project proponent must estimate the development's emissions using a District-approved model and complete a check list identifying design and planning features that will be employed to reduce emissions. Local municipalities have typically been the governmental agencies overseeing site planning and design. Now, the District will be involved as well. Under the District's Rules, developments must be designed to reduce emissions to a specified level by employing certain design and site planning features such as providing bicycle parking and day care facilities, locating the development near transit, and charging for parking. Project proponents that choose to reduce emissions through these measures must agree to on-site monitoring and reporting.

If design measures cannot accomplish all of the required reductions, project proponents are then required to pay fees to the District for the pollution that cannot be mitigated. The District estimates that new residential development fees will be as follows:

\$784.12 per unit in 2006

\$1,268.09 per unit in 2007

\$1,772 per unit in 2008

Fees would be levied against commercial and industrial development as well. For example, the District estimates that a 20,000 square foot convenience shopping center will pay a fee of about \$24,524.94 in 2006 and the fee increases to \$52,971.24 in 2008. The District estimates that a 39-acre industrial park would pay fees in the about of \$143,797.05 in 2006, increasing to \$309,965 in 2008. The District will use the fees to achieve emission reductions elsewhere. Currently, the Rules do not appear to allow project proponents to directly contract with a source to achieve the substitute emission reductions.

The District must approve the application prior to or concurrent with the municipality permit review process. This could impact local agency approval of projects if they have to wait until the District concludes its process. Also, there are no assurances yet that this analysis and mitigation will suffice for California Environmental Quality Act ("CEQA") compliance. It is uncertain whether paying the pollution fees will be considered adequate mitigation under CEQA because the District's program lacks certainty regarding when and where the District will achieve the substitute emission reductions.

What Happens to the Money the District Collects?

The District states that it will allocate the money it collects under the Rules to efforts to reduce pollution elsewhere by funding other public and private projects. The District expects that it will use the money to pave city and county roads, modernize public municipal vehicle fleets, purchase and retire high polluting vehicles, pay for new school buses, and construct new agricultural pumps.

The District will assess the effectiveness of its Rules by holding at least one series of public workshops, and then resubmit the Rules to the District's Governing

Board for reevaluation and reauthorization no later than December 31, 2010. In the interim, the District will prepare an annual report that will be available to the public accounting for the District's expenditures of offsite fee funds. The report must include the total amount of fees collected, total monies spent, total monies remaining, any refunds distributed, a list of all projects funded, total emissions reductions realized, and the overall cost-effectiveness for the projects funded.

More Information About the Rules are Available

The District held "ISR Program Implementation Workshops" earlier this month to discuss the Rules' requirements and the application process with affected industries and consultants in anticipation of the March 1, 2006, effective date. The District's staff will be holding additional workshops and training sessions over the next several months on topics related to the Indirect Source Rule Program. For additional information on what developers must do to comply with the Rules, including the application process and timeline for District review, see <http://www.valleyair.org/ISR/ISR.htm>.

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About the Firm:

Jackson DeMarco Tidus Peckenpaugh has offices in Irvine and Westlake Village and is recognized as a preeminent California full service law firm, offering high quality, innovative, responsive and cost-effective solutions to meet client needs. The Firm has represented developers and homebuilders throughout the United States and abroad on a variety of matters relating to land use, common interest subdivision, real estate and litigation. The Firm's land use and environmental attorneys represent clients before governmental agencies responsible for a wide variety of land use and environmental issues including air quality, endangered species, wetlands, water courses, water rights, and other regulatory programs.

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