

Air Quality Bulletin

Winter 2005

Air Pollution Control District To Consider “Indirect Source” Rules Affecting Developers by Alene Taber, Esq. & Kathryn Casey, Esq.

The San Joaquin Valley Air Pollution Control District Governing Board will consider the District’s proposed indirect source rules at a public hearing on December 15, 2005. If adopted, the Rules (Rule 9510: Indirect Source Review and Rule 3180: Mitigation Fee) 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 also intends to submit the Rules to Cal EPA for incorporation as part of the California State Implementation Plan (SIP). If the federal government approves the Rules, they will be “federally enforceable.”

What Are “Indirect Sources”?

The proposed 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). The goal of the new Rules is to cut new emissions in the District by 4.1 tons per day of NOx and 5.2 tons per day of particulate matter smaller than 10 microns (PM10).

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;
- 10,000 square feet or more of government space;
- 20,000 square feet or more of medical space;
- 25,000 square feet or more of industrial or educational space; or,
- 50,000 square feet or more of general office space.

Transportation and transit projects would only be 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 2 tons of pollution per year, would be exempted. Otherwise, the developer would be required to submit an Air Impact Assessment (AIA) application no later than applying for a final discretionary approval with the local government.

What Must Developers Do to Comply with the Proposed Rules?

Developers subject to the Rules would be required to adopt measures to cut the projects’ projected pollution in half. Developers would be encouraged to reduce emissions through on-site mitigation, such as designing energy-efficient buildings; building near or providing bus stops; incorporating mass transit; or, designing compact, walker- or bicycle-friendly developments.

If design measures could not accomplish all of the required reductions, developers would have to pay fees to the District for the pollution that could not be mitigated. The fees currently in Rule 9510 start at \$4,650 for each excess ton of NOx (rising to \$7,100 in 2007 and \$9,350 in 2008 and beyond), and \$2,907 per ton of PM10 in 2006 (rising to \$5,594 in 2007 and \$9,011 in 2008 and beyond). The District states that it will use the money for efforts to reduce pollution *elsewhere* – to fund projects such as upgrading fleets to low-emission vehicles, e-mobility, bicycle infrastructure, public transportation subsidies, and a planned vehicle-scraping program. These fees also do not account for the application, evaluation, and processing fees that the developers would also be required to pay under the Rules.

What Are Some of the Key Issues Associated with the Proposed Rules?

Aside from the practical problems, the Rules pose numerous policy considerations, including:

- Requiring developers to pay for emissions from automobiles.
- Whether there is a sufficient nexus between the amount of the fee and the impact of the emissions, and whether the required fee is excessive.
- Whether there is a sufficient quantity of feasible mitigation measures to cut a project’s emissions in half.
- The Rules’ effect on housing affordability and the economy.
- The methodology for calculating the emissions associated with the project. Rule 9150 specifies the use of an APCO-approved model (to estimate NOx and PM10 emissions from potential land uses), which was not developed for this purpose.
- Whether the Rules trigger Propositions 13 and 218.
- Allowing developers, instead of the District, to obtain credit for reducing emissions off-site and using emission credits to off-set emissions.
- The District’s authority to charge emission fees and delay land use projects.
- Whether the Rules should be made federally enforceable, and a commitment made to the federal government to significantly reduce NOx and PM10.

Other Efforts to Regulate “Indirect Sources”

A similar move to regulate indirect sources in the South Coast Air Quality Management District in the 1990s created such intense opposition that the Legislature restricted the District’s ability to regulate indirect sources. For example, the legislation restricted the manner in which the (over)

District could adopt rules regulating indirect sources, prohibited certain regulations aimed at shopping centers and event centers, and restricted employer rideshare programs. However, an exception for the San Joaquin Valley Air Pollution Control District was written into the law (Senate Bill 709, chaptered September 22, 2003) allowing the District to recover its costs associated with indirect source programs. ■

About the Authors:



Alene M. Taber, Esq. concentrates her practice in air quality, environmental law, CEQA, land use approvals, and land use and environmental-related litigation.



Kathryn M. Casey, Esq. concentrates her practice in environmental law, CEQA and land use entitlements, water-related issues, and general and land use litigation matters.

Disclaimer:

This newsletter has been prepared by Jackson DeMarco Tidus Peckenpaugh and is intended for informational purposes ONLY. The information provided in this newsletter is provided only as general information, which may or may not reflect the most current legal developments. The opinions expressed in or through this newsletter are the opinions of the individual author and may not reflect the opinions of Jackson DeMarco Tidus Peckenpaugh or any individual attorney.

Transmission of the information contained in this newsletter is not intended to create, and receipt does not constitute an attorney-client relationship between you and Jackson DeMarco Tidus Peckenpaugh. This newsletter is not a substitute for legal advice from a qualified attorney licensed in the appropriate jurisdiction.

Jackson DeMarco Tidus Peckenpaugh is recognized as a preeminent full-service law firm, representing clients in key California industries. We have 70 attorneys in Irvine and Westlake Village to meet the legal needs of the business community.

Asset Management
Business & Corporate
Common Interest Subdivision
Employment
Environmental
Estate Planning & Probate
Immigration
Insurance Coverage
Intellectual Property
Land Use & Natural Resources
Litigation
Oil & Gas/Energy
Real Estate
Tax
Technology & Life Sciences



2030 Main Street, Suite 1200
Irvine, CA 92614
t 949.752.8585
f 949.752.0597

2815 Townsgate Road, Suite 200
Westlake Village, CA 91361
t 805.230.0023
f 805.230.0087

www.jdtplaw.com