



**San Joaquin Valley**  
AIR POLLUTION CONTROL DISTRICT



# DRAFT STAFF REPORT

## **RULE 9510 INDIRECT SOURCE REVIEW**

**MAY 18, 2017**

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# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

*Draft Staff Report for Proposed Amendments to Rule 9510*

May 18, 2017

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## SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

### DRAFT STAFF REPORT

#### **Amendments to Rule 9510 (Indirect Source Review)**

May 18, 2017

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#### **I. SUMMARY**

The San Joaquin Valley Air Pollution Control District (District) is proposing to amend District Rule 9510 (Indirect Source Review (ISR) Rule) to ensure that the rule applies consistently throughout the San Joaquin Valley (Valley). Currently the rule applies to an applicant of a development project when such project is subject to a discretionary approval from a public agency. However, the approval process for similar projects can vary between public agencies resulting in inconsistency in the applicability of the ISR rule across the Valley and a diminished ability to reduce project related emissions. In fact, while a development project may require a discretionary approval from one public agency, the same project proposed in a different geographic location could be subject to a ministerial approval from another public agency. Based on the District's experience implementing the ISR rule, the most significant impacts related to inconsistent rule applicability have historically been associated with large development projects. Therefore, the District is proposing to refine the rule to eliminate the source of the applicability inconsistency and thereby ensure that all large development projects are subject to the ISR rule.

In addition, consistent with the District's core value of bringing continuous improvement to all District activities, staff is taking this opportunity to enhance and clarify other aspects of the rule.

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## II. DESCRIPTION OF RULE 9510 (INDIRECT SOURCE REVIEW)

The San Joaquin Valley is expected to be one of the fastest growing regions in the state from 2010 to 2020. The Demographic Research Unit of the Department of Finance released its latest population growth projections in December 2014 and projects approximately 13% growth in the Valley's population during the 2010 to 2020 period. In contrast, the total population for the State of California is projected to increase by only 9% over the same period of time.

Population growth results in increased number of vehicle miles traveled (VMT), resulting in more emissions due to the combustion of vehicle fuels. Area source emissions from activities such as consumer product use, fuel combustion for heating and cooking, and landscape maintenance, also increase with population growth. The projected growth in "indirect source" emissions erodes the benefits of emission reductions achieved through the District's stationary source program and the state and federal mobile source controls.

The District has longstanding statutory authority to regulate indirect sources of air pollution. Pursuant to this authority, the District made a federally enforceable commitment to regulate indirect sources when it adopted its PM10 Attainment Plan in June 2003. Subsequently, the California State Legislature passed Senate Bill 709, Florez, in the fall of 2003, which Governor Gray Davis subsequently signed and codified into the Health and Safety Code in §40604. This additional legislation required the District to adopt, by regulation, a schedule of fees to be assessed on area wide or indirect sources of emissions that are regulated by the District.

Rule 9510 is a commitment in the PM10 and Ozone Attainment Demonstration Plans. The objective of the rule is to reduce emissions of nitrogen oxides (NOx) and particulate matter smaller than ten microns in aerodynamic diameter (PM10) associated with construction and operational activities of development projects occurring within the San Joaquin Valley.

The Indirect Source Review (ISR) rule, which went into effect March 1, 2006, requires developers of new residential, commercial and industrial projects to reduce smog-forming and particulate emissions generated by their projects. The ISR rule also applies to transportation and transit projects whose construction exhaust emissions will result in a total of two tons per year of NOx or PM10. The ISR rule seeks to reduce the growth in NOx and PM10 emissions associated with construction and operation of new development, transportation and transit projects in the San Joaquin Valley.

The ISR rule requires developers to reduce construction NOx and PM10 exhaust emissions by 20% and 45%, respectively, and reduce operational NOx and PM10 emissions by 33.3% and 50%, respectively, as compared to the unmitigated baseline. Developers can achieve the required reductions through any combination of District

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approved on-site emission reduction measures. When a developer cannot achieve the required reductions through on-site measures, off-site mitigation fees are imposed to mitigate the difference between the required emission reductions and the mitigations achieved on-site. Monies collected from this fee are used by the District to fund emission reduction projects in the San Joaquin Valley on behalf of the project.

The preferred options for complying with the ISR rule is for the project proponent to use clean construction fleets (cleaner than the State's average) and incorporate project design elements that result in on-site reduction in emissions associated with the operation of the development project. Since the adoption of the ISR rule, the District has seen a significant increase in the use of clean construction fleets, from 14% of the approved ISR Air Impact Assessment projects to 39% resulting in eliminating 1,227 tons of PM10 and NOx emissions from construction phases. For operational emissions, since the adoption of the ISR rule, the incorporation of "clean" design elements has resulted in the elimination of more than 10,000 tons of NOx and PM10 combined.

## III. DISCUSSION OF PROPOSED RULE AMENDMENTS

### A. Applicability

Currently the rule applies to a development project proponent seeking "final discretionary approval" action over the proposed project. However, as mentioned above, that which is considered to be subject to a discretionary approval can vary between public agencies in the Valley for the same type of project. For instance, a Site Plan Review approval for a development project could be considered to be discretionary by one public agency, while a similar Site Plan Review approval for an identical development project located in a different area may be considered ministerial by another public agency. Based on the District's experience implementing the ISR rule, the more significant impacts related to inconsistent applicability of the rule have historically been associated with large development projects.

To illustrate this difference in approval processes among public agencies in the Valley, consider a large 200,000 square foot office development project, which exceeds the ISR applicability threshold of 39,000 square feet. In a jurisdiction that concludes this large project is exempt from a discretionary approval process (in other words, the land-use agency determines it has no authority to approve or disapprove the project), Rule 9510 would not apply. In such a case, the mitigation expected under Rule 9510 would not occur, resulting in 20% to 50% higher unmitigated NOx and PM10 emissions contributing to the Valley's air quality issues, compared to the case where the land-use agency exercised discretion over the project's approval. Because there are multiple public agencies in the Valley, including eight counties, fifty-nine cities, and several other state or local regulatory

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agencies, each of which have land use and/or project approval authority, removing this inconsistency is critical to providing fair and equitable application of the rule. To ensure that development projects are addressed and mitigated equally and consistently throughout the Valley under Rule 9510, the District explored the following rule applicability options:

- Option 1: Applicability Triggered by Building Permit

The District considered changing the applicability mechanism to be simultaneous with a lead agency's issuance of a building permit since this requirement is applied consistently by all land use agencies.

In considering this option, it's important to note that land use decisions, such as preventing urban sprawl and encouraging mix-use development, and project designs reducing vehicle miles traveled have proven to be beneficial for air quality. Addressing land use and site design issues while a proposed project is still in the conceptual stage increases opportunities to incorporate project design features to minimize land use compatibility issues and air quality impacts. However, building permits tend to be the final step required before construction of a development can proceed. An applicability mechanism that is set earlier in the land use process provides a better opportunity for the project proponent to prepare and consider project design elements that can benefit air quality.

Generally, it would be too late for the project proponent to consider and incorporate project design elements that would contribute to reducing emissions from the development project if rule applicability decisions were simultaneous with the issuance of a building permit. Therefore, establishing an applicability trigger that is simultaneous with the issuance of a building permit would conflict with the overall ISR rule goal of reducing emissions from new development.

- Option 2: Applicability Triggered by First Public Agency Approval

The District also considered using the initial public agency approval (ministerial or discretionary) rather than the final discretionary approval. If selected, this option would remove the inconsistent use of discretionary approval as explained above. This option would also ensure that the ISR applicability determination of a development project is made as early as possible in the project's approval process, thus allowing the maximum time available for the project proponent to incorporate design elements to reduce project impact on air quality.

However, the District does not currently receive information regarding all approvals from public agency. Therefore this option would create a significant and costly burden on public agencies and the District to ensure that all

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approvals adopted by public agencies are communicated to the District for evaluation.

In addition, at the time a project is proposed for initial approval by a public agency, specific project design information necessary to perform the District Air Impact Assessment is typically not available. Therefore, District analyses performed at the time of the first public agency approval would be general in nature, and would require further assessment to incorporate project specific design elements once proposed by the applicant. These subsequent reassessments would result in unnecessary delays in finalizing the ISR AIA for the project.

- Option 3: Applicability Triggered by Non-discretionary Approval of Large Development Projects not Otherwise Subject to the Rule Under Section 2.1.

To ensure the applicability mechanism applies to all large development projects consistently throughout the Valley, the District considered adding a secondary rule applicability trigger for large development projects that have not been subjected to a discretionary approval. This secondary threshold would apply to large projects that had been considered non-discretionary projects by the local land-use agency, but were subject to a non-discretionary (ministerial) approval process. Such ministerial decisions would include any permitting or approval processes by such agencies, up to and including the issuance of building permits.

The current ISR applicability thresholds for development projects are based on an estimated projection of two tons of NO<sub>x</sub> or PM<sub>10</sub> project-related emissions. If the District were to establish a secondary applicability threshold for large development projects, it would be natural to consider projects that may have exceeded the District's threshold of significance under the California Environmental Quality Act (CEQA), for instance 10 tons per year for NO<sub>x</sub> emissions, to be "large development projects". Since the original ISR applicability thresholds are based on a projected emissions rate of two tons of NO<sub>x</sub>, a large project threshold can be established by multiplying the current rule applicability thresholds by five. Some readers of earlier versions of this staff report were misled by the language used in this section to believe that the new large project thresholds were targeted specifically at projects that have significant emissions under CEQA. However, this approach is used simply to establish the applicability thresholds for "large development project" for rule 9510. These proposed thresholds do not necessarily equate to the District's CEQA significance levels (i.e., 10 tons of emissions) due to changes in emissions from cars and trucks, and in emissions quantification models, since the original rule was adopted. Finally, the proposed changes do not replace the existing Small Project Analysis Levels (SPALs) which were developed

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specifically to assist applicants by streamlining CEQA processes, and which have been inserted into the District's Guideline for Assessing and Mitigating Air Quality Impacts (GAMAQI), nor do they replace the environmental impact quantification that is required by CEQA.

The proposed applicability thresholds for large development projects, established at five times the original two-ton thresholds, would be:

- 250 residential units;
- 10,000 square feet of commercial space;
- 125,000 square feet of light industrial space;
- 500,000 square feet of heavy industrial space;
- 100,000 square feet of medical office space;
- 195,000 square feet of general office space;
- 45,000 square feet of educational space;
- 50,000 square feet of government space;
- 100,000 square feet of recreational space; or
- 45,000 square feet of space not identified above

## Recommendation

Option 3 appears to be the most workable solution. It addresses the issue of development projects that are not subject to discretionary approvals and that have the potential to significantly impact the Valley's air quality, but without impacting the majority of projects that are already subject to Rule 9510. Each of the other options could cause significant confusion among land use agencies and developers, and would result in less opportunity to modify a proposal's design to provide on-site or would cause agencies, including the District, to expend considerable resources for little additional positive air quality impact.

To implement the proposed change in the applicability mechanism presented under Option 3, the following amendments will be required:

Applicability: The rule will include applicability thresholds for large development projects, as discussed under Option 3 above.

March 1, 2006 Exemption: When the rule first went into effect, projects that received a final discretionary approval prior to March 1, 2006, were exempt. An effective date has been added to Section 2.1 of the rule to maintain this exemption for development projects seeking to gain a final discretionary approval and to Section 2.3 for transportation or transit development projects. In addition, an effective date has been added to Section 2.2 for large development projects not otherwise subject to the rule under Section 2.1.

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Exemption for In-process Projects Currently Not Subject to the Rule: Projects that are not subject to the current rule, and have already received a building permit or other final construction approval from the land use agency prior to adoption of this rule amendment, will be exempt from the amended rule.

ISR Application Submittal Timing: Currently the rule requires that an applicant subject to this rule submit an Air Impact Assessment (AIA) application no later than applying for a final discretionary approval with the public agency. Since the proposed amendment will include large development projects seeking non-discretionary approval, the rule will be amended to require the developer of a large development project subject to this rule to submit an ISR application no later than applying for, or otherwise seeking, a public agency's approval for the development project.

ISR Application Submittal Transition Timing: For projects for which a non-discretionary approval is pending as of the date the amended rule becomes effective, the District also proposes to incorporate a transitional timing component. If the applicant for a large development project has not received a building permit prior to the adoption date of this rule amendment, the developer will be given 30 days after the rule amendment date to submit an ISR application to the District.

## B. Other Proposed Rule Amendments

In addition to updating the applicability mechanism, the District is taking this opportunity to enhance and clarify several other aspects of the rule.

### Clarifying "Development Project" Definition:

The current definition of "development project" is:

*Development Project: any project, or portion thereof, that is subject to a discretionary approval by a public agency, and will ultimately result in the construction of a new building, facility, or structure, or reconstruction of a building, facility, or structure for the purpose of increasing capacity or activity.*

With the proposed rule amendment to include large development projects subject to ministerial approval, the term "discretionary" will be removed from the definition in an effort to address non-discretionary approval without impacting the current rule applicability for those projects subject to a discretionary approval.

Also, this definition could be misinterpreted that a "construction of a new building, facility, or structure" must result in an increase "in capacity or activity" to be considered a development project subject to the rule. Therefore, this definition will be rearranged to clarify that the "purpose of increasing capacity or activity" only applies to the reconstruction of a new building, facility, or structure.

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## **Clarifying “Transit and Transportation Project” Definitions:**

Similarly to housing or commercial development projects, transportation and transit projects contribute to growth in the San Joaquin Valley and the related increase in emissions from motor vehicles. As such, transportation and transit projects can be referred to as development projects. Therefore, the District is proposing to revise the definitions of Transit project and Transportation project to include reference to “development” project.

## **Removing Reference to “URBEMIS”:**

The District previously used the URBEMIS model to assess project impact on air quality. However, the URBEMIS model has been superseded by a new approved model, CalEEMod. This new model utilizes more recent emission factors and data and has been used by the District for several years. CalEEMod is maintained by experts, and is better suited to assess project emissions.

Although the rule did not contain a mandate to use the URBEMIS model, the reference to “URBEMIS” is no longer relevant and has been removed from the rule.

## **Adding Seismic Safety to List of Exemptions:**

The current rule exempts reconstruction of development projects that have been damaged or destroyed and is rebuilt to essentially the same use and intensity. Based on several requests from project proponents, the District has determined that including a similar exemption for seismic safety is consistent with the original intent of the rule. Therefore, the list of exemptions for a reconstruction of a project has been expanded to include retrofits solely for seismic safety.

## **Removing \$50,000 Minimum Fee Deferral Qualifier and Down Payment:**

Currently, the rule allows projects with total off-site mitigation fees exceeding \$50,000 to qualify for a fee deferral schedule. Furthermore, the rule currently requires a minimum initial down payment of \$50,000 when a fee deferral schedule is proposed by the applicant. Based on District experience, in addition to the obvious financial burden on developers, this requirement has been very difficult for the District to implement and track. Furthermore, the District’s direct enforcement authority provides adequate mechanisms to pursue developers who do not meet their post-application financial obligations under this rule. Therefore, to alleviate this financial burden, especially for smaller project developers, the District is proposing to remove this unnecessary \$50,000 minimum fee deferral qualifier and initial \$50,000 down payment requirement.

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## **Payment of Applicable Fees Required Prior to Generating Any Emissions:**

As clearly presented in the original rule adoption staff report, the payment of applicable fees must occur prior to generating any emissions associated with the project. To avoid any potential confusion, and assist project developers to comply with the rule requirements, the District is proposing to amend the rule to more clearly specify that the payment of applicable fees is required prior to generating any emissions associated with the project or within 60 days of invoice issuance, whichever occurs first.

## **Clarifying that Off-Site Fee Rate is Based on Fee Rate Applicable at the Time of Invoice Issuance:**

The rule currently requires that the off-site fee rate be based on the year the payment is made. However, rate specified on a District invoice is necessarily the rate in place at the time of issuance. Also, because invoices are issued with a 60-day term of payment, the rate could change prior to payment being made. In recognition of the unfairness to developers that this inconsistency causes, the District is proposing to amend the rule to clarify that the off-site fee rate is based on the fee in effect at the time of invoice issuance.

## **Requirement to Report a Change in Ownership of a Project:**

It is common for an applicant of a project to sell a project, or a portion thereof, to another applicant or developer. Currently, either the seller or the buyer contacts the District to proceed with changes to the project. However, this process is not clearly identified in the rule. Therefore, the District is proposing to clearly identify the process involved in a change of ownership of a development project.

The rule is being amended to require that, if a project, or portion thereof, changes ownership, the seller must inform the District of the change in ownership by completing a "Change of Developer" form with the District prior to the buyer starting activities generating any ground disturbance activities associated with the project or portion of the project. Both Seller and Buyer must sign the form.

Until the seller of the development project releases his rights to the development through this change of ownership process, the seller retains the responsibility for compliance with the rule.

## **Deleting the Reference to the Effective Date**

The effective date in Section 11.0 will be deleted. The effective date of the rule amendment shall be the amended date identified in the rule title.

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## IV. PROPOSED AMENDMENTS TO RULE 9510

The following discussion details the pertinent amendments to Rule 9510. Corrections to typographical errors and other insubstantial changes are not itemized here, but are captured in strikeout and underline in the attached draft revised rule.

### **Refining the Applicability Mechanism**

- The following provisions have been added to maintain the exemption for projects that pre-dates the original applicability of the rule:

*2.1 Effective on and after March 1, 2006, ~~T~~his rule shall apply to any applicant that seeks to gain a final discretionary approval for a development project, or any portion thereof, which upon full build-out will include any one of the following:...*

*2.24 Effective on and after March 1, 2006, ~~T~~his rule shall apply to any transportation or transit development project where construction exhaust emissions equal or exceed two (2.0) tons of NOx or two (2.0) tons of PM10.*

- To address the rule applicability issues discussed above for large development projects not subject to a discretionary approval, a new Section 2.2 has been proposed.

In response to comments received during the rule amendment process and to avoid confusion regarding the timing of the applicability of the rule to non-discretionary projects, an effective date has been added to Section 2.2. After receiving additional comments, the District revised the proposed rule language to remove any ambiguity regarding the District's intent that development projects that received final discretionary approval prior to March 1, 2006, remain exempt from the rule. The amendment further clarifies that, unless a development project received a discretionary approval and equals or exceeds the applicability thresholds as identified under rule Section 2.1, those development projects that received non-discretionary approval prior to the rule amendment date are not subject to the rule. This applicability "exemption" applies even in situations where subsequent non-discretionary approvals are sought after the rule amendment date.

In addition, the District has further clarified that the rule does not apply to development projects that have received a vested right to develop prior to the rule amendment date. For the purposes of this rule, a vested right to develop a project consists of a contract, tentative map approval, or other form of approval received from a governmental agency, which authorizes a guaranteed legal right to proceed with the development project, provided any such approval was not a discretionary decision. A definition of vested right to develop has also been added to the

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definition section of the rule.

The proposed Section 2.2 and the proposed applicability “exemption” as new Section 2.3 are as follows:

2.2 Effective on and after (rule amendment date), except as specified in Section 2.3, this rule shall apply to any applicant that seeks to gain approval from a public agency for a large development project, which upon full build-out will include any one of the following:

2.2.1 250 residential units;

2.2.2 10,000 square feet of commercial space;

2.2.3 125,000 square feet of light industrial space;

2.2.4 500,000 square feet of heavy industrial space;

2.2.5 100,000 square feet of medical office space;

2.2.6 195,000 square feet of general office space;

2.2.7 45,000 square feet of educational space;

2.2.8 50,000 square feet of government space;

2.2.9 100,000 square feet of recreational space; or

2.2.10 45,000 square feet of space not identified above.

2.3 Section 2.2 shall not apply if any of the following are true:

2.3.1 This rule applies pursuant to Section 2.1;

2.3.2 Final discretionary approval for the development project has been received prior to March 1, 2006; or

2.3.3 An approval that is not discretionary, including but not limited to a building permit or other Vested Right to Develop, has been received for the development project from a public agency prior to (rule amendment date).

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- To be consistent with the proposed changes related to the applicability mechanism of the rule, Section 2.3 (now proposed Section 2.5) is being amended to read as follows:

## 2.35 *Projects on Contiguous or Adjacent Property*

2.35.1 *Residential projects with contiguous or adjacent property under common ownership of a single entity in whole or in part, that is designated and zoned for the same development density and land use, regardless of the number of tract maps, and has the capability to accommodate more than fifty (50) residential units when determining applicability of the rule under Section 2.1, or more than 250 residential units when determining applicability of the rule under Section 2.2, are subject to this rule.*

2.35.2 *Nonresidential projects with contiguous or adjacent property under common ownership of a single entity in whole or in part, that is designated and zoned for the same development density and land use, and has the capability to accommodate development projects emitting more than two (2.0) tons per year of operational NOx or PM10 when determining applicability of the rule under Section 2.1, or more than ten (10.0) tons per year of operational NOx or PM10 when determining applicability of the rule under Section 2.2, are subject to this rule. Single parcels where the individual building pads are to be developed in phases must base emissions on the potential development of all pads when determining the applicability of this rule.*

- As discussed above, the District is proposing to add a definition for “Vested Right to Develop”:

3.36. *Vested Right to Develop: for the purposes of this rule, a contract, tentative map approval, or other form of approval received from a governmental agency, which authorizes a guaranteed legal right to proceed with the Development Project, provided any such approval was not a discretionary decision.*

- To be consistent with the proposed changes related to the applicability mechanism, the submission of an AIA is revised to address the proposed new section 2.2. In addition, for projects with a pending non-discretionary approval at the date of the amended rule becomes effective, the District also proposes to incorporate the transitional 30-day application due-date timing discussed above:

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## 5.0 Application Requirements

Any applicant subject to this rule shall submit an Air Impact Assessment (AIA) application no later than applying for a final discretionary approval with the public agency. ~~An applicant for a project for which a discretionary approval is pending at the date of rule effectiveness, shall also submit an AIA application by 30 days after the rule effectiveness date.~~ Nothing in this rule shall preclude an applicant from submitting an AIA application prior to filing an application for a final discretionary approval with the public agency. It is preferable for the applicant to submit an AIA application as early as possible in the process for that final discretionary approval.

An applicant for a large development project subject to this rule under Section 2.2 shall submit an AIA application no later than applying for, or otherwise seeking to gain an approval from a public agency for the project. An applicant for a large development project which has not received a building permit by the rule amendment date shall submit an AIA application within 30 days after the rule amendment date.

### **Clarifying “Development Project” Definition:**

As discussed above, the proposed amended section reads as follows:

- 3.13 *Development Project: any project, or portion thereof, that is subject to an ~~discretionary approval~~ by a public agency, and will ultimately result in:*
- *the construction of a new building, facility, or structure; or*
  - *the reconstruction of a building, facility, or structure for the purpose of increasing capacity or activity.*

As discussed above, the definitions for “Transit” and “Transportation Projects” were amended to include the term “development”. The proposed new definitions read as follows:

- 3.33 *Transit Development Project: any project solely intended to create a passenger transportation service, local, metropolitan or regional in scope that is available to any person who pays a prescribed fare. Examples of transit development projects include: ~~T~~ransportation by bus, rail, or other conveyance, either publicly or privately owned, which is provided to the public or specialty service on a regular or continuing basis. Also known as “mass transit,” “mass transportation,” or “public transportation.”*
- 3.34 *Transportation Development Projects: any project solely intended whose ~~sole purpose is~~ to create a new paved surface that is used for the transportation of motor vehicles, or any structural support thereof. Examples of transportation development projects include: streets, highways and any*

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*related ramps, freeways and any related ramps, and bridges. This does not include development projects where traffic surfaces are a portion of the project, but not the main land-use.*

## **Removing Reference to “URBEMIS”:**

Since URBEMIS model is no longer relevant, as discussed above, PM10 reference to “URBEMIS” and its definition have been removed as follows:

~~3.35 URBEMIS: a computer model that is owned and modified by the local air pollution control districts and air quality management districts in the State of California. URBEMIS estimates construction, area source and operational emissions of NOx and PM10 from potential land uses, using the most recent approved version of relevant ARB emissions models and emission factors and/or District specific emission factors; and estimates emissions reductions. The model has the capacity for changes to defaults when new or project specific information is known.~~

## **Adding Seismic Safety to Reconstruction Exemptions List:**

The exemptions list for a reconstruction project has been expanded to include retrofits solely for seismic safety.

*4.4.1 Reconstruction of any development project that is damaged or destroyed, or is retrofitted solely for seismic safety, and is rebuilt to essentially the same use and intensity.*

## **Removing \$50,000 Minimum Fee Deferral Qualifier and Down Payment:**

As discussed above, the District is proposing to remove the unnecessary \$50,000 minimum fee deferral qualifier and initial \$50,000 down payment requirement.

*5.5 Off-Site Fee Deferral Schedule (FDS): The District shall provide a standardized Fee Deferral Schedule form. ~~An applicant may propose a FDS with the District if the total Off-Site Fee exceeds \$50,000.~~ The payment schedule must provide assurance that reductions from off-site emission reduction projects can be obtained reasonably contemporaneous with emissions increases associated with the project and shall, at minimum, include the following:*  
[...]

~~5.5.7 Off-Site Fee down payment, to be not less than \$50,000;~~

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## **Payment of Applicable Fees Required Prior to Generating Any Emissions:**

As discussed above, the District is proposing to clarify requirements related to timing of payment of applicable fees:

- 7.3 *The applicant shall pay the Off-Site Fees in full by the invoice due date or prior to generating emissions associated with the project or any phase thereof, whichever occurs first. ~~within sixty (60) calendar days after the AIA application is approved or in accordance to the schedule contained in the APCO approved FDS.~~*
- 8.5 *Off-Site Fee: After the APCO approves the AIA application and its contents; the APCO shall provide the applicant with an estimate for the projected off-site fees, if applicable. The applicant shall pay the off-site fee ~~within 60 days, unless a FDS has been approved by the District in accordance with Section 7.3.~~*

## **Clarifying that Off-Site Fee Rate is Based on Fee Rate Applicable at the Time of Invoice Issuance:**

As discussed above, the District is proposing to clarify requirements related to applicability of off-site fees:

### 7.1.1.1 NOx Emissions

*CNR = Cost of NOx Reductions identified in Section 7.2.1 below, in dollars per ton. ~~For projects with an approved FDS, the fees shall be based on the year each payment is made. The cost of emissions reductions, in dollars per ton, shall be based on the applicable rate at the time the invoice is issued.~~*

### 7.1.1.2 PM10 Emissions

*CPR = Cost of PM10 Reductions identified in Section 7.2.2 below, in dollars per ton. ~~For projects with an approved FDS, the cost of reductions shall be based on the year each payment is made. The cost of emissions reductions, in dollars per ton, shall be based on the applicable rate at the time the invoice is issued.~~*

### 7.1.2.1 NOx Emissions

*CNR = Cost of NOx Reductions identified in Section 7.2.1 below, in dollars per ton. ~~For projects with an approved FDS, the cost of reductions shall be based on the year each payment is made. The cost of emissions reductions, in dollars per ton, shall be based on the applicable rate at the time the invoice is issued.~~*

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## 7.1.2.2 PM10 Emissions

*CPR = Cost of PM10 Reductions identified in Section 7.2.2 below, in dollars per ton. For projects with an approved FDS, the fees shall be based on the year each payment is made. The cost of emissions reductions, in dollars per ton, shall be based on the applicable rate at the time the invoice is issued.*

## **Requirement for a Change in Ownership of a Project:**

As discussed above, the District is proposing to clarify the process involved in reporting to the District a change of ownership of a development project:

*9.1.3 If a project, or portion thereof, changes ownership, the seller shall inform the District of the change in ownership by filing a "Change of Developer" form with the District prior to the buyer generating emissions associated with the project.*

## **Removing Section 11.0 the Effective Date**

The effective date in Section 11.0 will no longer be necessary and will be deleted:

~~*11.0 Effective date of this rule  
The provisions of this rule shall become effective on March 1, 2006.*~~

## **V. RULE AMENDMENT PROCESS**

### **A. Public Workshop**

District staff hosted a public workshop on April 26, 2016, and the draft proposed amendments to the rule were presented at the public workshop in the form of a power point presentation. The focus of the public workshop was to present the proposed amendments to the rule and to solicit public feedback. At the public workshop District staff presented the objectives of the rule-amending project, explained the District's rule development process for this project, solicited feedback from affected stakeholders, and informed all interested parties of the comment period and project milestones. The public workshop was held via video teleconferencing in all three District offices and was also livestreamed using the webcast.

The Draft Staff Report and Draft Rule were made available on the District's website prior to the public workshop, and a four week comment period commenced on April 26, 2016, and ended on May 24, 2016, following the public workshop.

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Comments received during and subsequent to this public workshop are addressed in Appendix A of this staff report. The District received additional comments after the May 24, 2016 deadline and those comments are addressed in Appendix B of this staff report. The District hosted a second workshop on January 17, 2017, at 1:30 PM. The workshop was held in the District's Fresno office, and was video-conferenced to the District's offices in Modesto and Bakersfield, also livestreamed using the District's webcast. The public provided comments on the proposed rule amendments. Those comments are addressed in Appendix C of this staff report.

The District is hosting a third workshop on May 18, 2017 at 2:30 PM. The workshop will be held in the District's Fresno office, and will be video-conferenced to the District's offices in Modesto and Bakersfield, and also livestreamed using the District's webcast. Comments received by June 1, 2017, will be addressed in the final staff report that will be presented with the proposed rule for the Governing Board's consideration.

## **B. Public Hearing**

In accordance with California Health and Safety Code (CH&SC) Section 40725, the proposed amendments to District Rule 9510 and final draft staff report will be publicly noticed and made available on the District's website prior to the Governing Board public hearing to consider adoption of the proposed rule amendments.

## **VI. COST EFFECTIVENESS AND SOCIOECONOMIC IMPACT ANALYSES**

Pursuant to CH&SC Section 40920.6(a), the District is required to analyze the cost effectiveness of new rules or rule amendments. Additionally, state law (CH&SC § 40728.5(a)) requires that "whenever a District intends to propose the adoption, amendment, or repeal of a rule or regulation that will significantly affect air quality or emissions limitations, that agency shall, to the extent data is available, perform an assessment of the socioeconomic impacts of the adoption, amendment, or repeal of the rule or regulation. The provision in the current District ISR Rule providing for exemption of non-discretionary projects was not intended to be used as a means to circumvent rule applicability by bypassing normal CEQA obligations to fully disclose a project's environmental impacts to the public. The proposed rule amendment is designed to remove this circumvention path.

The District has also included a socioeconomic impact analysis for the rule (Appendix D). As demonstrated in Appendix D, since the proposed amendments do not change the original intent of the rule with respect to applicability, as that intent was explained and documented in the original rule development process, the proposed changes do not result in new costs or socioeconomic effects as compared to those assessed at the time the rule was adopted. As such, the original cost effectiveness and socioeconomic

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analyses remain relevant and applicable to the proposed amendments. A review of the actual economic impacts of the rule, as implemented, is also captured in Appendix D, demonstrating that the actual costs are below those projected in 2004 and confirming the conservative nature of the original assessment. Therefore, the conclusion of the original socioeconomic impact analysis, specifically that the rule would not have a significant impact on the land development industry, remains relevant and accurate today.

## VII. RULE CONSISTENCY ANALYSIS

Pursuant to CH&SC Section 40727.2 (g) a rule consistency analysis of the draft rule is not required, because the draft rule does not strengthen emission limits or impose more stringent monitoring, reporting, or recordkeeping requirements.

## VIII. ENVIRONMENTAL ASSESSMENT

California Environmental Quality Act (CEQA) Guidelines §15308 (Actions by Regulatory Agencies for Protection of the Environment), provides a categorical exemption for *“actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.”*

This amendment to Rule 9510 is an action taken by a regulatory agency, the San Joaquin Valley Air District, as authorized by state law (see section II of this staff report), to assure the maintenance, restoration, enhancement, or protection of air quality in the San Joaquin Valley where the regulatory process involves procedures for protection of air quality. No construction activities or relaxation of standards are included in this project. Therefore, the rule amendment is exempt from CEQA.

In addition, according to Section 15061 (b)(3) of the CEQA Guidelines, a project is exempt from CEQA if, *“(t)he activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.”*

The District investigated the possible environmental impacts of Rule 9510 prior to the 2005 adoption of the rule, and prepared a Negative Declaration which concluded that no significant impacts could be anticipated due to the adoption of the rule. The amendments proposed in the attached proposed rule do not involve any new

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requirements. They merely expand the existing rule requirements to a small subset of projects that have potentially taken advantage of an unintended inconsistency in application of the rule in a few jurisdictions in the Valley. It should be noted that the proposed amendments to District Rule 9510 do not change the original intent of the rule, as that intent was explained and documented in the original rule development process and the associated CEQA documentation.

The District has reviewed the 2005 Negative Declaration and determined that it remains relevant today, specifically that the proposed rule amendments can have no significant impacts on the environment. (See *Friends of the College of San Mateo Gardens v. San Mateo* (2016) 1 Cal.4<sup>th</sup> 937.) Based on this determination, and based on the lack of evidence to the contrary, the District has concluded that the rule amendments will not have any significant adverse effects on the environment. As such, the District finds that the rule amendment project is not subject to CEQA.

Therefore pursuant to Section 15062 of the CEQA Guidelines, Staff will file a Notice of Exemption upon Governing Board approval of amendments to Rule 9510.

## **APPENDICES**

**Appendix A:** Summary of Significant Comments and Responses for Amendments to Rule 9510 - Public Workshop (April 26, 2016)

**Appendix B:** Summary of Significant Comments and Responses for Amendments to Rule 9510 - Public Comment Period (August 16 – September 15, 2016)

**Appendix C:** Summary of Significant Comments and Responses for Amendments to Rule 9510 - Public Workshop (January 17, 2017)

**Appendix D:** Socioeconomic Analysis for Rule 9510

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**APPENDIX A**

**Summary of Significant Comments and Responses  
For Amendments to Rule 9510  
Public Workshop  
(April 26, 2016)**

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## **SUMMARY OF SIGNIFICANT COMMENTS RULE 9510 (INDIRECT SOURCE REVIEW RULE) PUBLIC WORKSHOP - APRIL 26, 2016**

The San Joaquin Valley Unified Air Pollution Control District (District) held a public workshop to present, discuss, and hear comments on the draft amendments to Rule 9510 and draft staff report on April 26, 2016. Summaries of significant comments received during and subsequent to the public workshop are addressed below.

### **EPA REGION IX COMMENTS:**

No comments were received from EPA Region IX

### **ARB COMMENTS:**

No comments were received from ARB.

### **PUBLIC COMMENTS:**

Comments were received from the following:

Ron Hunter, Insight Environmental Consultants/Trinity Consultants  
Randy Wasnick, 4Creeks  
Jim Sanders, Paynter Realty & Investments, Inc.  
Molly Saso, Insight Environmental  
Colby Morrow, SoCalGas and SDG&E  
Devon Jones, City of Visalia  
Jesse Madsen  
Elliot Kirschenmann, Real Estate Developer  
Michael Olmos, City Manager of Visalia  
Nancy Lockwood, Visalia Economic Development Corporation  
Lee Ann Eager, Central California EDC  
Paul M. Saldana, Economic Development Corporation Tulare County  
Craig B. Cooper, Roll Law Group (The Wonderful Company)  
Jean Fuller, California State Senate-Sixteenth Senate District  
Michael Washam, Tulare County Resource Management Agency  
Anonymous

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## AIA APPLICATION TIMING/BUILDING PERMIT

1. **COMMENT:** Commenters suggested alternatives for the timing of the requirement to submit the Air Impact Assessment (AIA) to the District. For example a project application could be submitted at any time up to 30 days before the building permit is pulled. Another suggestion is that the AIA application be submitted to the Air District within 60 days after final discretionary approval instead of prior to discretionary approval date. In both cases, commenters suggested that this would allow applicants to more fully plan the project before having to pay offsite mitigation fees.  
*(Elliot Kirschenmann, Real Estate Developer; Ron Hunter, Insight Environmental Consultants/Trinity Consultants; Randy Wasnick, 4Creeks)*

**DISTRICT RESPONSE:** Rule 9510 currently contains the flexibility necessary to address the commenters' concerns. The administrative process of Rule 9510 allows for the Air Impact Assessment (AIA) application to be deemed incomplete while the applicant gains approval from the land use agency and finalizes other details. This "incomplete" status allows for more project specific information to be provided to the District at a later time to finalize the assessment of the AIA and thus minimize or eliminate mitigation fees.

The current requirement for submitting an AIA to the District while seeking final discretionary approval is to increase opportunities to incorporate project design features to minimize land use compatibility issues and air quality impacts during the project's conceptual stage. To that end, the Rule requires submission of an AIA at an earlier time during the permitting process of the public agency approving the project.

Overall, opportunities remain for the applicant to contact the District and update the AIA as needed even after it has been finalized and approved. Therefore, the District is not proposing to extend the deadline for submitting the AIA.

2. **COMMENT:** District should re-examine Option One, the building permit trigger. The building permit process includes several different reviews. An initial project submission may undergo numerous changes prior to the start of construction. It would help developers to pay a fee for a specific building at the time the building is being built. In addition, I suggest a simplified fee structure similar to the City of Bakersfield's Habitat Conservation Plan (HCP) fee. A simplified fee structure would eliminate builders questions; in addition, I suggest that some of the mitigations be worked into the land use agency zoning and ordinance codes.  
*(Elliot Kirschenmann, Real Estate Developer; Anonymous)*

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**DISTRICT RESPONSE:** Using the building permit as a trigger will reduce opportunities for developers to incorporate emission-reduction design elements. The District encourages incorporation of such emission-reduction design elements at the early stage of project development planning. At the building permit stage, a developer has already designed the project and may not be able to make project design changes such as adding bike lanes, adding sidewalks, or a variety of other measures for reducing emissions. Capturing projects well before the issuance of a building permit provides time for a developer to add emission-reduction design elements into their projects.

3. **COMMENT:** Under the current language of Rule 9510, commercial projects that need a discretionary approval from the municipality and are over 2,000 square feet are required to prepare an Indirect Source Review application which includes an Air Impact Assessment. An environmental consultant is required to prepare the assessment and AIA, the average cost in our experience is \$15,000.  
(Anonymous)

**DISTRICT RESPONSE:** Applicants are not required by the District's rules, or by District policy, to obtain an environmental consultant to process their Air Impact Assessment (AIA) application. While applicants do frequently hire consultants to assist with the AIA, and other project design elements not related to addressing Rule 9510, the District will perform an AIA for each ISR project submittal regardless of whether the application was prepared by a consultant or the project owner.

During the AIA assessment process, the District reviews the inputs, assumptions and modeling for accuracy, and may require additional information and/or revision for items that are inaccurate, inconsistent or unjustified if needed. District staff members proactively work with applicants to obtain additional information to ensure all mitigation measures and options are discussed and implemented as directed by the applicant to maximize emission reductions in order to reduce project mitigation fees. While the District's AIA processing cost varies, the average is less than \$1,000, including filing fees.

4. **COMMENT:** Any amendment should make it easier for all development projects by calculating projects fee based on a simple equation so no advanced professional consultants are necessary. Examples: 1) City of Bakersfield traffic impact fee schedule. 2) Bakersfield HCP fee. 3) City of Bakersfield plumbing fee. These fees are calculated by the municipality using the proposed use and a fee per square foot of building area. The District should establish a fee structure and make it simple for a developer to calculate the fee.  
(Anonymous)

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**DISTRICT RESPONSE:** As noted above, the intent of the rule is to reduce each project's air quality impacts by encouraging the incorporation of design elements that reduce project emissions. The District's preferred option for complying with the ISR rule is for the developer to incorporate project design elements that result in sufficient emissions reductions associated with the development project to completely eliminate the need to pay mitigation fees. For example, construction utilizing a "clean fleet" results in no fees for that aspect of the project. Developers can achieve the required reductions through any combination of District approved emission reduction measures. Only when a developer cannot achieve the required reductions through on-site mitigation measures and design changes do off-site mitigation fees apply to mitigate the excess emissions. If a general schedule of fees was established for all ISR projects, this would reduce incentive and opportunity for developers to incorporate clean air design elements into projects.

5. **COMMENT:** By shifting the timelines of ISR fees, the District can ensure that the correct fees for the correct buildings and uses are being paid. Under the current rule, developers are supposed to re-study and re-submit the AIA to the District at additional cost in consultant fees if there are projects changes from the approved plan. This is money that could be going to pay the fees and not the consultants. *(Anonymous)*

**DISTRICT RESPONSE:** Rule 9510 currently contains provisions to address the commenter's concern. The rule has a provision allowing an applicant to request a Fee Deferral Schedule (FDS) that allows the project developer to defer payment of off-site mitigation fees until just prior to starting construction and generating emissions. The FDS has built-in flexibility to accommodate design and scheduling changes. As additional detailed project-specific information becomes available, the District can reassess the associated fees, either up or down as appropriate. Therefore, the rule already addresses the scenario mentioned in the comment.

Finally, as previously mentioned, in no instance does the District require a developer to hire a consultant. District staff is available to assist applicants throughout the life of the project.

6. **COMMENT:** There may be projects that are in process (that is, applications and maps have been received) but may not receive their building permits within the 30-day transition period due to scheduling of Project Review Committee meeting opportunities. It would be unfair and costly to applicants who have started the process prior to the new requirements and cannot receive permits due to issues beyond their control. The County suggests that the District revise the transitional timing from having "received" a building permit prior to the adoption of the rule

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amendments, to having “submitted” an application for a building permit prior to the adoption of the rule amendments. In addition, the County requested clarification on whether the 30-day transition period was calendar days or business days.

*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** The 30-day transition period is calendar days. Adjusting the amendment from having “received” a building permit to having “submitted an application” for a building permit, may result in a large number of premature building permit applications in the days prior to the rule’s effectiveness date. This transition period only applies to a small number of large development projects whose air quality impacts were not being mitigated under Rule 9510 due to variation in Valley land use agencies’ use of ministerial versus discretionary decision making processes. The intent is to eliminate inconsistent implementation of the rule across the Valley without unnecessarily extending the length of time that such inconsistency is possible.

7. **COMMENT:** Throughout the proposed amendments, the rule refers to building permits. However, there may be projects in which building permits are not required, and the only approval is for grading permits. Will the amendments be revised to clarify throughout, where applicable, that agency issued permits (grading, building, etc.) are included rather than specifically identifying building permits?

*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** While the District believes the likelihood that a large project subject to this rule that is non-discretionary and also does not require a building permit is minimal, there may very well be such instances. Therefore, the proposed section 4.6 has been modified as follows to address this concern:

- 4.6 *Any large development project that has received a building permit, or other final construction authorization, prior to (rule amendment date) shall be exempt from the requirements of this rule. This exemption shall not apply to development projects that failed to comply with applicable requirements of the prior version of this rule.*

## COST/SOCIO ANALYSIS

8. **COMMENT:** A cost analysis of potential savings for mitigation measures should be conducted. A cost per square foot of each mitigation measure should be provided.

*(Randy Wasnick, 4Creeks)*

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**DISTRICT RESPONSE:** The District agrees that many mitigation measures will result in construction and operations cost savings. However, such savings are expected to vary significantly depending on specific project proposals, changes to construction/operational costs with time, and a number of other factors, and calculation of such savings is therefore best performed by project developers as part of their business plan development for the project.

9. **COMMENT:** The District should allow project applicants to use the offsite mitigation fees due under the rule to incorporate additional emission reduction measures in their project, rather than being used by the District to generate emissions reductions.  
(Randy Wasnick, 4Creeks)

**DISTRICT RESPONSE:** Offsite mitigation fees paid to the District are only required when onsite mitigation measures are not sufficient to meet the rule requirements for emission reductions. The District encourages the implementation of onsite mitigation measures to meet rule requirements, so that the air quality impact of the project is minimized. Only where the project cannot be (or has not been) mitigated to the full extent expected by the Rule are offsite mitigation fees necessary to mitigate the remaining portion of Rule's expected air quality impact mitigation. The funds provided through payment of offsite fees are reinvested into the San Joaquin Valley to reduce emissions utilizing the District's highly successful emission reduction incentive grant administration program. The funds are awarded to Valley businesses, residents, and municipalities as partial payment of clean-air projects that generate real and quantifiable reductions in emissions. The District ensures funds collected target the most efficient opportunities to maximize emission reductions that are most beneficial to Valley residents. Furthermore, the District is in the position to adequately quantify the incentives project types and identify the reductions achieved through its Strategies and Incentive Department.

10. **COMMENT:** The District stated that socioeconomic and cost effective analyses are not required. The County disagrees with the District's determination that a cost-effectiveness and socioeconomic impact analysis is not necessary because an amendment with wider applicability will require formerly exempt sources to comply with the Rule.  
(Jesse Madsen; Michael Washam, Tulare County Resource Management Agency)

**DISTRICT RESPONSE:** Pursuant to CH&SC Section 40920.6(a), the District is required to analyze the cost effectiveness of new rules or rule amendments. Additionally, state law (CH&SC § 40728.5(a)) requires that "whenever a District

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intends to propose the adoption, amendment, or repeal of a rule or regulation that will significantly affect air quality or emissions limitations, that agency shall, to the extent data is available, perform an assessment of the socioeconomic impacts of the adoption, amendment, or repeal of the rule or regulation. The provision in the District's ISR Rule providing for exemption of non-discretionary projects was never intended to be used as a means to circumvent rule applicability to large development projects. The proposed rule amendment is designed to remove the unintended circumvention of the rule's original applicability to large projects

The District has included an additional appendix to the staff report (Appendix B) to address the socioeconomic analysis based on the analysis that was originally conducted for the rule. Since the proposed amendments do not change the original intent of the rule, with respect to applicability, the proposed changes do not result in new cost or socioeconomic effects as compared to those assessed at the time the rule was adopted. As such, the original cost effectiveness and socioeconomic analyses remain relevant and applicable to the proposed amendments. A review of the actual economic impacts of the rule, as implemented, is also captured in Appendix B, demonstrating that the actual costs are below those projected in 2004 and confirming the conservative nature of the original assessment. Therefore, the conclusion of the original socioeconomic impact analysis, specifically that the rule would not have a significant impact on the land development industry, remains relevant and accurate today.

11. **COMMENT:** The County is concerned by the District's use of the phrase "so-called ministerial approval" as it appears to undermine a land use agency's authority. The County believes that the determination of whether a project should be ministerial or discretionary should remain with the land use agency which differs based on a land use agencies specific needs, goals, and objectives. *(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** The District staff report uses the phrase "so-called discretionary decision process" but does not use the phrase referenced above. The District is not questioning any land use agency's authority. As a public health agency, the District's goal is to ensure consistent air quality mitigation under rule 9510 in all Valley communities.

The District agrees that the land use agency or approving agency has authority for the ministerial or discretionary approval decision. The District does not have the authority to change local public agency processes. The District has repeatedly emphasized over the years that the District will not be making land-use decisions and Rule 9510 does not set any land-use authority for the District. The District is respectful of the fact that many land use agencies throughout the

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valley have needs specific to their communities and recognizes the variability of the application of project discretion in the Valley. Therefore, the District is defaulting to the jurisdiction's interpretation on discretionary decision, so as not to interfere with the local jurisdiction's land use authority.

The proposed rule amendment regarding large development projects is to ensure consistent application of Rule 9510 throughout the Valley. The result is consistent mitigation of potentially significant emissions in all communities, which is the District's responsibility as a public health agency and has been the intent of the rule since originally adopted.

12. **COMMENT:** Are applicants required to submit cost effectiveness or socioeconomic analyses?  
(*Molly Saso, Insight Environmental*)

**DISTRICT RESPONSE:** Applicants have not and will not be required to provide cost effectiveness or socioeconomic analyses for ISR projects.

## LARGE PROJECTS AND SPAL

13. **COMMENT:** Commenters suggested that the commercial space applicability threshold is too low in the current and proposed rule. For instance, the City of Bakersfield defines a large retail development as those exceeding 50,000 square feet, while the District large commercial development project threshold is 10,000 square feet. The commenters state that they do not feel that the District's methodology for defining a large project is justified and appears to be arbitrary. The District's June 2012 Small Project Analysis Level (SPAL) guidance on determining CEQA applicability, significance of impacts, and potential mitigation of significant impacts identifies substantially larger square footages for all land use categories. Another comment asked "when defining large center, maybe it's appropriate to have applicant show that the project doesn't meet the large CEQA threshold".  
(*Michael Olmos, City Manager of Visalia; Nancy Lockwood, Visalia Economic Development Corporation; Lee Ann Eager, Central California EDC; Paul M. Saldana, Economic Development Corporation, Tulare County; Jean Fuller, California State Senate-Sixteenth Senate District; Elliot Kirschenmann, Real Estate Developer; Jim Sanders, Paynter Realty & Investments, Inc.; Anonymous; Molly Saso, Insight Environmental*)

**DISTRICT RESPONSE:** The Rule 9510 applicability thresholds are based on average emissions per project type, and the same thresholds apply throughout the Valley. The thresholds are not intended to sync with the city of Bakersfield's

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project size definitions, or with those of any of the other 60-plus land use agencies in the Valley. These varying square footage thresholds are intended to result in equivalent emissions, on average, for the different project types. A primary reason the commercial square footage results in more emissions per square foot is due to the nature of the business related to mobile source emissions. On average, there are more vehicle miles traveled related to commercial space compared to the other categories.

The proposed thresholds are not arbitrary. Please note that we have changed the language of the staff report to avoid any misunderstanding of the District's intent regarding large project thresholds, and to more fully describe their development. The new language is as follows:

*The current ISR applicability thresholds for development projects are based on an estimated projection of two tons of NOx or PM10 project-related emissions. If the District were to establish a secondary applicability threshold for large development projects, it would be natural to consider projects that may have exceeded the District's threshold of significance under the California Environmental Quality Act (CEQA), for instance 10 tons per year for NOx emissions, to be "large development projects". Since the original ISR applicability thresholds are based on a projected emissions rate of two tons of NOx, a large project threshold can be established by multiplying the current rule applicability thresholds by five. Some readers of earlier versions of this staff report were misled by the language used in this section to believe that the new large project thresholds were targeted specifically at projects that have significant emissions under CEQA. However, this approach is used simply to establish the applicability thresholds for "large development project" for rule 9510. These proposed thresholds do not necessarily equate to the District's CEQA significance levels (i.e., 10 tons of emissions) due to changes in emissions from cars and trucks, and in emissions quantification models, since the original rule was adopted. Finally, the proposed changes do not replace the existing Small Project Analysis Levels (SPALs) which were developed specifically to assist applicants by streamlining CEQA processes, and which have been inserted into the District's Guideline for Assessing and Mitigating Air Quality Impacts (GAMAQI), nor do they replace the environmental impact quantification that is required by CEQA.*

14. **COMMENT:** The indirect source review rule should not apply to large development projects if approval of such projects is not deemed by the lead agency to be a discretionary decision under CEQA.  
(Michael Olmos, City Manager of Visalia; Nancy Lockwood, Visalia Economic Development Corporation; Lee Ann Eager, Central California EDC; Paul M.

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*Saldana, Economic Development Corporation Tulare County; Jean Fuller, California State Senate-Sixteenth Senate District)*

**DISTRICT RESPONSE:** The provision in the District's ISR Rule providing for exemption of non-discretionary projects was never intended to be used as a means to circumvent rule applicability to large development projects. This issue came to our attention in light of the lawsuit filed by Coalition for Clean Air, Center for Environmental Health, Association of Irrigated Residents, Kevin Long, and Teamsters Joint Council 7 (Coalition for Clean Air v. City of Visalia, 2012). In this case, the City of Visalia deemed approval of a 500,000 square foot warehouse to be a ministerial decision under CEQA. The litigants argued that this project failed to comply with provisions of their Municipal Code requiring a planned development permit and violated CEQA by classifying the approval of the project as a ministerial act exempt from CEQA, and therefore should have been subject to ISR. At the time, the District maintained that under the current language of the ISR Rule the facility was exempt from ISR, based on the lead agency's finding that the project's approval was not discretionary. The District, however, made a commitment to revise the rule after the resolution of the legal case to ensure that large projects are treated uniformly throughout the San Joaquin Valley. This was especially important as the District's review indicates that projects similar to the one cited in this case were deemed discretionary in other jurisdictions in the San Joaquin Valley.

The above case was resolved under settlements in which the City of Visalia agreed to pay \$50,000 to the Rose Foundation for air quality mitigation projects, and VWR agreed to a number of specific air quality mitigations, including using an electric forklift fleet, installation of an electric car charger, various electrical energy efficiency improvements at the warehouse, and other commitments.

Another factor that compels the District to ensure that large development projects are subject to the ISR Rule is the fact that emissions from mobile sources constitute over 85% of the Valley's total NOx emissions. The District cannot attain the ever-toughening federal standards on the back of Valley businesses alone without addressing mobile source emissions. The District ISR Rule incentivizes new developments to incorporate project design features that help reduce vehicle miles travelled. Valley businesses are already subject to some of the toughest stationary source air regulations in the nation and it is only fair for mobile source sectors of our economy to contribute their fair share.

The proposed amendments provide for uniform application of the Rule throughout the Valley and as was illustrated in the above referenced case in the City of Visalia will actually bring the needed certainty for development projects that can otherwise be delayed or stopped with unnecessary litigation. Although

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the settlement that addressed the CEQA lawsuit included extensive additional air quality impact mitigation, subjecting the project to Rule 9510 would have substantially avoided both the need for the lawsuit in the first place and the related business uncertainty. There have been other similar industrial projects that could raise similar concerns in other jurisdictions in the Valley. In addition to being subject to potential lawsuits and delays, large projects that escape complying with Rule 9510 due to a public agency's use of a ministerial approval process potentially create increased health risks to the public by not mitigating project related emissions. The District's responsibility of ensuring public health through cleaner air requires that we address this inconsistent application of the rule.

## DISCRETIONARY APPROVAL VS MINISTERIAL

15. **COMMENT:** Commenters suggested changes and clarifications to the definition of discretionary. The applicability of the rule should be amended to define "discretionary approval" as: 1) zone change 2) general plan amendment 3) conditional use permit. This step would eliminate the jurisdictional syntax differences and ensure consistent application of the rule throughout the valley. The applicability of the rule should be amended so that the Rule should apply to projects that have or will go through: 1) zone change 2) general plan amendment 3) conditional use permit after March 1, 2006, the date of the rule's adoption. *(Elliot Kirschenmann, Real Estate Developer; Anonymous)*

**DISTRICT RESPONSE:** Changing the definition of "discretion" to be different than that captured in CEQA law and the current District rule 9510 would be a major undertaking.

Under CEQA law and Rule 9510, a discretionary action or "discretionary approval" is a decision by a public agency that requires the exercise of judgment or deliberation when the public agency or body approves or disapproves a particular development project, as distinguished from situations where the public agency merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations. The District believes that considerable confusion, and renewed legal challenge, would result if the District were to redefine "discretion" for the purposes of Rule 9510.

16. **COMMENT:** Projects that have zoning that precedes March 1, 2006, should be exempt from the rule and payment of any fees as their development right and property value is vested before adoption of the rule. Also, under Applicability Section 2.2, which applies the rule to any applicant that seeks to gain ministerial or otherwise non-discretionary approval from a public agency for a large

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development project seems to contradict Section 4.5 (Exemptions) which exempts projects that received a final discretionary approval prior to March 1, 2006. This makes it unclear whether or not a large development project that only needs ministerial approval is exempt or not. Our group believes they should be exempt because if not, the proposed amendment would constitute an uncompensated taking of private property. It also would violate the equal protection clause by singling out a small number of entities including our group, to regulatory and financial burdens not imposed on other developers.

*(Craig B. Cooper, Roll Law Group for Wonderful Company; Anonymous)*

**DISTRICT RESPONSE:** The rule's applicability timing is not determined by the zoning that the project relies upon in the original rule, and the District is not proposing to make any change in this regard (see August 30, 2016 response to comment number 6, in this appendix). However, the District agrees that the proposed rule language could result in potential confusion related to the timing of the applicability of the rule to non-discretionary projects and has changed rule language to eliminate that potential confusion. As noted in the staff report, the referenced exemption has been deleted (previously proposed new Section 4.5) and replaced with dates of applicability in Section 2, as follows:

- 2.1 Effective on and after March 1, 2006, ¶this rule shall apply to any applicant that seeks to gain a final discretionary approval for a development project, or any portion thereof, which upon full build-out will include any one of the following:
- 2.2 Effective on and after (rule amendment date), unless this rule applies pursuant to section 2.1,...this rule shall apply...
- 2.3 Effective on and after March 1, 2006, ¶this rule shall apply to any transportation or transit development project where construction exhaust emissions equal or exceed two (2.0) tons of NOx or two (2.0) tons of PM10.

## DEVELOPMENT PROJECT DEFINITIONS

17. **COMMENT:** Regarding clarifying the "Development Project" definition, the amendment would result in previously exempted public benefit projects to be subject to Rule 9510, such as new sewage pipes for compliance with current regulations or to replace weak pipes, flood control basins, installation of sidewalks and bike lanes, and other public safety improvements that do not increase capacity or activity. The County opposes redefining "transportation project" and "transit project" that are undertaken for public benefit to be considered as development projects subject to rule 9510. As such, the County

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suggests that the District include an exemption for Public Benefit projects, such as replacing obsolete but equivalent facilities, repairing vital facilities or equipment or providing other public benefits.

*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** The District notes that there has been confusion on this issue in the past, and we appreciate the opportunity to clarify. Your interpretation of the rule is incorrect. The rule addresses both construction and operational emissions. Your interpretation would inappropriately avoid mitigation of construction emissions that intended to be captured by the rule. The exemption from the Rule for reconstruction that does not result in expanded capacity is a special case that was negotiated as part of the original rule development. The clarification of the Development Project definition does not alter this interpretation or applicability.

## GENERAL COMMENTS AND SUGGESTIONS

18. **COMMENT:** Will a remodel of an existing building, with no addition of new square footage, but a change in use, be subject to ISR? For example, if you have a 70,000 square foot former retail building which will be re-tenanted, say into three separate retail user spaces – one a restaurant, one a fitness gym and one a retail use, is this going to be required to pay an ISR fee?

*(Jim Sanders, Paynter Realty & Investments, Inc.)*

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

Per current rule exemption section 4.4.1, reconstruction of any development project that is damaged or destroyed and is rebuilt to essentially the same use and intensity is exempt. Therefore, for this specific example, the project is exempt from the rule 9510. District staff is available to meet with applicants to discuss the regulatory requirements that are associated with a project. In addition, an applicant can request for an ISR applicability determination by emailing [ISR@valleyair.org](mailto:ISR@valleyair.org) or by contacting the District Technical Services at (559) 230-6000.

19. **COMMENT:** A link to the most recently approved model should be included on the District's website so that project applicants have access to use it.

*(Colby Morrow, SoCalGas and SDG&E; Elliot Kirschenmann, Real Estate Developer)*

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**DISTRICT RESPONSE:** Links to the California Emissions Estimator Model (CalEEMod) and other tools are available on the valleyair.org website at <http://www.valleyair.org/ISR/ISRResources.htm#Models>.

In addition, information on how to use CalEEMod is also available at <http://caleemod.com>. District staff is also available to answer questions regarding how to use CalEEMod or assess a project's air quality emissions under Rule 9510.

20. **COMMENT:** I concur with removing \$50,000 minimum fee deferral qualifier and down payment.  
(Randy Wasnick, 4Creeks)

**DISTRICT RESPONSE:** Comment noted.

21. **COMMENT:** I suggest a timeline be provided by the District to detail approval date of the AIA from time of submittal.  
(Randy Wasnick, 4Creeks)

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

The rule does contain such timelines. Per Section 8.4 of the current rule, the applicant will be notified by the District within ten (10) calendar days after determination of an AIA application as complete. Upon receipt of an AIA application, the District notifies the applicant in writing if the application is complete or incomplete. Once deemed complete, the 30-day timeline to finalize the application begins. Additional frequently asked questions (FAQs) and answers are available at:

[http://www.valleyair.org/ISR/Documents/isr\\_faq\\_10\\_29\\_12.pdf](http://www.valleyair.org/ISR/Documents/isr_faq_10_29_12.pdf).

22. **COMMENT:** I request review of Final Draft Rule 9510 Amendment before public hearing.  
(Randy Wasnick, 4Creeks)

**DISTRICT RESPONSE:** The proposed final rule amendments and associated documents will be posted on our website at:

[http://www.valleyair.org/Workshops/public\\_workshops\\_idx.htm](http://www.valleyair.org/Workshops/public_workshops_idx.htm)

There will be opportunity to review those documents and provide additional comments until the Governing Board hearing date, tentatively scheduled for September 15, 2016. We will notify the availability of such documents via newspapers, our website as listed above and through the ISR listserv. If you are

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not already signed up for ISR notification, please sign up to the ISR listserv at: <http://www.valleyair.org/lists/list.htm>

23. **COMMENT:** The majority of proposed amendments are logical and consistent with Rule 9510.  
(*Michael Olmos, City of Visalia*)

**DISTRICT RESPONSE:** Comment noted.

24. **COMMENT:** The commenters feel that the various land use agencies' Climate Action Plans are sufficient for achieving the 30% reduction target below 2005 baseline by year 2030, without a drastic expansion of projects applicable to the rule, and without subjecting large projects to the emission reduction requirements of Rule 9510.  
(*Michael Olmos, City of Visalia; Nancy Lockwood, Visalia EDC; Paul Saldana, Economic Development Corporation Tulare County; Jean Fuller, California State Senate-Sixteenth Senate District*)

**DISTRICT RESPONSE:** Climate Change Action Plans address greenhouse gases, while Rule 9510 addresses the so-called criteria pollutants that affect public health at ground level – these are two different sets of pollutants. Climate Change Action Plans do not address the NOx and PM10 emissions addressed under District Rule 9510. As noted above, the proposed rule amendment is designed to remove the unintended circumvention of the rule's original applicability to large projects and provide for uniform application of the Rule throughout the Valley, and are not related to Climate Change Action Plans.

25. **COMMENT:** The commenter states that this proposed amendment, if implemented, would threaten many economic development projects within various jurisdictions within the Central Valley. The proposed ISR 9510 amendment would significantly impact cities and other communities' economic development efforts negatively. This will directly lead to the loss of a city's ability to attract jobs; which is of particular concern given their location in a region that already has some of the highest unemployment levels in the nation. Given this concern about economic impacts, the City of Visalia is troubled by the District's conclusion that this rule 9510 expansion is not subject to CEQA. Expansion of the rule to projects that received discretionary approval prior to March 1, 2006 was clearly not examined as part of the original CEQA documentation that was completed in 2006. Even if the District were to argue the proposed rule expansion was indeed analyzed, the original EIR was at least 10 years old and conditions have changed dramatically in the last decade.  
(*Michael Olmos, City of Visalia*)

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**DISTRICT RESPONSE:** It should be noted that CEQA is designed to address environmental impacts, not economic impacts. However, please also note that the District has updated its earlier socioeconomic impact analysis and concludes that the rule would not have a significant impact on the land development industry (see Appendix B).

As noted in this staff report, the District action fully complies with applicable requirements. In fact, the rule amendments are likely to have a positive impact on the environment, through the reduction in emissions from new large development projects that are currently approved and constructed without the mitigation required under this rule.

26. **COMMENT:** The County has questions regarding the Change of Developer, specifically, under what circumstances is the buyer required to submit a new AIA application and when should it be submitted? Who's responsible if the buyer purchased the project without notification of applicability of Rule 9510 and the previous developer can't be located? Is the buyer or seller responsible for violations of the rule if the seller doesn't comply with the Change of Developer stipulation?

*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** AIA applications would only be required for changes to the previously approved AIA, per existing Rule Section 9.0. For transactions solely consisting of developer changes, the proposed amendments identify the seller as the responsible party to inform the District of the change in ownership by filling the "Change of Developer" form with the District. As the original applicant for submitting on Air Impact Assessment (AIA) application to the District, it is a seller's responsibility to submit the form. That said, the District is always willing to work with individual project proponents on a case by case basis.

27. **COMMENT:** The Road Construction and Transit Projects FAQ (revised 8/4/14) states that for projects below two tons without mitigation, "The project would not be subject to District Rule 9510, thus there is no need to submit an Air Impact Assessment Application. However, it is recommended that you maintain records supporting your determination. Furthermore, the project may be subject to other District rules, such as Regulation VIII." This poses a problem when trying to obtain a Dust Control Plan (DCP). The DCP process requires proof of compliance with Rule 9510 or verification that it is exempt from the rule. However, we are aware that it has been District practice that verification of the exemption cannot be provided unless an AIA application is submitted. The FAQ also states, "...per the San Joaquin Valley Air Pollution Control District's Policy ADM1445 (Applicable fees for exemption determinations for equipment and development projects), when an application is submitted and an analysis by the

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District was required to determine if or that the project is exempt from ISR requirements, the application filling fee will not be refunded.” Therefore, an AIA application fee will not be refunded even if an air quality analysis has been provided with the AIA application because District staff has to take time and review the analysis and come to their own determination as to the validity of the analysis.

Furthermore, the County recommends that the exemptions and AIA applicability requirements for transit/transportation projects provided in the FAQ be included under Section 2.0 of the rule itself.

Also, the County requests that the Air District make available to the public, in an easily accessible location (such as the Air District website), all documents pertaining to the implementation and processing protocols for Rule 9510. These documents would assist the County, land use agencies, consultants, and project proponent in providing the Air District with more accurate project related details and emissions analyses, and would benefit the Air District as it would reduce the time spent by Air District staff for obtaining information from incomplete, inappropriate, or inadequate AIA application forms.

*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** These comments do not pertain to the proposed amendments; however, the District offers the following response.

The commenter mischaracterizes the process for rule applicability determination of a project and its connection to District’s issuance of a Dust Control Plan (DCP). The District’s process ensures efficient and expedient processing of a DCP. The District has a process in place that document the ISR applicability of a project in relation to a DCP. Further information on DCPs can be found here: [http://www.valleyair.org/busind/comply/PM10/compliance\\_PM10.htm](http://www.valleyair.org/busind/comply/PM10/compliance_PM10.htm).

In addition, the commenter is mistaken that the District does not provide exemption verifications without the submittal of an ISR application. Requesting the District for a rule applicability determination is not a requirement of the rule nor does it require submission of an ISR application. The District provides such determinations as a service to stakeholders upon request.

An FAQ document should be expected to provide clarification for a given rule. While the District maintains that the rule is clear on the subject of transportation projects referenced above, the District does reserve the right to continue to clarify the rule language with the FAQ.

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The ISR Homepage at: <http://www.valleyair.org/ISR/ISRHome.htm>, currently provides much of the information requested above. In addition, District staff is available to assist the County, land use agencies, consultants, the project proponent, and the public via telephone and email and in person during District business hours.

Furthermore, the District is committed to continuous process improvements, particularly when our processes directly affect the public. The District encourages the County to navigate through the website and to contact the District with any questions. The District welcomes suggestions to making improvements and to providing excellent customer service.

28. **COMMENT:** The AIA application no longer includes an area for the applicant to include justification for the mitigation measures not selected. Does the District still require this information? If the District no longer enforces this requirement as part of the AIA application process, the County recommends that Section 5.3.2 be removed from the rule.

*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the applications do continue to require justification where applicable.

29. **COMMENT:** Does the current Monitoring and Reporting (MRS) Schedule sent to applicants upon project approval include provisions for failure to comply? If not, the District should either revise the form to include the provision for failure pursuant to Section 5.4.6 of the rule, or Section 5.4.6 should be removed from the rule.

*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

This specific requirement that the County is referring to pertains to a requirement that is to be met by the applicant and not the District. When an applicant proposes a Monitoring and Reporting Schedule, the rule requires the applicant to include provisions for failure to comply; when such information is not provided by the applicant, the District defaults to its authority to enforce the rule for non-compliance with the selected on-site emission reduction measures. Therefore, it is not necessary to remove that section.

30. **COMMENT:** As a result of the economic downturn and continuing slow recovery of development within the Valley, will the District consider pro-rating a refund for

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a project that has started construction but is not completed, and will not be seeking a time extension for their entitlement?

*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

The District recognizes that there are variable factors beyond the applicants' control that would impact their project, and already has in place several processes to assist applicants. For example, in 2009 the District implemented an Economic Assistance Initiative that includes several provisions to assist businesses that are experiencing financial hardship. More information on the Economic Assistance Initiative can be found at:

[http://www.valleyair.org/Programs/EconomicAssistance/EconAssistance\\_Contacts.htm](http://www.valleyair.org/Programs/EconomicAssistance/EconAssistance_Contacts.htm)

In addition, a fee deferral schedule allows an applicant to defer payment of the off-site mitigation fee according to a project phase as an alternative to paying the entire project off-site mitigation fee up-front. For many years now, applicants have taken advantage of a fee deferral schedule for their project so that payment of fees can be better timed to the actual expected project phase start date.

Furthermore, as many developers also sell their project prior to completion, providing the District with a completed Change of Developer form would also provide for the payment of the off-site mitigation fee to be paid by the appropriate party.

Therefore, the District believes that pro-rating refunds is not necessary. The District encourages an applicant to contact the District for assistance on those areas.

31. **COMMENT:** Are emissions from large projects more than those from regular sized projects? And why do the rule amendments propose to add only large projects moving to ministerial and not all projects?

*(Jesse Madsen)*

**DISTRICT RESPONSE:** Yes, emissions from large projects are greater, often significantly greater, than smaller projects. The District is not trying to change the intended applicability of the rule; rather, the proposed large development thresholds are to cease the circumvention of CEQA requirements and ISR applicability. Following the previously mentioned lawsuit involving VWR in the City of Visalia, the District committed to revise the rule to ensure that large projects were treated uniformly throughout the San Joaquin Valley. The proposed amendments provide that uniformity.

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32. **COMMENT:** Section 5.6 of the rule states that if an AIA is not provided by the applicant, an AIA would be performed by the District. Does the District perform the AIA and charge for processing the AIA? It is suggested that if the District performs the AIA and charges for processing the AIA, that this be made clear to the applicant.  
(*Jesse Madsen*)

**DISTRICT RESPONSE:** In all cases, the District will perform an AIA; however, this does not preclude applicants from submitting an analysis with their application performed either by themselves or a consultant. The District will review the inputs, assumptions and modeling for accuracy, and will require additional information and/or revision for items that are inaccurate, inconsistent or unjustified. The application filing fee covers a certain number of hours for processing the AIA. Processing time surpassing the application fee is billable, as required by Rule 3180 (Administrative Fees for Indirect Source Review). The District will revise its Frequently Asked Questions and other documents to clearly indicate that there are processing charges associated with performing the AIA.

33. **COMMENT:** How much land is being affected by the proposed rule amendment?  
(*Elliot Kirschenmann, Real Estate Developer*)

**DISTRICT RESPONSE:** Rule 9510 does not induce or approve project developments, and therefore cannot be associated with a specific quantity of land. Land being developed is a function of land planning that is implemented by the land use agencies or agencies with approval authority, such as cities and counties. Rule 9510 is designed to mitigate emissions associated with those developments, and the amendments do not change the original intention of the rule that the emissions of all large development projects approved after March 1, 2006 should be mitigated.

34. **COMMENT:** Rule 9510 Section 4.4.3.2 exempts activities like almond hulling and food manufacturing, grain processing and storage...Would food storage / cold storage fit with these exemptions as well? The rule says, "...including but not limited to..." so I am assuming food storage is expected to accompany food manufacturing and is therefore exempt. However, because this detail is not in writing it cannot be assumed.  
(*Molly Saso, Insight Environmental*)

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

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Per Section 4.4.3 of the current rule, a development project whose primary functions are subject to Rule 2201 (New and Modified Stationary Source Review Rule) or Rule 2010 (Permits Required) are exempt from ISR. There are no proposed amendments related to this exemption. District staff is available to meet with applicants to discuss the regulatory requirements that are associated with any project. In addition, an applicant can request for an ISR applicability determination by emailing [ISR@valleyair.org](mailto:ISR@valleyair.org) or by contacting the District Technical Services at (559) 230-6000.

35. **COMMENT:** Section 4.4.2.2 exempts Transportation Control Measures in the District's air quality plans. However, this exemption is not clear as to whether transportation and transit projects specifically identified in a land use agency's RTP, the STIP, and FTIP are covered by the exemption. If the intent of Section 4.4.2.2 is to include the TCMs in agency adopted transportation plans, the County recommends that the exemption be amended to clarify that transportation and transit projects identified in the RTP, STIP, and FTIP are exempted from the rule.  
(*Michael Washam, Tulare County Resource Management Agency*)

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

The District disagrees. The language is clear that the exemption applies only to Transportation Control Measures in District attainment plans. Transportation Control Measures included in plans prepared by other agencies are not exempt.

36. **COMMENT:** Regarding existing Section 5.4.7, we are unclear of the purpose of this requirement? Has there ever been an applicant that included a reduction measure that required ongoing funding? If so, can the District provide an example of such a measure? If there have not been any such measures in the past 10 years, the County recommends the District evaluate the necessity of this requirement, and if deemed not necessary, then removing this requirement would be appropriate.  
(*Michael Washam, Tulare County Resource Management Agency*)

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

This section was designed to allow applicants the option to, on an ongoing basis, fund emissions reduction projects and to provide the necessary mechanisms to ensure the reductions occur on an ongoing basis. The District sees no need to remove this option from the rule.

**SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT**

*Draft Staff Report for Proposed Amendments to Rule 9510*  
Appendix B: Comments and Responses

May 18, 2017

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**APPENDIX B**

**Summary of Significant Comments and Responses  
For Amendments to Rule 9510  
Public Comment Period  
(August 16 – September 15, 2016)**

# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

*Draft Staff Report for Proposed Amendments to Rule 9510*  
Appendix B: Comments and Responses

May 18, 2017

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## **SUMMARY OF SIGNIFICANT COMMENTS ON PROPOSED RULE AMENDMENTS TO RULE 9510 (INDIRECT SOURCE REVIEW RULE) DURING PUBLIC COMMENT PERIOD ENDING AUGUST 30, 2016**

The San Joaquin Valley Unified Air Pollution Control District (District) posted the final draft staff report and the proposed amendments to Rule 9510 on August 16, 2016 for a public hearing on September 15, 2016. The public comment period ended on August 30, 2016. Summaries of significant comments received during the comment period and on or before September 15, 2016 are addressed below.

### **EPA REGION IX COMMENTS:**

No comments were received from EPA Region IX

### **ARB COMMENTS:**

No comments were received from ARB.

### **PUBLIC COMMENTS:**

Comments were received from the following:

Bill King, City of Merced Development Services  
Craig B. Cooper, Roll Law Group (The Wonderful Company)  
John Candas, (Allen Matkins Leck Gamble Mallor, & Natsis LLP)  
Melissa Poole, The Wonderful Company

# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

- 1. COMMENT:** How will the District know when “large development projects” have been submitted to local governments for non-discretionary review? Non-discretionary actions are not always noticed to other agencies. Similarly, how are applicants of “large development projects” to know that they need to file an ISR application with the District?  
*(Bill King, City of Merced Development Services)*

**DISTRICT RESPONSE:** The District intends to provide significant outreach assistance to land-use agencies throughout the Valley, including handout materials that may be made accessible to project proponents. To better serve their constituents, many land use agencies have incorporated ISR compliance steps into their various application check-lists. Quite often, District staff receives telephone calls from applicants seeking to verify ISR applicability before the land use agency will process their application. We encourage all land use agencies to add such information to their application checklists. In addition, the District always welcomes suggestions on improving our processes, including how to best assist land use agencies and developers with ISR compliance.

- 2. COMMENT:** Projects that received a discretionary approval prior to the March 1, 2006, implementation of the rule should remain exempt from the rule. Singling out previously exempt large projects violates the equal protection clause, constitutes the uncompensated “taking” of private property and is a violation of due process. Since the District intends to subject previously exempt projects to the rule, the District will need to provide an adequate cost benefit analysis.  
*(Craig B. Cooper, Roll Law Group (The Wonderful Company))*

**DISTRICT RESPONSE:** The District greatly appreciates this comment, as it illuminated an area of potential confusion in the rule. It has never been the District intention to apply the revised rule to projects that have received their final discretionary approval prior to March 1, 2006, as clearly indicated in our staff report. To clarify this intent and eliminate any potential confusion, the District has proposed the following change to section 2.2:

*“Effective on and after (rule amendment date), unless this rule applies pursuant to section 2.1, or unless final discretionary approval for the development project has been received prior to March 1, 2006,...this rule shall apply...”*

Regarding the need to analyze the costs of the rule, since we have clarified that projects that have received their final discretionary approval prior to March 1, 2006 will remain exempt from the ISR rule, the concerns brought by the commenter are alleviated. However, as an aside, see Appendix B for the District’s socioeconomic impact analysis of the proposed amendments.

## SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

3. **COMMENT:** The proposed amendments to the rule should include proper cost benefit and socioeconomic analyses. These analyses should include an inventory of fully-entitled and pending projects that would be affected by the proposed amendments.  
(*John Candas, Allen Matkins Leck Gamble Mallory & Natsis LLP*)

**DISTRICT RESPONSE:** The District has included an additional appendix to the staff report (Appendix B) to address the socioeconomic analysis based on the analysis that was originally conducted for the rule. As explained in section III-A of the staff report, the provision in the District's ISR Rule providing for exemption of non-discretionary projects was never intended to be used as a means to circumvent rule applicability to large development projects. The proposed rule amendment is designed to remove the unintended circumvention of the rule's original applicability to large projects, and to address the inherent lack of fairness associated with unequal application of the rule depending on which local jurisdiction analyzes a project. Since the proposed amendments do not change the original intent of the rule with respect to applicability, the proposed changes do not result in new costs or socioeconomic effects as compared to those assessed at the time the rule was adopted, regardless of their applicability to pending projects. As such, the original cost effectiveness and socioeconomic analyses remain relevant and applicable to the proposed amendments. A review of the actual economic impacts of the rule, as implemented, are also captured in Appendix D, demonstrating that the actual costs are below those projected in 2004 and confirming the conservative nature of the original assessment. Therefore, the conclusion of the original socioeconomic impact analysis, specifically that the rule would not have a significant impact on the industry, remains relevant and accurate today.

4. **COMMENT:** Section 2.2 or Section 4.5 should be revised to extend the exemption from Rule 9510 for projects that received all final discretionary approvals, regardless of whether or not the developer has submitted a grading or building permit. The amendments should exclude projects with valid final entitlements issued prior to the effective date of the proposed amendments via final discretionary approval that will still require additional ministerial approval.  
(*John Candas, Allen Matkins Leck Gamble Mallory & Natsis LLP*)

**DISTRICT RESPONSE:** As the District has previously stated, all those projects that received a final discretionary approval prior to the rule implementation date of March 1, 2006, will not be affected by the amendments. However, if final discretionary decision was received after March 1, 2006, the requested change would have the result of improperly exempting that project from requirements that were applicable at the time of the discretionary decision. However, the District has made minor changes (double underlined below) to remove any ambiguity

# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

regarding the District's intent that development projects that received final discretionary approval prior to March 1, 2006, remain exempt from the rule.

The latest amendment further clarifies that, unless a development project received a discretionary approval and equals or exceeds the applicability thresholds as identified under rule Section 2.1, those development projects that received non-discretionary approval prior to the rule amendment date are not subject to the rule. This applicability "exemption" applies even in situations where subsequent non-discretionary approvals are sought after the rule amendment date. The proposed section 2.2 was revised as follows:

2.2 Effective on and after (rule amendment date), unless this rule applies pursuant to section 2.1, or unless final discretionary approval has been received for the development project prior to March 1, 2006, or unless an approval that is not discretionary has been received for the development project from a public agency prior to (rule amendment date), this rule shall apply to any applicant that seeks to gain approval from a public agency for a large development project, which upon full build-out will include any one of the following:

5. **COMMENT:** The proposed rule amendments should not be exempt from CEQA under CEQA Guidelines 15061 (b)(3), the "common sense" exemption. Although the proposed amendments may have some marginal reduction in air pollution, the collateral effects on the environment cannot be assumed to be benign. (John Candas, Allen Matkins Leck Gamble Mallory & Natsis LLP)

**DISTRICT RESPONSE:** Please see section VIII of this staff report for expanded language discussing CEQA and its applicability to this rule amendment.

6. **COMMENT:** The Wonderful Project has all discretionary entitlements. The Wonderful Project's final discretionary approval was issued by the Shafter City Council on March 21, 2006. (John Candas, Allen Matkins Leck Gamble Mallory & Natsis LLP)

**DISTRICT RESPONSE:** CEQA Guidelines section 15378(c) provides that "[t]he term 'project' refers to the activity which is being approved and ... does not mean each separate governmental approval." Accordingly, the "final discretionary approval" date is the date the agency first formally approves the project and not the date of any subsequent approvals. Similarly, section 15352 defines "approval" of the project as occurring when a decision "commits the agency to a definite course of action in regard to a project intended to be carried out by any person." These sections place the "approval" of a project at the earliest date on which a public agency first authorizes the underlying activity.

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Based on additional information provided by the commenter to the District, the Wonderful Project's approval received on March 21, 2006, refers to a zoning approval through the City's process for the location the Wonderful project and other projects would be located on. Based on the original 2005 staff report for Rule 9510, general planning projects such as zoning, and discretionary decisions associated solely with zoning or rezoning are not subject to District Rule 9510, since subsequent projects that rely on that zoning generally would be subject to further discretionary decision making and environmental review.

Therefore, regarding the Wonderful Project, any subsequent development project(s) that would require approval from a public agency may trigger ISR requirements based on the following two scenarios. In the case the subsequent development project is subject to a discretionary approval from a public agency, based on the discussion above, this subsequent discretionary approval will be the "final discretionary approval" for the development project that will be considered for ISR applicability purposes. In the case the subsequent development project is subject to a ministerial (non-discretionary) approval from a public agency after the adoption date of these amendments, the project may be subject to ISR requirements based on the large project applicability thresholds as identified under section 2.2 of the proposed amended rule.

7. **COMMENT:** In an attempt to address District proposed amendments related to the rule applicability for development projects, suggested revisions to the proposed amendments are shown in double-underline for additions and ~~strikethrough~~ for deletions.

2.1 Effective on and after March 1, 2006, ~~this rule shall apply to any new application~~ for that seeks to gain a final discretionary approval for a development project, or any portion thereof, which upon full build-out will include any one of the following:

2.2 Effective on and after (rule amendment date), ~~unless to the extent this rule does not apply~~ applies pursuant to section 2.1, this rule shall apply to any applicant that seeks to obtain gain ministerial or otherwise non discretionary approval from a public agency for a large development project any approval that is subject to review pursuant to CEQA. This rule shall not apply to any approvals to which CEQA does not apply pursuant to Public Resources Code section 21080(b), which includes any approval that is deemed to be ministerial (as defined in CEQA Guidelines section 15369) under the ordinances, rules, and regulations of the public agency from which the approval is sought. A large development project is any project which upon full build-out will include any one of the following:

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Draft Staff Report for Proposed Amendments to Rule 9510  
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4.5 Any large development project (as defined in Section 2.2) that has received a building permit, or other final construction authorization, prior to (rule amendment date) shall be exempt from the requirements of this rule. This exemption shall not apply to development projects that failed to comply with applicable requirements of the prior version of this rule.

*(Melissa Poole, The Wonderful Company)*

**DISTRICT RESPONSE:** The suggested changes maintain the concept of using a discretionary approval when determining applicability for the large development projects. This concept would result in the continuation of the applicability inconsistency across the Valley and is contrary to the intent of the proposed amendments to the rule which is to eliminate the source of such inconsistency. Therefore, the District will not incorporate this proposed change.

**SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT**

*Draft Staff Report for Proposed Amendments to Rule 9510*  
Appendix C: Comments and Responses

May 18, 2017

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**APPENDIX C**

**Summary of Significant Comments and Responses  
For Amendments to Rule 9510  
Public Workshop  
(January 17, 2017)**

# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

*Draft Staff Report for Proposed Amendments to Rule 9510*  
Appendix C: Comments and Responses

May 18, 2017

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## **SUMMARY OF SIGNIFICANT COMMENTS ON PROPOSED RULE AMENDMENTS TO RULE 9510 (INDIRECT SOURCE REVIEW RULE) PUBLIC WORKSHOP- JANUARY 17, 2017**

The San Joaquin Valley Unified Air Pollution Control District (District) held a public workshop to present, discuss, and hear comments on the draft amendments to Rule 9510 and draft staff report on January 17, 2017. Summaries of significant comments received during the public workshop and the associated two-week commenting period following the workshop are summarized below.

### **EPA REGION IX COMMENTS:**

No comments were received from EPA Region IX

### **ARB COMMENTS:**

No comments were received from ARB.

### **PUBLIC COMMENTS:**

Comments were received from the following:

Melissa Poole, The Wonderful Company  
John Guinn, The Wonderful Company  
Jesse Madsen  
Genevieve Gale, Coalition for Clean Air (CCA)  
Jessica Willis, Tulare County Resource Management Agency  
James S. Sanders, Paynter Realty & Investments, Inc.  
Devon Jones, City of Visalia  
Lee Ann Eager, California Central Valley Economic Development Corporation  
Michael Washam, Tulare County Resource Management Agency  
Courtney Davis for John Condas, Allen Matkins, Leck, Gamble, Mallory, & Natsis, LLP  
Kevin Hamilton, Central California Asthma Collaborative  
Dolores Weller, Central Valley Air Quality Coalition  
Bill Magavern, CCC  
Tom Frantz, Association of Irrigated Residents

# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

1. **COMMENT:** The Wonderful Company believes that the District should defer adoption of the rule until all concerns are addressed. Projects that have already received discretionary approval should remain exempt, regardless of further ministerial approvals. The Wonderful Company feels that the amendment unjustifiably burdens large projects and are advocating for a more narrow amendment that would not capture these projects.

*(Melissa Poole, The Wonderful Company; Courtney Davis for John Condas, Allen, Matkins, Leck, Gamble, Mallory & Natsis, LLP)*

**DISTRICT RESPONSE:** The revised rule does not apply to projects that have received their final discretionary approval prior to March 1, 2006. All projects over the thresholds listed in Section 2.1 and that have received their final discretionary approval on or after March 1, 2006, are already subject to the rule. The revised rule in no way changes the applicability of the rule for any projects that have received or will receive a discretionary approval.

2. **COMMENT:** Proposed amendment will subject projects to costly redesigns. Proposed amendment could cost \$350K on a one million square foot refrigeration warehouse that has already been planned.

*(Melissa Poole, The Wonderful Company)*

**DISTRICT RESPONSE:** The purpose of this rule is to reduce the growth in both NOx and PM10 emissions from mobile sources associated with construction and operation of new development projects in the Valley by encouraging clean air designs to be incorporated into the development project. For example, under this rule, warehouse distribution centers and similar projects that attract vehicular traffic are given the option to implement project design features that minimize vehicle emissions through reducing vehicle miles travelled and through other means.

However, based on comments received, the District is proposing to add language to section 2.2 of the rule to clarify that the rule does not apply to large development projects in the following cases:

- Final discretionary approval for the development project has been received prior to March 1, 2006,
  - An approval that is not discretionary, including but not limited to a building permit or other Vested Right to Develop, has been received for the development project from a public agency prior to (rule amendment date).
3. **COMMENT:** The Wonderful Company also feels that the previous socio-economic analysis is inadequate and is requesting a socio-economic analysis

## SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

specific to “large” projects. The Wonderful Company also wants to know if any projects other than Wonderful Company projects would be “caught” under the amendment.

The Wonderful Company also thinks that today’s setting is completely different than the 2005-2006 timeframe and that the socioeconomic study should be viewed in today’s setting. There’s been a tremendous amount of investment over the last ten years based on the rule as it currently stands. In addition, the Wonderful Company has concerns about CEQA compliance for the rule relating to the complete socio economic analysis of the amendment.

*(Melissa Poole, The Wonderful Company; Courtney Davis for John Condas, Allen, Matkins, Leck, Gamble, Mallory & Natsis, LLP)*

**DISTRICT RESPONSE:** As previously stated, the proposed rule amendment is designed to remove the unintended circumvention of the rule’s original applicability to large development projects, and to address the inherent lack of fairness associated with unequal application of the rule depending on which local jurisdiction analyzes a project. Since the proposed amendments do not change the original intent of the rule with respect to applicability, the proposed changes do not result in new costs or socioeconomic effects as compared to those assessed at the time the rule was adopted, regardless of their applicability to pending projects. As such, the original cost effectiveness and socioeconomic analyses remain relevant and applicable to the proposed amendments.

Additionally, the Draft Staff Report published in December included an additional appendix to the staff report (Appendix D) to address the socioeconomic analysis based on the analysis that was originally conducted for the rule. A review of the actual economic impacts of the rule on development projects including large development projects, as implemented demonstrated that the actual costs are below those projected in 2004 and confirmed the conservative nature of the original assessment. Therefore, the conclusion of the original socioeconomic impact analysis, specifically that the rule would not have a significant impact on the industry, including on large development projects, remains relevant and accurate today.

4. **COMMENT:** Isn’t this air district the only one that has this indirect source rule? The Wonderful Company believes that this point is important in the analysis of the effect of this rule.  
*(John Guinn, The Wonderful Company)*

**DISTRICT RESPONSE:** As noted in the staff report, the District has longstanding statutory authority to regulate indirect sources of air pollution. Pursuant to this authority, the District first made a federally enforceable

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commitment to regulate indirect sources when it adopted its PM10 Attainment Plan in June 2003. Subsequently, the California State Legislature passed Senate Bill 709, Florez, in the fall of 2003, which Governor Gray Davis subsequently signed and codified into the Health and Safety Code in §40604. This additional legislation required the District to adopt, by regulation, a schedule of fees to be assessed on area wide or indirect sources of emissions that are regulated by the District. The District's ISR rule was subsequently adopted in late 2005.

Mobile source emissions make up over 85% of the Valley's NOx emissions, the primary driver in the formation of particulate and ozone pollution. The purpose of this rule is to reduce the growth in both NOx and PM10 emissions from mobile sources associated with construction and operation of new development projects in the Valley by encouraging clean air designs to be incorporated into the development project, or, if insufficient emissions reductions can be designed into the project, by paying a mitigation fee that will be used to fund off-site emission reduction projects.

5. **COMMENT:** The Wonderful Company doesn't think there have been any large industrial projects processed by the District in the last ten years-only large warehouses. There are relatively few large industrial projects that have occurred and there will be relatively few going forward and the majority of those caught in the amendment would be owned by the Wonderful Company. Therefore, it would be very helpful to have the cost benefit analysis and also what the benefit to the air would be and the Wonderful Company would like to have an opportunity to examine the data showing the savings over the last ten years. (*John Guinn, The Wonderful Company*)

**DISTRICT RESPONSE:** Appendix D contains the updated socioeconomic impact report associated with this rule revision. As noted in the report, "*The actual costs for industrial projects since rule inception is far below the predictions in the 2005 socioeconomic analysis, further validating the 2005 socioeconomic analysis' conclusions.*" The District therefore does not anticipate any significant impact on the development of any large projects as a result of the rule revision, including on large industrial projects.

6. **COMMENT:** I want to support what the Wonderful Company is saying regarding previously approved projects that have already been designed. There's a lot that goes into revising a project, including environmental review and project re-design which can potentially cost 100's of thousands of dollars. Maybe there's a way to have a little flexibility- Perhaps, a project that has passed a certain percent in the design process (ie-60% of design) can be exempt. (*Jesse Madsen*)

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**DISTRICT RESPONSE:** See responses to Comment 1 and Comment 2.

7. **COMMENT:** The 5x threshold doesn't seem logical.  
(*Jesse Madsen*)

**DISTRICT RESPONSE:** The current ISR applicability thresholds for development projects are based on an estimated projection of two tons of NO<sub>x</sub> or PM<sub>10</sub> project-related emissions. Since the original ISR applicability thresholds are based on a projected emissions rate of two tons of NO<sub>x</sub>, a large project threshold can be established by multiplying the current rule applicability thresholds by five, bringing the estimated project emissions to 10 tons of NO<sub>x</sub> or PM<sub>10</sub>. A number of District rules and policies are aligned in considering 10 tons of emissions of any one pollutant a large or significant source of emissions.

8. **COMMENT:** How is the ministerial approval triggered? How does a land use agency or an applicant know that they now have to go thru ISR?  
(*Jesse Madsen*)

**DISTRICT RESPONSE:** The District intends to provide outreach assistance to land-use agencies throughout the Valley, including handout materials that may be made accessible to project proponents. To better serve their constituents, many land use agencies have already incorporated ISR compliance steps into their application processes.

In addition, the District always available to assist developers, land-use agencies, and other stakeholders to provide support and respond to inquiries regarding the applicability of the rule.

9. **COMMENT:** Can a project net emissions? That should be allowed when converting existing buildings and additions to existing buildings. The previous owner could already have had an ISR project that counted towards the State Implementation Plan (SIP) and by not netting emissions, the District is violating SIP by double counting the emission reductions. Double counting emission reductions could open the District up to legal liability with EPA for double counting emissions.  
(*Jesse Madsen*)

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

While the rule does not call for netting of emissions, its practical application generally results in limiting a project proponent's obligation under the rule to

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mitigating an increase in emissions for projects that are expanding an existing facility or utilizing an existing facility for the same or similar use, when the existing facility has already been subject to ISR in the past. As to the legality of the rule, both state and federal courts ruled in favor of the District in response to lawsuits challenging the rule. The District prevailed on all issues in all courts, and appeals to the state and federal supreme courts were rejected without hearing.

- 10. COMMENT:** Did you take out the reference to a specific model (ie; CalEEMod)?  
(*Jesse Madsen*)

**DISTRICT RESPONSE:** At the time the rule was first adopted, the District used the URBEMIS model to assess project impact on air quality, and therefore URBEMIS was referenced in the rule. However, the URBEMIS model has been superseded by a new EPA-approved model, CalEEMod. This new model utilizes more recent emission factors and data and has been used by the District for several years. CalEEMod is maintained by experts, and is better suited to assess project emissions. Although the rule did not contain a mandate to use the URBEMIS model, the reference to “URBEMIS” is no longer relevant and has been removed from the rule. To accommodate flexibility in adopting future model improvements, reference to specific models has been removed. To answer the commenter’s question specifically, the rule never referenced CalEEMod.

- 11. COMMENT:** We appreciate the large project overlay to the existing rule, but do not think it should be limited to large projects only; in other words, we believe that the District should remove the discretionary requirement entirely. This would make the rule act just like other Clean Air Act rules. The District should also reduce the thresholds of applicability.  
(*Genevieve Gale, Coalition for Clean Air; Dolores Weller, Central Valley Air Quality Coalition; Bill Magavern, CCC; Kevin Hamilton, Central California Asthma Collaborative; American Lung Association in California; Tom Frantz, Association of Irrigated Residents*)

**DISTRICT RESPONSE:** This proposed rule revision is to address an unanticipated loophole in the original rule. We believe the loophole has only applied to the large projects that are addressed by this rule revision, and we are certain that applying the revised rule to large projects in the future will capture the vast majority of emissions from development in the San Joaquin Valley. Because this rule revision is only intended to address this loophole, we will not be addressing the appropriateness of the applicability thresholds at this time.

- 12. COMMENT:** The Organizations also opposes any retroactive immunity. As the rule notes that the amendment is to address an unintended circumvention of the

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rule, the District should not grant blanket pardons for past violations of the law. Furthermore, such pardons would not be lawful under the Clean Air Act- the 1990 Supreme Court Case of General Motors vs the United States, even if an air district changes a Clean Air Act rule, the change does not excuse violations of the EPA approved SIP.

*(Genevieve Gale, Coalition for Clean Air; Dolores Weller, Central Valley Air Quality Coalition; Bill Magavern, CCC; Kevin Hamilton, Central California Asthma Collaborative; American Lung Association in California; Tom Frantz, Association of Irrigated Residents)*

**DISTRICT RESPONSE:** The rule revisions do not provide retroactive immunity, or pardon, but are instead intended to address an unintended loophole in the rule that allowed some projects to legally avoid the applicability of the rule. In this case, the rule is actually becoming more stringent. The *General Motors* case was addressing a situation in which a regulation was being relaxed, and is therefore not applicable.

- 13. COMMENT:** The Organizations also believe that PM2.5 limits should be included in the ISR rule. PM2.5 is one of the deadliest forms of pollution and the Valley is in non-attainment for the annual and 24 hour standard. As we work on a new PM2.5 attainment strategy, including it in the ISR rule could help.

*(Genevieve Gale, Coalition for Clean Air CCA; Dolores Weller, Central Valley Air Quality Coalition; Bill Magavern, CCC; Kevin Hamilton, Central California Asthma Collaborative; American Lung Association in California; Tom Frantz, Association of Irrigated Residents)*

**DISTRICT RESPONSE:** The rule targets NOx and PM10 emissions from mobile source equipment related to construction and operational activities. As you know, PM2.5 is a subset of PM10. In the case of mobile source equipment emissions covered by this rule, the overwhelming majority of particulate emissions are PM2.5, and so adding a PM2.5 limit will not meaningfully reduce actual PM2.5 emissions. Perhaps more importantly, the District's incentive programs that are used in the offsite mitigation program reduce almost exclusively exhaust emissions, which are essentially all PM2.5. Therefore, to the extent that some of the emissions increases may be PM10 larger than the PM2.5 fraction, those increases get offset by reductions in PM2.5 resulting in a net air quality benefit.

- 14. COMMENT:** I feel strongly that PM 2.5 emissions should be part of the ISR permitting process which is presently limited to PM-10 and NOx. I assume the NOx is expected to control the PM 2.5, however directly emitted PM 2.5 is the largest source of this criteria pollutant and so should be called out rather than just assumed to be captured as a subset of PM-10, or prevented through the NOx

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limitation on Ammonium Nitrate formation. NOx also neglects Ammonium Sulfate formation which directly contributes to violations of both Annual PM 2.5 standards.

*(Kevin D. Hamilton, Central California Asthma Collaborative)*

**DISTRICT RESPONSE:** See the response above.

Further, secondary PM2.5 formation such as ammonium nitrate, which is formed by a combination of NOx and ammonia, is the largest contributor to peak PM2.5 concentrations in the winter months in the Valley. The rule already contains limits for NOx. As such, adding a PM2.5 limit will not meaningfully reduce actual PM2.5 emissions.

In addition, ammonium sulfate formed from SOx and ammonia, is a small fraction of the peak winter PM2.5 concentrations in the Valley (less than 10%). As a strategy to reduce formation of ammonium sulfate, the primary effort has been to reduce SOx emissions. Towards that end, SOx emissions have been dramatically reduced over time, and there is relatively little left in the Valley to reduce. However, as a part of the District's current PM2.5 planning processes, we are evaluating the potential to further reduce SOx emitted in the Valley that would result in additional ammonium sulfate reductions.

- 15. COMMENT:** Tulare County has some concerns regarding proposed changes. Of particular concern is the applicability of ISR to public benefit projects and lack of exemption for certain projects of those types, such as waste water systems and bridge replacements. These projects include the installation of new sewer/sewerage collection pipes for compliance with current regulations, flood control detention/retention basins, flood control berms, installation of sidewalks and bike lanes for pedestrian safety, public parks, fire stations, and road improvements or other improvements to comply with current state/federal requirements for road safety. Public benefits projects are often required by state or federal regulations and they often receive state or federal funding, so our concern is why are certain transportation projects requiring conformity analysis such as projects on the regional transportation plan, the state implementation plan, or the federal transportation implementation plan are not exempted. The County may receive air quality improvement funds, such as Congestion Mitigation and Air Quality Improvement Program and Tulare County's Measure R and/or other state or federal funding. The County believes that projects receiving these funds should be exempt from ISR. While the County appreciates the District's efforts, we request that you re-examine some of your exemptions status's for these projects or other form of special consideration for public benefits projects.

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*(Jessica Willis, Tulare County Resource Management Agency; Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

The commenter is correct that the rule applies to public works development projects that exceed the applicability thresholds listed in the rule. Such projects may result in construction and operational emissions, if they are large enough, that require mitigation according to the rule.

In our experience, the types of projects you are referencing only entail construction emissions. We have also found that project proponents have realized that it is relatively easy to satisfy the construction requirements of the Rule by using a “Clean Construction Fleet” to meet the required reductions of NOx and PM10 emissions. The construction fleet for a project includes all the pieces of construction equipment that are greater than 50 horsepower and generate emissions from the use of an internal combustion engines related to construction activity. By selecting the Clean Construction Fleet mitigation measure, the project proponent commits to using a construction fleet that will reduce construction emissions to below the state-wide average by the amounts identified in the rule, and will fully satisfy the emission reduction requirements of the rule.

- 16. COMMENT:** Did the most recent reports or even past reports identify transportation or construction only projects in the analysis?  
*(Jessica Willis, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** No. The District does not specifically track construction only or transportation projects in the District ISR annual report.

- 17. COMMENT:** Many of our projects receive federal or state money and once you receive that money, you can't add to the project costs that would be incurred using a clean fleet.  
*(Jessica Willis, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** It has been our experience that a condition of receiving state or federal funds is a commitment to meet all local regulations and a certification of having done so. Therefore, we believe the cost of meeting the requirements of this regulation, if any, should be built into the original project proposals that are receiving state or federal funds. Fortunately, as discussed above, recent trends indicate that a significant number of projects proponents have been using Clean Construction Fleet to satisfy ISR requirements.

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- 18. COMMENT:** The public benefits projects that the County is requesting to exempt, or receive another form of special-case-by-case consideration, do not contribute to growth as they accommodate only existing conditions. As such, the County maintains that the Rule as written, without exemptions for these projects place an unfair economic burden on agencies that are not part of the “land development industry”.

*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

The commenter is correct that the rule applies to public works development projects that exceed the applicability thresholds listed in the rule. However, any project that does not contribute to growth is not covered by this rule. See definition of Development Project in the rule.

- 19. COMMENT:** The County previously requested documentation demonstrating that public benefit projects, including transit and transportation-related projects emit sufficient amounts of criteria pollutants necessary to not exempt them from applicability to the Rule. The County feels that the statistics and analyses provided in the Socioeconomic Analysis (Appendix D of the Draft Staff Report) did not fully address the County’s concerns. The County reiterates its request that the District re-evaluate the need to include public benefit projects in the applicability to the Rule including documentation regarding the emissions reductions efficiencies, cost-effectiveness of public benefits projects, and any potential impacts to agencies as a result of not exempting, or proving another form of special case-by-case consideration for these projects. Specifically, the County is requesting the percentage of clean fleets and total tons of construction-related emissions attributable to “construction only” or “public benefit” projects. The County is also requesting what percentage of the 25% increase in the use of clean fleets and how many tons of reductions are attributable to “construction only” or “public benefits” projects.

*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

Transportation and transit projects must emit more than 2 tons per year before triggering the requirements of the rule, precisely because projects over that threshold have been determined to “emit sufficient amounts of criteria pollutants” to require application of the rule.

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As noted above, the District does not track separately the “public benefit” projects, so the District cannot provide the requested statistics. The District understands public work development projects are important for the communities in the Valley, but, like any other development projects, they may result in construction and operational emissions that have the potential to affect the health of Valley residents. Therefore, the rule applies to public works development projects that exceed the applicability thresholds listed in Section 2 of the rule.

- 20. COMMENT:** The Socioeconomic Analysis indicates that the actual costs of reductions over a 10-year period are considerably less than what was projected in 2005. If the District determines that an exemption for public benefits projects is not warranted, the County requests the District consider a reduction in the amount of off-site mitigation fees for these types of projects consistent with the actual cost of reductions, not the estimated \$9,500/ton projected in 2005.  
*(Michael Washam, Tulare County Resource Management Agency)*

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

The District provides an annual ISR report that presents the revenues, expenditures, and emission reductions achieved through the investment of ISR funds in its emission reduction incentive programs, and the District uses that information on an annual basis to determine whether a fee adjustment is necessary. To date, no adjustments have been made since adoption of the original rule. The ISR Annual Reports can be found at:  
<http://www.valleyair.org/ISR/ISRResources.htm#ISRReports>.

- 21. COMMENT:** As far as the actual fee and how it was calculated, I understand that originally, it was based on the affordability to the project. Was there a consideration to what the actual value or worth of the reduction will be?  
*(John Guinn, The Wonderful Company)*

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

The offsite mitigation fee was originally based on the projected cost of providing an equivalent amount of reductions through the District’s voluntary incentive grant program. As discussed above, the District provides an annual ISR report that presents the revenues, expenditures, and emission reductions achieved. One hundred percent (100%) of all off-site mitigation fees are used by the District to fund emission reduction projects through its Incentives Programs, achieving emission reductions on behalf of the project proponent. Examples of types of emission reduction projects are replacement of old trucks with new low-emission

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vehicles, repair or repair older high-polluting vehicles/school buses, and electrification or replacement of existing diesel-powered off-road equipment. For the 2016 fiscal year, the District achieved emission reductions totaling 322 tons NO<sub>x</sub> and 12 tons PM<sub>10</sub>, for a combined total of 334 tons. As demonstrated on an annual basis in the ISR report, the cost effectiveness (\$/ton) of projects funded to achieve the targeted emission reductions has been met since the rule adoption.

The ISR Annual Reports can be found at:

<http://www.valleyair.org/ISR/ISRResources.htm#ISRReports>.

- 22. COMMENT:** Is the % reduction target with use of a clean fleet for ISR on “business as usual” emissions? Does the clean fleet baseline, “business as usual”, factor in increasingly stringent regulations from ARB on fleets?  
(*Jesse Madsen*)

**DISTRICT RESPONSE:** This comment does not pertain to the proposed amendments; however, the District offers the following response.

Yes. Under State and Federal regulations emissions from construction and operational fleets are decreasing. Project related baseline emissions are calculated using updated fleet emission factors for the proposed fleet. Since the ISR rule requires a percentage of emission reductions compared to the state average, the required emission reductions at a project level follow the decreasing trend of emission reductions recorded at the state level.

- 23. COMMENT:** Has there been any consideration to what the effect of this rule amendment would do to redevelopment projects? Often times ground up is the point of focus but redevelopment is just as important and if there is an increase in applicability for certain sized projects, would this apply to redevelopments or remodels? If so, is there an increase in certain mitigations and off-sets being applied for existing projects to be redeveloped?

If an existing building is being brought up to code to meet the 2016 CBC and Title 24 energy usage requirements, the redevelopment project should not be held to an ISR fee.

(*James S. Sanders, Paynter Realty & Investments, Inc.*)

**DISTRICT RESPONSE:** To be subject to the rule, redevelopments or remodels need to meet the definition of a “development project” as defined by rule 9510. According to Section 3.13 of the rule, a development project is a project that is subject to an approval by a public agency, and will result in:

- The construction of a new building, facility or structure, or

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- The reconstruction of a building, facility, or structure for the purpose of increasing capacity or activity

Any project that does not meet the “development project” definition of the rule is not subject to ISR.

Based on the comment received, remodeling to solely meet Title 24 energy usage requirements without any increase in activity or capacity of the building is not a development project and therefore is not subject to ISR. In all cases, the District recommends that project proponents contact the District for further assistance in making an ISR applicability determination.

- 24. COMMENT:** Are projects that had been previously approved ministerially that would now trigger ISR fees going to have to retroactively pay ISR fees?  
(*Devon Jones, City of Visalia*)

**DISTRICT RESPONSE:** It has never been the District intention to apply the revised rule to projects that have received their final discretionary approval prior to March 1, 2006. The point of the rule amendment is to ensure that the rule is consistently and equitably applied in the Valley.

Based on comments received, the District is proposing to add language to section 2.2 of the rule to clarify that the rule does not apply to large development projects in the following cases:

- Final discretionary approval for the development project has been received prior to March 1, 2006,
- an approval that is not discretionary, including but not limited to a building permit or other Vested Right to Develop, has been received for the development project from a public agency prior to (rule amendment date).

- 25. COMMENT:** The proposed rule significantly changes the “original intent” of the Rule and is therefore subject to CEQA and other federal and state regulations. The claim by the District staff that the amendment does not change the “original intent” is not correct. The District did consider the option of applying the Rule as part of the building permit process and chose the current rule as constructed to “be compatible with local land use authorities’ decision making processes, and to have the ability to be worked into CEQA documents at the Lead Agencies’ discretion” (emphasis added). Likewise, litigation that followed the initial adoption of Rule 9510 also noted that the Rule was applicable for “projects” seeking “discretionary approval”. Staff presentations in 2011 and the District’s “Frequently Asked Questions Regarding Indirect Source Rule” even go as far as

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to emphasize “final discretionary approval” either by bolding or underlining the text. District staff has “expertise in application of the California Environmental Quality Act (“CEQA”) and is knowledgeable of the land use planning and entitlement processes”. This is evident in the responses found on page A-18 of the draft staff report regarding “discretionary action” and “discretionary approval”. That being the case, District staff is aware of the definitions regarding “ministerial” and “ministerial projects” as codified in CEQA regulations and guidelines. Consequently, District staff knows that CEQA guidelines state “similar projects may be subject to discretionary controls in one city or county and only ministerial controls in another”. The attempt to use the argument that the “original intent” was to include ministerial projects along with discretionary projects therefore is not a valid argument to approve the proposed amendment. Likewise, the District is thereby establishing a new rule by now making projects categorically exempt from CEQA subject to CEQA mitigation measures. The District has not demonstrated it has the legal authority to render categorically exempt projects subject to CEQA nor has it demonstrated any evidence that it is following all state and federal laws and regulations which provide the authority to make such an overreach of authority. In approving the original Rule for incorporation into the California State Implementation Plan, the Environmental Protection Agency consistently recognized the Rule applied to applicants seeking “final discretionary approval”. If original intent was ministerial projects, then it would have been noted in the EPA’s final approval of the Rule.

To claim that the amendment “does not change the original intent of the rule” is not true and therefore should be deleted from the staff report and the District should follow the process for establishing a new rule, including demonstrating it clearly has the authority to subject non-CEQA ministerial projects to CEQA, as well as complete a new CEQA document, economic impact analysis and conformity report to the Clean Air Act.

*(Lee Ann Eager, California Central Valley Economic Development Corporation. (CCVEDC))*

**DISTRICT RESPONSE:** The commenter claims that the Rule revisions are not consistent with the original intent of the rule. Contrary to the comment and as discussed above, these changes are certainly consistent with, and adhere to, the original intent of the Rule. However, in developing the original ISR Rule, the District did not envision the scenario that occurred in the City of Visalia, namely that a large project, a 500,000 square foot warehouse with the potential to significantly impact air quality, could be approved without a discretionary decision. The proposed revisions have the effect of matching the language of the rule to its original intent by capturing such projects and requiring them to mitigate their emissions to the same extent as is occurring in other land-use jurisdictions that are approving such projects with discretionary decisions.

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- 26. COMMENT:** The District does not demonstrate inconsistency in the application rule across the Valley. District staff purports that Rule 9510 has been inconsistently applied throughout the Valley. However, the District does not provide any specific cases in which the Rule, as currently written, has not been applied to discretionary actions by local agencies. The only case that is used to justify this amendment is a ministerial action by a single jurisdiction in the Valley in which was litigated and which the District was a co-respondent. Likewise, as noted in point 1 above, CEQA guidelines clearly state that a project that is subject to discretionary action in one jurisdiction may be ministerial in another. As such, the staff report should remove all references that there is inconsistent application of the Rule unless it can provide evidence that local jurisdictions took discretionary action to which the Rule was not applied.  
(Lee Ann Eager CCVEDC)

**DISTRICT RESPONSE:** The commenter claims that the District “has not demonstrated” inconsistency in application of the rule. Staff disagrees, as is explained above in the discussion of the City of Visalia case. In fact, the District believes that most jurisdictions in the Valley properly approve large projects as a discretionary decision. To the extent that application of the rule has been inconsistent, the rule amendments will address at least the issue that was brought to our attention by the City of Visalia warehouse project discussed above.

- 27. COMMENT:** District does not demonstrate that local jurisdictions “circumvented” or “bypassed normal CEQA” obligations. District staff implies that local jurisdictions have been taking actions to circumvent the Rule as well as CEQA in making their land use decisions. Accusing local jurisdictions of avoiding the regulation and or violating CEQA without substantiating these statements with facts is unwarranted. The District staff relies on a single legal challenge that was filed against a company by a union that claimed jobs would be lost at another facility the company operated, as a result of the new facility. While the Staff Report makes conjunctures of how the legal challenge would have turned out, there is no evidence that any local jurisdiction used the “exemption of non-discretionary projects” to “circumvent rule applicability by bypassing normal CEQA obligations” and as such, these statements should be removed from the staff report. It should be noted that an injunction to halt the project in order to conduct further environmental review was denied as the request “failed to present “clear showing” of entitlement to the extraordinary remedy of preliminary injunctive relief”.  
(Lee Ann Eager CCVEDC)

**DISTRICT RESPONSE:** The commenter claims that the District “has not demonstrated” that local jurisdictions circumvented or bypassed normal CEQA

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processes. However, the District is not concerned about individual land-use agencies application of, and compliance with, CEQA, and the rule amendments are not intended to compel compliance with CEQA. In fact, the District's approach to remedying the rule is intended to ensure that large projects' air quality impacts are mitigated regardless of a local jurisdiction's application of, or adherence to, CEQA.

- 28. COMMENT:** Committing to revise a rule prior to public input process and off agenda violates Ralph M. Brown Act. The District states that it "made a commitment to revise the rule after the resolution of the legal case to ensure that large projects are treated uniformly throughout the San Joaquin Valley" (emphasis added). The Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code) requires that decisions be made in an open and public setting. There is no evidence that a public meeting took place prior to the District's commitment to revise the rule. The "commitment to revise the rule" denied the public the opportunity for due process and from participating in the rule making process. As such, the process that has taken place thus far has been to formalize a decision that the District staff has already made, as it is clear that the District's intent is to approve the Rule amendment, regardless of what testimony may be provided by the public. The District is not under any judicial or regulatory mandate to amend the Rule; however, it appears that the decision of the District is already pre-determined to meet the "commitment" made by the District. It would be more appropriate for the District to have taken the position to consider a proposal to revise the rule rather than make an outright commitment to do so. The staff report should make clear what commitments were made and to whom staff made those commitments to.

*(Lee Ann Eager CCVEDC)*

**DISTRICT RESPONSE:** The commenter claims that the District somehow violated the Brown Act by committing to revise the rule without public input. However, the District has complied with all applicable public notification and Brown Act requirements throughout the entire process, in addition to satisfying the notice and comment rule adoption requirements of Health & Safety Code §§ 40725 *et. seq.* This issue was publicly discussed at the Governing Board's May 6 and 7, 2015 Study Session, where the District Board directed staff to propose and workshop potential amendments to the rule to address the inconsistency in application of the rule discussed above. The District's intent to develop proposed amendments to Rule 9510 for the Board's consideration and possible adoption has subsequently been disclosed in virtually every Governing Board meeting agenda since June of 2015. Proposed changes to the rule have been publicly workshopped twice, to date, with at least one more to come. No final decision on the adoption of a modified rule has been made by the District Governing Board.

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The opportunity by the public to weigh in before a final decision has not been sidestepped, and in fact the opportunity for public input continues as of this writing and will continue until the District Board takes final action on the rule later this year. Public input will continue to be accepted during that Board hearing, and the final decision, approval or denial, is not pre-ordained.

- 29. COMMENT:** The proposed amendment constitutes a taking and is in violation of Amendment 5 of the US Constitution. We agree with the Wonderful Company and other property owners' comments that singling out previously exempt projects violates the equal protection clause as well as a violation of due process. The amendment proposes to extend the Rule to previously exempt ministerial projects, including ministerial projects that are already in the review process. By the time an applicant has submitted a building permit, their project design, cost estimates, including fees, are known and anticipated. The approval of the amended Rule would "interfere with distinct investment backed expectations" and thereby denying property owners "economically viable use of his land". Land owners who have received their discretionary approval for projects have a vested right to a building permit and as such, imposing an additional burden after discretionary action has been completed would constitute a taking.  
(*Lee Ann Eager CCVEDC*)

**DISTRICT RESPONSE:** This comment incorrectly claims that the rule applies retroactively and therefore has the effect of a "taking" in violation of the U.S. Constitution. There is nothing in this rule that applies retroactively to projects. In fact, the District tabled and postponed the final hearing for this proposed rule in September 2016 to address this issue more clearly and to ensure that no projects will be affected retroactively. To address the concern that the proposed amendments will lead to increased, unanticipated costs for development projects that are already in the pipeline, District staff is proposing to continue work on the proposed amendment and to engage the public on how the proposed amendments might be adequately limited to prevent undue impingement upon vested development rights. Towards that end, the District will host an additional workshop to present a revised proposal and also address public comments.

- 30. COMMENT:** Proposed amendment opens District and local jurisdictions to challenges under Government Code Section 66020. Property owners are afforded the right to challenge the validity of conditions imposed on a building permit that divest them of "money or a possessory interest in property". Since the District is proposing to extend the Rule to previously exempt ministerial projects, particularly those in the application process, building permit applicants will be able to challenge the validity of the conditions imposed by the District on their building permit. While case law may show the right of the District to implement the Rule on "discretionary" actions, there is no mention in any District

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report, state, federal or legal filings or court opinions to support the District and as such every property owner who has a right to ministerial permits could bring a challenge to both the local jurisdiction and the District. Therefore, the District, by extending the rule on previously exempt ministerial projects, is exposing itself and local jurisdictions to legal challenges by property owners. At a minimum, the Rule should include indemnification for local jurisdictions from legal challenges for implementing the Rule.

*(Lee Ann Eager CCVEDC)*

**DISTRICT RESPONSE:** The District has no authority over land-use approval. As such, the District does not and is not able to place conditions on building permits issued by a land use agency. Considering the building permit to be a trigger to the ISR applicability determination process is not a condition to the building permit itself. Moreover, the ISR fees required by Rule 9510 are not development fees subject to the Mitigation Fee Act, but rather are valid regulatory fees (*California Building Industry Association v. San Joaquin Valley Air Pollution Control District* (2009) 178 Cal.App.4th 120.). As such, Government Code Section 66020 is not applicable as a remedy to protest the validity of any ISR fees required by the rule.

- 31. COMMENT:** The proposed rule extends to any and all actions by a local jurisdiction that are categorically exempt under CEQA. Many jurisdictions in the Valley have economic incentive programs as well as use other tools to attract new business investment. Often times these incentives “agreements” are offered to companies prior to a formal announcement of the project. Under section 15061(b)(3) of the CEQA guidelines, action on these types of agreements are exempt from CEQA. However, as the current amendment is constituted it applies to “any project or portion thereof that is subject to approval by a public agency and will ultimately result in the construction of a new building, facility, or structure”. Since the approval of an incentive agreement, or a reimbursement agreement, or for that matter, any categorically exempt action taken by a local agency would “ultimately result in” the construction of a new facility, that would then require a local jurisdiction to levy the fee on a project before they even make a decision for building in that jurisdiction.

*(Lee Ann Eager CCVEDC)*

**DISTRICT RESPONSE:** The commenter claims that the rule amendments, if adopted as written, would extend “to any and all actions by a local jurisdiction that are categorically exempt under CEQA.” Of course, this is not correct. Even the narrow category that the letter discusses after making this broad-brush claim – the signing of an incentive agreement to attract a development to a specific city or county – is a discretionary decision, and as such is not covered by the amendments to the rule.

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- 32. COMMENT:** The proposed rule will require adoption by the California Building Codes Commission prior to being effective. Government Code section 18944.5 binds all public agencies to the California Building Standards Law. Since the District is imposing a new “standard” on building permit applicants and requiring local jurisdictions to enforce this standard on building permit applicants, the Rule would therefore require the approval of the California Building Standards Commission and must meet the review consideration and factual determinations as outlined in the Law. The staff report should fully outline how the proposed Rule meets the factual determinations as well as the analysis required by the California Building Standards Commission. No public agency is permitted to add to the building permit process absent approval from the Commission.  
(Lee Ann Eager CCVEDC)

**DISTRICT RESPONSE:** This comment also makes the claim that the proposed amendments to Rule 9510 consist of new “building standards” in violation of Government Code Section 18944.5, which requires any new building standards to be approved by the California Building Standards Commission before they can be enforced. The letter writer mis-cites and misconstrues the applicable requirement. It is presumed that the letter writer intended to reference Government Code Section 11152.5 (as section 18944.5 does not exist in the Government Code). Substantively, Section 11152.5, by its terms, applies only to any state agency authorized to adopt rules and regulations which are building standards. The District is not a state agency, and is therefore not subject to Section 11152.5. Alternatively, the letter writer may have intended to reference Health & Safety Code Section 18944.5, which simply provides that the California Building Standards Code is binding on state and other public agencies.

In either case, the proposed amendments to Rule 9510 are neither building standards, nor are the requirements of Rule 9510 incorporated into any building permit. Rule 9510 is a stand-alone requirement that the District independently imposes and enforces through its own lawful authority. The letter also raises other arguments as to the legality of the rule amendments. However, the District’s authority to adopt Rule 9510 has been solidly affirmed by both state and federal courts. In *National Ass’n of Home Builders v. SJVAPCD*, 627 F.3d 730 (9th Cir. 2009), the court held that Rule 9510 was expressly authorized by the Clean Air Act at 42 U.S.C. § 7410, and was not preempted by the Clean Air Act’s prohibition against adopting emission standards for mobile equipment. Similarly, in *California Bldg. Industry Ass’n v. SJVAPCD*, 178 Cal.App.4th 120 (2009) in response to challenges that the rule was unconstitutional and in excess of the District’s authority, the court affirmed the District’s express statutory authority under Health & Safety Code §§ 40604, 40716 and 42311 to adopt the rule and found that the rule was a valid regulatory fee bearing a reasonable relationship

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between the fee charged and the burden to air quality imposed by the development. Both of these challenges were appealed to the Supreme Court level, where review was denied.

- 33. COMMENT:** It would be warranted to provide an example of how this rule goes beyond the original scope and intention. Ulta, a beauty products retailer, recently constructed a new store that exceeded the 10,000-square foot threshold. They located in a shopping center that was originally subject to CEQA and received its discretionary permits in accordance with state and local regulations and ordinances. Ulta located on the last remaining development pad within the retail center. Had the proposed amendment been in place at the time of Ulta's submission of a building permit, they would have been forced to pay mitigation fees, as their ability to institute mitigation measures within an built out retail center would have not been possible. The addition of thousands of dollars in mitigation fees would have rendered the project unfeasible and consequently, the project would not have been built. Ulta is just the example of one retailer who will be unduly harmed by the implementation of this new Rule.  
(*Lee Ann Eager CCVEDC*)

**DISTRICT RESPONSE:** The commenter's conclusions regarding the Ulta facility are clearly based on a misunderstanding of the rule. The development in which the Ulta facility was constructed received its final discretionary decision prior to the effective date of the rule, so all of the construction within that development is exempt from the requirements of the ISR Rule. The proposed rule modifications do nothing to change this exemption – the Ulta facility would remain exempt under the proposed modified rule, as well.

- 34. COMMENT:** Finally, the staff report only provides selected excerpts from letters received during the prior public review process along with the District response. Since there are many organizations that have voiced their opposition to the proposed amendments and whose comments may not have received adequate response, the final staff report should include full copies of all comments the District received regarding the proposed amendments so that a full and complete record of the process is available for public review.  
(*Lee Ann Eager CCVEDC*)

**DISTRICT RESPONSE:** The District believes that it has fairly and accurately captured and addressed all comments, whether received in written or verbal form. Of course, all written comments are available upon request, but the District believes that attaching them to a rule development staff report is generally unnecessary and can be excessively cumbersome.

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Draft Staff Report for Proposed Amendments to Rule 9510  
Appendix C: Comments and Responses

May 18, 2017

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- 35. COMMENT:** We encourage the Board to vote against the proposed amendments to Rule 9510. Subjecting the District and local jurisdictions to lengthy legal challenges because of the proposed amendments as well as the loss of commercial and industrial businesses that will result from this regulatory overreach can be avoided by maintaining the Rule as it currently exists and for which has been uniformly and consistently implemented throughout the San Joaquin Valley for the past eleven (11) years.  
(Lee Ann Eager CCVEDC)

**DISTRICT RESPONSE:** Comment noted.

**SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT**

*Draft Staff Report for Proposed Amendments to Rule 9510*  
Appendix D: Socioeconomic Analysis

May 18, 2017

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**APPENDIX D**

**Socioeconomic Analysis for Rule 9510**

# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

## I. Introduction

Pursuant to state law, the San Joaquin Valley Air Pollution Control District (District) is required to perform an assessment of the socioeconomic impacts prior to the adoption, amendment, or repeal of a rule that will have significant air quality benefits or that will strengthen emission limitations. As such, the District has prepared the following socioeconomic analysis based upon the 2005 socioeconomic analysis conducted for District Rule 9510 (Indirect Source Review) adopted on December 15, 2005. The 2005 socioeconomic analysis was referenced as Appendix F of the 2005 staff report and is available at: <http://www.valleyair.org/ISR/ISRSupportDocuments.htm>.

## II. Socioeconomic Analysis

The 2005 socioeconomic analysis examined trends of industries that would be affected by District Rule 9510, in addition to evaluating the economic impact on air quality fees, including with respect to a development project's profitability. The 2005 socioeconomic analysis described the methodology for evaluating economic characteristics of sources affected by District Rule 9510 and 3180 (Administrative Fees for Air Impact Assessment Applications), and the socioeconomic impacts of compliance costs on the regional economy.

The original 2005 socioeconomic impact analysis concluded that the rule would not have a significant impact on the industry, and this remains accurate today.

### A. Residential Development Projects

The 2005 socioeconomic analysis predicted and identified the worst-case fees that would impact typical residential development projects. The worst-case per residential dwelling unit cost was estimated at \$784 starting in year 2006, climbing to \$1,268 the following year, and \$1,772 in 2008. It was noted that the fee could be lower depending on the strategies that a developer employs to reduce emissions.

The 2005 socioeconomic analysis indicated that while the worst-case residential fee that a typical residential development would pay under Rule 9510 and 3180 can increase the amount of household income required to finance the purchase of a new home, the estimated increase represented a small fraction of the original household income required to finance a new home in the event no air quality fees were in place. The effect of the fees on rents was similarly small. The 2005 socioeconomic analysis also examined the impacts of proposed worst-case off-site emission reduction fees on commercial, industrial and institutional projects. While a typical non-

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residential development can absorb the 2006 and 2008 fees, projects will have to recover the cost of the fee over a period of time.

Table 16 from the 2005 socioeconomic analysis is shown below:

<b>Year</b>	<b>Per Unit</b>
2006	\$784.12
2007	\$1,268.09
2008	\$1,772

Since the original 2005 socioeconomic analysis and rule effectiveness date of March 1, 2006, the District has over 10 years of implementation history. The highest per residential dwelling unit cost of all projects during that time was \$1,675, below the worst case prediction in the 2005 analysis of \$1,772. This project was an outlier. The next two highest projects were \$1,482 and \$1,268 per dwelling unit, and the actual average cost per residential dwelling unit over the entire implementation history of the rule is \$476. Most recently, the actual average cost per residential dwelling unit is \$343 and \$283 for years 2015 and 2016, respectively. It is important to note that we have not adjusted the 2005 analysis for inflation and are in fact using the estimated maximum per residential dwelling unit cost of \$1,772 projected for 2008. However, as a reference, using a CPI adjustment for inflation, this is equivalent to \$1,986 in today's dollars.

The actual costs for residential projects since rule inception is far below the predictions in the 2005 socioeconomic analysis, further validating the 2005 socioeconomic analysis' conclusions. The proposed amendments to District Rule 9510 do not change the original intent of the rule, as that intent was explained and documented in the original rule development process. Therefore, the proposed amendments do not result in new costs or socioeconomic effects regarding residential development projects as compared to those assessed at the time the rule was adopted. As shown above, the original 2005 socioeconomic analysis and its conclusions remain relevant and applicable to the proposed amendments.

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## **B. Industrial/Commercial (Non-Residential) Development Projects**

The 2005 socioeconomic analysis indicated that the rule fee will impact net profits of commercial small businesses by 1.5 percent.

The 2005 socioeconomic analysis also indicated that it was important to note that any fee identified in the report was the estimated maximum fee in the worst-case scenario for a typical development project, with the understanding that the actual fee would vary with the particulars of any project. Any fee in the 2005 report was presented for the purposes of analyzing potential impacts given costs associated with reducing quantifiable emissions resulting from what constitutes typical residential, commercial and industrial developments. It was also noted that developers may reduce fees by incorporating on-site emission reduction measures into the project that may or may not result in additional cost. In any event, it was anticipated that the developer would choose the least costly option. Overall, for developments subject to the rule the impact fee resulting from District Rule 9510 was not expected to be a significant impact on them.

### **Industrial**

The 2005 socioeconomic analysis predicted and identified the worst-case fees that would impact typical industrial development projects. For the year 2008, these estimated costs ranged from \$179,956 to \$747,626 per project. The analysis concluded that these costs were not a significant impact. It was noted that the fees could be lower depending on the strategies that a developer employs to reduce emissions. Table 17 from the 2005 socioeconomic analysis is shown below:

<b>2006</b>		
<b>Use</b>	<b>Average Acres</b>	<b>Corresponding Fee Total</b>
Heavy Industrial	300.0	\$357,394.75
Light Industrial	75.0	\$240,508.75
Warehouses	25.0	\$83,645.68
Misc. Industrial (industrial park)	39.0	\$143,797.05
<b>2008</b>		
Heavy Industrial	300.0	\$747,626
Light Industrial	75.0	\$518,237
Warehouses	25.0	\$179,956
Misc. Industrial	39.0	\$309,965

# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

Since the original 2005 socioeconomic analysis and rule effectiveness date of March 1, 2006, the District has over 10 years of implementation history. No heavy industrial projects have been subject to the ISR rule, so no further analysis is necessary. For light industrial development projects, the 2005 analysis projected the maximum cost of the rule to be \$518,237 for the year 2008. However, the actual maximum cost experienced by any light industrial project has been \$83,399, and the average over the 10 years for such projects is \$13,760. For warehouse development projects, the 2005 analysis projected the maximum cost of the rule to be \$179,956 for the year 2008. The average over the 10 years for such projects is \$109,173. However, the District has seen one very large distribution center that was subject to an ISR fee of \$883,000. On the other hand, similar projects that have committed to using clean truck fleets have totally avoided ISR fees. On average, distribution centers, while significantly different than warehouses anticipated in the 2005 socioeconomic analysis, paid far less than the anticipated worst-case cost per warehouse, at an average of \$109,173 per project. For miscellaneous industrial projects, the 2005 analysis projected the maximum cost of the rule to be \$309,965 for year the 2008. However, the actual maximum cost experienced by any miscellaneous industrial projects has been \$243,260 and the average over the 10 years for such projects is \$34,470. It is important to note that we have not adjusted the 2005 analysis for inflation and are, for the purposes of this analysis update, using the estimated maximum per project projected in 2005 for the year 2008.

The actual costs for industrial projects since rule inception is far below the predictions in the 2005 socioeconomic analysis, further validating the 2005 socioeconomic analysis' conclusions. The proposed amendments to District Rule 9510 do not change the original intent of the rule, as that intent was explained and documented in the original rule development process. Therefore, the proposed amendments do not result in new costs or socioeconomic effects regarding residential development projects as compared to those assessed at the time the rule was adopted. As shown above, the original 2005 socioeconomic analysis and its conclusions remain relevant and applicable to the proposed amendments.

## **Commercial**

The 2005 socioeconomic analysis predicted and identified the worst-case fees that would impact typical industrial development projects. For the year 2008, these estimated costs ranged from \$52,971 to \$2.7 million per project. It was noted that the fees could be lower depending on the strategies that a developer employs to reduce emissions. Table 18 from the 2005 socioeconomic analysis is shown below:

# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

<b>TABLE 18</b>			
<b>Worst Case Estimate: Fee That Corresponds To a Typical Commercial Development</b>			
<b>TYPE OF SHOPPING CENTERS</b>	<b>SIZE RANGE</b>	<b>TYPICAL SIZE (sq ft)</b>	<b>Corresponding Fee Total</b>
<b>2006</b>			
convenience shopping center	up to 30,000	20,000	\$24,524.94
neighborhood shopping center	30,000 to 100,000	50,000	\$61,599.54
community shopping center	100,000 to 450,000	150,000	\$184,647.45
super community shopping center	200,000 to 300,000	250,000	\$403,546.91
regional shopping center	300,000 to 700,000	450,000	\$626,791.07
superregional shopping center	500,000 to 2 million	900,000	\$1,253,582.15
<b>2008</b>			
convenience shopping center	up to 30,000	20,000	\$52,971.24
neighborhood shopping center	30,000 to 100,000	50,000	\$131,689.99
community shopping center	100,000 to 450,000	150,000	\$397,483.34
super community shopping center	200,000 to 300,000	250,000	\$872,322.57
regional shopping center	300,000 to 700,000	450,000	\$1,353,824.12
superregional shopping center	500,000 to 2 million	900,000	\$2,708,116.82

Since the original 2005 socioeconomic analysis and rule effectiveness date of March 1, 2006, the District has over 10 years of implementation history.

For convenience shopping center development projects, the 2005 analysis projected the maximum cost of the rule on any one project to be \$52,971 for the year 2008. The average over the 10 years for such projects is \$5,018. However, the District had two convenience shopping center development projects from 2008 that were subject to ISR fees of \$57,204 and \$86,212. On the other hand, 83% of convenience shopping center development projects have committed to using clean truck fleets and other mitigation measures to totally avoid ISR fees. On average, convenience shopping center development projects paid far less than the anticipated cost per convenience shopping center, at an average of \$5,018 per project. Further, since 2008, the average cost for convenience shopping center development projects is a mere \$1,867.

For neighborhood shopping center development projects, the 2005 analysis projected the maximum cost of the rule on any one project to be \$131,869 for years 2008 and beyond. The average over the 10 years for such projects is \$76,274. However, in 2007 the District has seen one neighborhood shopping center development project subject to an ISR fee of \$209,394. On the other

## SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

hand, similar projects that have committed to using clean truck fleets and other mitigation measures to greatly reduce or totally eliminate fees ISR fees. On average, neighborhood shopping center development projects paid far less than the anticipated cost per neighborhood shopping center, at an average of \$76,274 per project.

For community shopping center development projects, the 2005 analysis projected the maximum cost of the rule to be \$397,483 for the year 2008. However, the actual maximum cost experienced by any community shopping center project has been \$382,970 and the average cost over the 10 years for community shopping center development projects is \$163,719.

For super community shopping center development projects, the 2005 analysis projected the maximum cost of the rule to be \$872,323 for the year 2008. However, the actual maximum cost experienced by any super community shopping center project has been \$349,766 and the average cost over the 10 years for super community shopping center development projects is \$238,812.

For regional shopping center development projects, the 2005 analysis projected the maximum cost of the rule to be \$1.35 million for the year 2008. However, the actual maximum cost experienced by any regional shopping center project has been \$991,909 and the average cost over the 10 years for regional shopping center development projects is \$445,238.

For super regional shopping center development projects, the 2005 analysis projected the maximum cost of the rule to be \$2.7 million. However, the actual maximum cost experienced by any regional shopping center project has been \$1.3 million and the average cost over the 10 years for super regional shopping center development projects is \$735,533.

It is important to note that we have not adjusted the cost predicted in 2005 analysis for inflation and we are in fact using the estimated maximum per project projected in 2005 for the year 2008.

The actual costs for industrial projects since rule inception is far below the predictions in the 2005 socioeconomic analysis, and further validates the 2005 socioeconomic analysis' conclusions. The proposed amendments to District Rule 9510 do not change the original intent of the rule, as that intent was explained and documented in the original rule development process. Therefore, the proposed amendments do not result in new cost or socioeconomic effects regarding industrial development projects as compared to those assessed at the time the rule was adopted. As shown above, the

# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

original 2005 socioeconomic analysis and its conclusions remain relevant and applicable to the proposed amendments.

## **C. Program Benefits**

The 2005 socioeconomic analysis indicated that the District will use the Off-Site Emission Reduction Fees to fund off-site emission reduction projects located within the San Joaquin Valley. Besides providing a health benefit to all Valley residents by reducing overall emissions in the air basin, the funding projects benefit the Valley's economy. Potential projects for funding through this program are numerous and varied ranging from public works construction project such as procuring cleaner vehicles and equipment for businesses and local government agencies, to school bus upgrades. All of the money received as an off-site fee is spent on projects within the region that make the air cleaner. The program benefits the economy through three beneficial impacts:

- Local purchases: Projects that require a purchase of equipment, materials, or services results in money being re-circulated into the regional economy.
- Local projects: It has already been stated that the program would fund local projects. This means that the school, city, industry or private group that receives the funding for an emission reduction project would benefit economically from the program.
- Job creation: The off-site funding program made possible by the ISR Program may also lead to short-term and perhaps long-term job creation. For example, for a financially strapped company or public agency, the funding allows for the purchase and installation or construction of the item (be it a school bus or road project).

The District's use of the ISR funding is documented in an annual report published each November. The report includes information on funding received through the ISR program, and specifies the actual emission reduction projects funded locally. For instance, the most recent report shows an investment in 2015-16 of over \$1.2 million in ISR funds to help Valley businesses replace older agricultural tractors and on-road heavy duty trucks with cleaner versions, achieving about 148 tons of reductions of nitrogen oxide and particulate emissions. These program benefits are not accounted for in the above cost impact analyses.

# SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

### III. Bearing on Proposed Rule 9510 Amendments

As demonstrated above, the 2005 socioeconomic analysis conservatively assessed the socioeconomic impacts that would result from the implementation of the rule on development projects meeting the applicable size square footage or greater. In nearly every case, it over-estimated worst case impacts of District Rule 9510.

Since the original 2005 socioeconomic analysis and rule effectiveness date of March 1, 2006, the District has over 10 years of implementation history. The actual costs for residential, industrial, and commercial development projects since rule inception are far below the predictions in the 2005 socioeconomic analysis. The proposed amendments to District Rule 9510 do not change the original intent of the rule, as that intent was explained and documented in the original rule development process. Therefore, the proposed amendments do not result in new cost or socioeconomic effects regarding development projects as compared to those assessed at the time the rule was adopted.

Since actual costs have been demonstrably lower than anticipated when the rule was originally adopted, and these amendments do not change the original intent of the rule, the original cost effectiveness and socioeconomic analyses remain relevant and applicable to the proposed amendments. Therefore, the conclusions of the original socioeconomic impact analysis, specifically that the rule would not have a significant impact on the land development industry, remain accurate and relevant today.

**SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT**

*Draft Staff Report for Proposed Amendments to Rule 9510*  
Appendix D: Socioeconomic Analysis

May 18, 2017

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