



San Joaquin Valley
AIR POLLUTION CONTROL DISTRICT



FINAL DRAFT STAFF REPORT

RULE 9510 INDIRECT SOURCE REVIEW

SEPTEMBER 15, 2016

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SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

Final Draft Staff Report for Proposed Amendments to Rule 9510

September 15, 2016

SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

FINAL DRAFT STAFF REPORT

Amendments to Rule 9510 (Indirect Source Review)

September 15, 2016

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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, what 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,

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including eight counties, fifty-nine cities, and several other state or local regulatory 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

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and costly burden on public agencies and the District to ensure that all 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_x 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 NO_x emissions, to be "large development projects". Since the original ISR applicability thresholds are based on a projected emissions rate of two tons of NO_x, 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

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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.

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

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be rearranged to clarify that the “purpose of increasing capacity or activity” only applies to the reconstruction of a new building, facility, or structure.

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 provision has been added to maintain the exemption for projects that have received a discretionary approval which pre-dates the original applicability of the rule. In response to comments received during the rule amendment process and to avoid confusion regarding the timing of the applicability of the rule to projects seeking discretionary approval and to transportation or transit development projects, Section 4.5, as contained in the April 26, 2016, proposal, has been removed and an effective date has been added to Sections 2.1 and 2.3 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:...~~

2.23 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.~~

- 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.

2.2 Effective on and after (rule amendment date), unless this rule applies pursuant to section 2.1, this rule shall apply to any applicant that seeks to gain ministerial or otherwise non-discretionary 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;

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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.

- To be consistent with the proposed changes related to the applicability mechanism of the rule, Section 2.3 (now proposed Section 2.4) is being amended to read as follows:

2.34 *Projects on Contiguous or Adjacent Property*

2.34.1 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.

2.34.2 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.

- Large development projects that have been approved without a discretionary approval, and have received a building permit, or other final construction authorization such as a grading permit when a building permit is not required (the latter was added in response to comments - See attached Appendix), from the land

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use agency during this rule amendment process, will be exempt from the amended rule:

4.5 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.

- 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:

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 reconstruction of a building, facility, or structure for the purpose of increasing capacity or activity.~~*
- *the construction of a new building, facility, or structure; or*
 - *the reconstruction of a building, facility, or structure for the purpose*

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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 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.*

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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;~~

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.~~

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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.

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.~~

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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. Comments received during and subsequent to the public workshop are addressed in the Appendix of this staff report. None of the comments resulted in significant changes to the proposed rule. As such, it was also determined that there is no need to hold a future workshop.

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. The proposed amendments and final draft staff report will be made available to the public no later than August 16, 2016, with a two-week public comment period ending at 5:00 PM on August 30, 2016. Comments received before August 30, 2016, will be addressed in the final draft staff report presented to the Governing Board. The public is also invited to provide comments after August 30, 2016, either before or during the public hearing for the adoption of the proposed rule amendments on September 15, 2016.

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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 nondiscretionary 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. Since the proposed amendments do not change the original intent of the rule, as that intent was explained and documented in the original rule development process, 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, and therefore new analyses are not required.

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

According to the California Environmental Quality Act (CEQA) statutes and pursuant to Section 15061 of the CEQA Guidelines, the District investigated the possible environmental impacts of the amendments to Rule 9510, 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 exempt per the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment (CEQA Guidelines §15061 (b)(3)). 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.

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

September 15, 2016

APPENDIX

Summary of Significant Comments and Responses For Amendments to Rule 9510

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

September 15, 2016

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 (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.

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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 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.*

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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)

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

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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 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 nondiscretionary 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. Since the proposed amendments do not change the original intent of the rule, 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 a socioeconomic analyses remain relevant and applicable to the proposed amendments, and therefore new analyses or not required.

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 valley have needs specific to their communities and recognizes the variability of the application of project discretion in the Valley. Therefore, the District is

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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 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

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

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DISTRICT RESPONSE: The provision in the District's ISR Rule providing for exemption of nondiscretionary 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. The requirements imposed and agreed to by the City under the settlement further signify that the City in fact had discretionary authority over the project.

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 the settlement that addressed the CEQA lawsuit included extensive additional air

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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 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 to any applicant that seeks to gain ministerial or otherwise non-discretionary approval from a public agency for a large development project, which upon full build-out will include any one of the following:
- 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 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.

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

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.

As noted in this staff report, the District action fully complies with applicable CEQA requirements. In fact, the rule amendments are likely to have a positive impact on the environment. Furthermore, in the City of Visalia case discussed above, the District believes that, had the legal case been carried to fruition through the courts, the City's permitting decision would have been found to be discretionary, and would have triggered ISR.

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.

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.

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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 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

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

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projects were treated uniformly throughout the San Joaquin Valley. The proposed amendments provide that uniformity.

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)

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

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 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.

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Appendix: Comments and Responses

September 15, 2016

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.

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