San Joaquin Valley
AIR POLLUTION CONTROL DISTRICT

HEALTHY AIR LIVING

FINAL DRAFT STAFF REPORT

RULE 9510
INDIRECT SOURCE REVIEW

DECEMBER 21, 2017

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SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

FINAL DRAFT STAFF REPORT

Amendments to Rule 9510 (Indirect Source Review)

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Prepared by: Cherie Clark, Air Quality Specialist
Patia Siong, Supervising Air Quality Specialist

Reviewed by: Brian Clements, Program Manager
Arnaud Marjollet, Director of Permit Services
Dave Warner, Deputy Air Pollution Control Officer

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. In the first case, the project's emissions are mitigated under rule 9510, while in the latter case the emissions would not be subjected to the emission reduction and mitigation requirements of the rule. Based on the District's experience implementing the ISR rule, the most significant air quality 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.

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 such "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 has subsequently become a commitment in the District's Ozone Attainment Demonstration Plans as well. 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 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.

Specifically, 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 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 option 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. For instance, 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 the elimination of 1,227 tons of PM10 and NOx emissions from construction phases. For operational emissions, since the adoption of the ISR rule, the incorporation of "clean" design elements has resulted in the elimination of more than 10,000 tons of NOx and PM10 combined.

III. DISCUSSION OF PROPOSED RULE AMENDMENTS

A. Applicability

Currently the rule applies to a development project proponent seeking "final discretionary approval" action over the proposed project. However, as mentioned above, that which is subjected 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 air quality impacts related to inconsistent applicability of the rule have historically been associated with large development projects.

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

To ensure that development projects are addressed and mitigated equally and consistently throughout the Valley under Rule 9510, the District explored the following rule applicability options:

- Option 1: Applicability Triggered by Building Permit

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

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

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

- Option 2: Applicability Triggered by First Public Agency Approval

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

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

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 changes will be required (see section IV for a full discussion of the specific rule amendments necessary to implement these changes):

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 2.4 for transportation or transit development projects. In addition, an effective date has been added to Section 2.3 for large development projects not otherwise subject to the rule under Section 2.1.

Exemption for In-process large Development Projects Currently Not Subject to the Rule: Unless an In-process large Development project is already subject to the rule under Section 2.1, it will remain exempt from the rule if any of the following criteria under new Section 2.3 are met:

- Final discretionary approval has been received prior to March 1, 2006; or
- Prior to 90 days after the rule adoption date, the applicant received project-level building permits, a conditional use permit, or similar approvals for the particular large development project; or
- The project qualifies as a Grandfathered Large Development Project, which is a non-discretionary large development project that has received approval and has invested significantly based on that approval before 90 days after the rule adoption date.

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 approval for the project prior to the effective date of this rule amendment, the developer will be given 30 days after the effective rule amendment date to submit an ISR application to the District.

B. Other Proposed Rule Amendments

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

Clarifying "Development Project" Definition:

The current definition of "development project" is:

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

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

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

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.

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.

Credit for Off-Site Emission Reductions Prior to Rule Adoption

Section 7.4 contains a reference to the original "rule adoption date". To avoid confusion with the adoption date of the amended rule, the District updated Section 7.4 to replace the "rule adoption date" with the rule's original adoption date of December 15, 2005.

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 effective date identified in the rule title.

IV. PROPOSED AMENDMENTS TO RULE 9510

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

Refining the Applicability Mechanism

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

  2.1 Effective on and after March 1, 2006, ~~T~~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~~4 Effective on and after March 1, 2006, ~~T~~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, the District made several additional changes to the rule applicability amendments. Regarding the timing of the applicability of the rule to non-discretionary

projects, an effective date has been added to Section 2.3 and has also specifically identified that Section 2.2 does not apply to large development projects for which a final discretionary approval has been received prior to March 1, 2006 (the effective date of the current rule).
The District also revised the proposed rule language to remove any ambiguity regarding the District's intent that development projects that received final discretionary approval prior to March 1, 2006, remain exempt from the rule. The amendment further clarifies that, unless a development project received a discretionary approval and equals or exceeds the applicability thresholds as identified under rule Section 2.1, those development projects, for which the applicant received project-level building permits, a conditional use permit, or similar approvals for the particular large development project prior to the rule amendment effective date, are not subject to the rule.

The District further expanded the concept of the proposed applicability under Section 2.3 by providing additional criteria for which large development projects would not be subject to the rule. This expanded concept includes a "Grandfathered Large Development Project." A definition for this new term has been added to Section 3.0 of the rule.

The proposed Sections 2.2 and 2.3 are as follows:

2.2 Except as specified in Section 2.3, this rule shall apply to any applicant that seeks to gain approval from a public agency for a large development project, which upon full build-out will include any one of the following:

2.2.1 250 residential units;

2.2.2 10,000 square feet of commercial space;

2.2.3 125,000 square feet of light industrial space;

2.2.4 500,000 square feet of heavy industrial space;

2.2.5 100,000 square feet of medical office space;

2.2.6 195,000 square feet of general office space;

2.2.7 45,000 square feet of educational space;

2.2.8 50,000 square feet of government space;

2.2.9 100,000 square feet of recreational space; or

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

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

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

2.3.2 The large development project requires or required a discretionary approval and is subject to the rule under Section 2.1; or

2.3.3 Prior to [insert date 90 days after rule adoption], the applicant received project-level building permits, a conditional use permit, or similar approvals for the particular large development project; or

2.3.4 The large development project qualifies as a Grandfathered Large Development Project.

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

2.~~3~~5 *Projects on Contiguous or Adjacent Property*

2.~~3~~5.1 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.~~3~~5.2 Nonresidential projects with contiguous or adjacent property under common ownership of a single entity in whole or in part, that is designated and zoned for the same development density and land use, and has the capability to accommodate development projects emitting more than two (2.0) tons per year of operational NOx or PM10 when determining applicability of the rule under Section 2.1, or more than ten (10.0) tons per year of operational NOx or PM10 when determining applicability of the rule under Section 2.2, are subject to this rule. Single parcels where the individual building pads are to be developed in phases must base emissions on the potential development of all pads when determining the applicability of this rule.

- As discussed above, the District is proposing to add a definition for “Grandfathered Large Development Project”:

3.17 Grandfathered Large Development Project: a large development project that meets the following to the satisfaction of the APCO:

3.17.1 The large development project must be identified by the applicant and be a particular and defined large development project meeting at least one of the land use categories in Section 2.2; and

3.17.2 The applicant provides written confirmation from the public agency responsible for project-level building permits, conditional use permits, or similar approvals, that the large development project identified under Section 3.17.1 has received a land-use entitlement and requires no discretionary approval prior to starting construction; and

3.17.3 Prior to [insert date 90 days after rule adoption], and in reliance upon the land use entitlement, the applicant has entered into binding agreements or contractual obligations for the large development project identified under Section 3.17.1, which cannot be canceled or modified without substantial loss to the applicant, for designing, developing, or constructing the large development project.

- 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 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 subject to this rule under Section 2.2 who has applied for, or otherwise

sought to gain, approval from a public agency for the project prior to [insert date 90 days after rule adoption], shall submit an AIA application prior to [insert date 120 days after rule adoption].

Clarifying "Development Project" Definition:

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

3.13 Development Project: any project, or portion thereof, that is subject to an ~~discretionary~~ approval by a public agency, and will ultimately result in:

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

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

3.3~~3~~4 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~~transportation 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."

3.3~~4~~5 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, PM10reference to "URBEMIS" and its definition have been removed as follows:

~~3.35 URBEMIS: a computer model that is owned and modified by the local air pollution control districts and air quality management districts in the State of California. URBEMIS estimates construction, area source and operational emissions of NOx and PM10 from potential land uses, using the most recent approved version of relevant ARB emissions models and emission factors and/or~~

~~*District-specific emission factors; and estimates emissions reductions. The model has the capacity for changes to defaults when new or project specific information is known.*~~

Adding Seismic Safety to Reconstruction Exemptions List:

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

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

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

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

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

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

Payment of Applicable Fees Required Prior to Generating Any Emissions:

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

7.3 The applicant shall pay the Off-Site Fees in full by the invoice due date or prior to generating emissions associated with the project or any phase thereof, whichever occurs first. ~~within sixty (60) calendar days after the AIA application is approved or in accordance to the schedule contained in the APCO approved FDS.~~

8.5 Off-Site Fee: After the APCO approves the AIA application and its contents; the APCO shall provide the applicant with an estimate for the projected off-site fees, if applicable. The applicant shall pay the off-site fee ~~within 60 days, unless a FDS has been approved by the District~~ in accordance with Section 7.3.

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

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

7.1.1.1 NOx Emissions

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

7.1.1.2 PM10 Emissions

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

7.1.2.1 NOx Emissions

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

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.

Credit for Off-Site Emission Reductions Prior to Rule Adoption

Section 7.4 contains a reference to the original “rule adoption date”. To avoid confusion with the adoption date of the amended rule, the District updated Section 7.4 to replace the “rule adoption date” with the rule’s original adoption date of December 15, 2005.

7.4 The applicant shall receive credit for any off-site emission reduction measures that have been completed and/or paid for, prior to ~~the adoption of this rule~~ December 15, 2005, if the following conditions have been met:

Requirement for a Change in Ownership of a Project:

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

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

Removing Section 11.0 the Effective Date

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

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

V. RULE AMENDMENT PROCESS

A. Public Workshops

As part of the rule amendment process, the District has held a number of workshops throughout development of the rule amendment process to seek public input. The focus of the public workshops was to present the proposed amendments to the rule and to solicit public feedback. At the public workshops 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 workshops were held via video teleconferencing in all three District offices and were 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 comment period would follow the public workshop. The questions asked and knowledge gathered during the public workshops were used to help craft the evolving draft rule amendment and final draft staff report. Comments received during the public workshop process were incorporated in the amended draft rule as appropriate.

The District provided five separate opportunities for the public to offer comments on the proposed rule amendments. The comments received and associated responses are included in Appendices C, D, E, F, and G of this final draft staff report. The District has included a copy of all the comment letters received from the public throughout this process at the end of each of the appendices.

B. Public Hearing

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

VI. COST EFFECTIVENESS AND SOCIOECONOMIC IMPACT ANALYSES

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

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

VII. RULE CONSISTENCY ANALYSIS

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

VIII. ENVIRONMENTAL ASSESSMENT

California Environmental Quality Act (CEQA) Guidelines §15308 (Actions by Regulatory Agencies for Protection of the Environment), provides a categorical exemption for "*actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption."* (*See Magan v. County of Kings* (2002) 105 Cal.App.4th 468.)

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

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

The District investigated the possible environmental impacts of Rule 9510 prior to the 2005 adoption of the rule, and prepared a Negative Declaration which concluded that no significant impacts could be anticipated due to the adoption of the rule. The amendments proposed in the attached proposed rule do not involve any new requirements. They merely expand the existing rule requirements to a small subset of projects that have the potential to take advantage of an unintended inconsistency in application of the rule. It should be noted that the proposed amendments to District Rule 9510 do not change the original intent of the rule, as that intent was explained and documented in the original rule development process and the associated CEQA documentation.

The District has reviewed the 2005 Negative Declaration and determined that it remains relevant today, specifically that the proposed rule amendments can have no significant impacts on the environment. (*See Friends of the College of San Mateo Gardens v. San Mateo* (2016) 1 Cal.4th 937.) The District has also conducted public workshops at which interested stakeholders were given the opportunity to provide any evidence of any potential environmental impacts. Based on this determination and on the absence of any substantial 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 from CEQA.

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

IX. APPENDICES

Appendix A: Final Draft Amendments to Rule 9510

Appendix B: Socioeconomic Analysis for Rule 9510

Appendix C:
- Public Workshop (August 29, 2017)
- Comments Received and District Responses
- Comment Letters Received

Appendix D:
- Public Workshop (May 18, 2017)
- Comments Received and District Responses
- Comment Letters Received

Appendix E:
- Public Workshop (January 17, 2017)
- Comments Received and District Responses
- Comment Letters Received

Appendix F:
- Public Comment Period (August 16, 2016 - September 15, 2016)
- Comments Received and District Responses
- Comment Letters Received

Appendix G:
- Public Workshop (April 26, 2016)
- Comments Received and District Responses
- Comment Letters Received

APPENDIX A

Final Proposed Amendments to Rule 9510
December 21, 2017

RULE 9510 INDIRECT SOURCE REVIEW (ISR) (Adopted December 15, 2005; Amended [*Date of Adoption*], but not in effect until [*insert date 90 days after rule adoption*])

1.0 Purpose

The purposes of this rule are to:

1.1 Fulfill the District's emission reduction commitments in the PM10 and Ozone Attainment Plans.

1.2 Achieve emission reductions from the construction and use of development projects through design features and on-site measures.

1.3 Provide a mechanism for reducing emissions from the construction of and use of development projects through off-site measures.

2.0 Applicability

2.1 Effective on and after March 1, 2006, ~~T~~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:

2.1.1 50 residential units;

2.1.2 2,000 square feet of commercial space;

2.1.3 25,000 square feet of light industrial space;

2.1.4 100,000 square feet of heavy industrial space;

2.1.5 20,000 square feet of medical office space;

2.1.6 39,000 square feet of general office space;

2.1.7 9,000 square feet of educational space;

2.1.8 10,000 square feet of government space;

2.1.9 20,000 square feet of recreational space; or

2.1.10 9,000 square feet of space not identified above.

2.2 Except as specified in Section 2.3, this rule shall apply to any applicant that seeks to gain approval from a public agency for a large development project,

which upon full build-out will include any one of the following:

2.2.1 250 residential units;

2.2.2 10,000 square feet of commercial space;

2.2.3 125,000 square feet of light industrial space;

2.2.4 500,000 square feet of heavy industrial space;

2.2.5 100,000 square feet of medical office space;

2.2.6 195,000 square feet of general office space;

2.2.7 45,000 square feet of educational space;

2.2.8 50,000 square feet of government space;

2.2.9 100,000 square feet of recreational space; or

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

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

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

2.3.2 The large development project requires or required a discretionary approval and is subject to the rule under Section 2.1; or

2.3.3 Prior to [*insert date 90 days after rule adoption*], the applicant received project-level building permits, a conditional use permit, or similar approvals for the particular large development project; or

2.3.4 The large development project qualifies as a Grandfathered Large Development Project.

2.~~2~~4 Effective on and after March 1, 2006, ~~T~~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.

2. ~~3~~5 Projects on Contiguous or Adjacent Property

2~~3~~5.1 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~~3~~5.2 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.

3.0 Definitions

3.1 APCO: as defined in Rule 1020 (Definitions).

3.2 APCO-Approved Model: any computer model that estimates construction, area source and/or 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 has been approved by the APCO and EPA.

3.3 Air Impact Assessment (AIA): the calculation of emissions generated by the project and the emission reductions required by the provisions set forth in this rule. The AIA must be based solely on the information provided to the APCO in the AIA application, and must include all information listed in Section 5.6, et seq.

3.4 Air Impact Assessment (AIA) Application: the aggregate of documentation supporting the development of an AIA. This includes, but is not limited to, the information listed in Section 5.0, et seq.

3.5 Air Resources Board (ARB or CARB): as defined in Rule 1020 (Definitions).

3.6 Applicant: any person or entity that undertakes a development project.

3.7 Area Source: any multiple non-mobile emissions sources such as water heaters, gas furnaces, fireplaces, wood stoves, landscape equipment, architectural coatings, consumer product, etc., that are individually small but can be significant when

combined in large numbers.

3.8 Baseline Emissions: the unmitigated NOx or PM10 emissions as calculated by the APCO-approved model.

3.9 Construction: any excavation, grading, demolition, vehicle travel on paved or unpaved surfaces, or vehicle exhaust that occurs for the sole purpose of building a development project.

3.10 Construction Baseline: the sum of baseline NOx or exhaust PM10 for the duration of construction activities for a project, or any phase thereof, in total tons.

3.11 Construction Emissions: any NOx or exhaust PM10 emissions resulting from the use of internal combustion engines related to construction activity, which is under the control of the applicant through ~~either~~ ownership, rental, lease agreements, or contract.

3.12 Contiguous or Adjacent Property: a property consisting of two or more parcels of land with a common point or boundary, or separated solely by a public roadway or other public right-of-way.

3.13 Development Project: any project, or portion thereof, that is subject to a<u>n</u> ~~discretionary~~ approval by a public agency, and will ultimately result in<u>:</u>

- the construction of a new building, facility, or structure; or

- <u>the</u> reconstruction of a building, facility, or structure for the purpose of increasing capacity or activity.

3.14 Discretionary Approval: a decision by a public agency that requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove 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.

3.15 District: the San Joaquin Valley Unified Air Pollution Control District as defined in Rule 1020 (Definitions).

3.16 Emission Reduction Measure: an activity taken or conditions incorporated in a project to avoid, minimize, reduce, eliminate, or compensate emissions estimated to occur from new development projects.

3.16.1 On-Site Emission Reduction Measure: any feature activity, device, or control technology of a project, which is incorporated into the design of

that project or through other means, which will avoid, minimize, reduce or eliminate the project's emissions. All on-site emission reductions achieved beyond District or state requirements shall count towards the mitigated baseline. City, County and other public agency requirements may also be credited towards emission reductions.

3.16.2 Off-Site Emission Reduction Measure: any feature, activity, or emission reduction project used, undertaken, or funded to compensate for a project's emission that is not part of the development project.

3.17 Grandfathered Large Development Project: a large development project that meets the following to the satisfaction of the APCO:

3.17.1 The large development project must be identified by the applicant and be a particular and defined large development project meeting at least one of the land use categories in Section 2.2; and

3.17.2 The applicant provides written confirmation from the public agency responsible for project-level building permits, conditional use permits, or similar approvals, that the large development project identified under Section 3.17.1 has received a land-use entitlement and requires no discretionary approval prior to starting construction; and

3.17.3 Prior to [*insert date 90 days after rule adoption*], and in reliance upon the land use entitlement, the applicant has entered into binding agreements or contractual obligations for the large development project identified under Section 3.17.1, which cannot be canceled or modified without substantial loss to the applicant, for designing, developing, or constructing the large development project.

3.1~~7~~8 Indirect Source: any facility, building, structure, or installation, or combination thereof, which attracts or generates mobile source activity that results in emissions of any pollutant, or precursor thereof, for which there is a state ambient standard, as specified in Section 1.1.

3.1~~8~~9 Land Use: any facility, building, structure, installation, activity, or combination thereof, and the purpose, for which it is arranged, designed, intended, constructed, erected, moved, altered or enlarged on, or for which it is or may be occupied or maintained. Land use can be identified in the following categories:

3.1~~8~~9.1 Commercial: any facility, building, structure, installation, activity or combination thereof, that offers goods and services for sale. This can include but is not limited to wholesale and retail stores, food establishments, hotels or motels, and movie theatres.

3.1~~8~~9.2 Educational: any facility, building, structure, installation, activity or combination thereof, whose purpose is to develop knowledge, skill, and character. This can include but is not limited to: schools, day care centers, libraries, and churches.

3.1~~8~~9.3 General Office: any facility, building, structure, installation, activity or combination thereof, where the affairs of a non-medical business are conducted.

3.1~~8~~9.4 Governmental: any facility, building, structure, installation, activity or combination thereof, where the affairs of an entity that exercises authority over a country, or any subdivision thereof, are carried on.

3.1~~8~~9.5 Industrial: any facility, building, structure, installation, activity or combination thereof that creates, collects, extracts, packages, modifies, and/or distributes goods.

3.1~~8~~9.5.1 Light Industrial: ~~U~~ usually employs fewer than 500 persons, with an emphasis on activities other than manufacturing and typically have minimal office space. Typical light industrial activities include: print plants, material testing labs, and assemblers of data processing equipment. Light Industrial tends to be free-standing.

3.1~~8~~9.5.2 Heavy Industrial: ~~A~~also categorized as manufacturing facilities. Heavy Industrial usually has a high number of employees per industrial plant.

3.1~~8~~9.6 Medical Office: any facility, building, structure, installation, activity or combination thereof, where the affairs of a business related to the science and art of diagnosing, treating, and preventing diseases are carried on.

3.1~~8~~9.7 Recreational: any facility, building, structure, installation, activity or combination thereof, where individuals may relax or refresh the body or the mind. This can include but is not limited to: parks, fitness clubs, and golf courses.

3.1~~8~~9.8 Residential: any facility, building, structure, installation, activity or combination thereof, which provides a living space for an individual or group of individuals.

3.~~19~~20 Mitigation: synonym of on-site emission reduction measure. For the purposes of this rule, mitigation is all on-site emission reductions achieved beyond District or

state requirements. City, County and other public agency requirements may be counted as mitigation, and credited towards emission reductions for the mitigated baseline.

3.20~~1~~ Mitigated Baseline: the NOx or PM10 emission generated by a project after on-site emission reduction measures have been applied.

3.21~~2~~ Mobile Emissions: the NOx or PM10 emissions generated by motorized vehicles.

3.22~~3~~ Monitoring and Reporting Schedule (MRS): a form listing on-site emission reduction measures committed to by the applicant that are not enforced by another public agency along with the implementation schedule and enforcement mechanism for each measure. The Construction Equipment Schedule constitutes a MRS for the construction phase of a development project. The format of the MRS shall be provided by the District. ~~The format of the MRS shall be provided by the District.~~

3.23~~4~~ NOx: any oxides of nitrogen.

3.24~~5~~ Off-Site Emission Reduction Fee (Off-Site Fee): a fee to be paid by the applicant to the District for any emission reductions required by the rule that are not achieved through on-site emission reduction measures. Off-Site Fees shall only apply to off-site emission reductions required, and shall only be used for funding off-site emission reduction projects.

3.25~~6~~ Off-Site Emission Reduction Fee Deferral Schedule (FDS): a payment schedule requested by the applicant and approved by the District for Off-Site Emission Reduction Fees that ensures contemporaneous off-site emission reductions for the development project. Fee payment shall be made prior to the issuance of a building permit. The District shall provide the FDS format.

3.26~~7~~ On-Site Emission Reduction Checklist (On-Site Checklist): the list provided by the District that identifies potential on-site emission reduction measures. Project applicants must identify those measures that will be implemented and those that will not. There is no minimum required to be selected for implementation.

3.27~~8~~ Operational Baseline: the baseline NOx or PM10 emissions, including area source and mobile emissions, calculated by the APCO-approved model, for the first year of buildout for that project, or any phase thereof, in tons per year.

3.28~~9~~ Operational Emissions: for the purposes of this rule, the combination of area and mobile emissions associated with an indirect source.

3.29~~30~~ Phase: a defined portion ~~on a map,~~ or stage of a development project.

3.3~~0~~1 PM10 (or PM-10): as defined in Rule 1020 (Definitions).

3.3~~1~~2 Public Agency: any federal, state, local, or special agency that exercises discretionary powers on development activities within the San Joaquin Valley Air Basin.

3.3~~2~~3 San Joaquin Valley Air Basin (SJVAB): as defined in Rule 1020 (Definitions).

3.3~~3~~4 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~~transportation 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."

3.3~~4~~5 Transportation Development Project~~s~~: 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.

~~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.~~

3.36 Vehicle Trip: a trip by a single vehicle regardless of the number of persons in the vehicle, which is one way starting at one point and ending at another. A 'round trip' is counted as two separate trips.

4.0 Exemptions

4.1 Transportation development projects shall be exempt from the requirements in Sections 6.2 and 7.1.2.

4.2 Transit development projects shall be exempt from the requirements in Sections 6.2 and 7.1.2.

4.3 Development projects that have a mitigated baseline below two (2.0) tons per year of NOx and two (2.0) tons per year of PM10 shall be exempt from the requirements in Sections 6.0 and 7.0.

4.4 The following shall be exempt from the requirements of this rule:

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.

4.4.2 Transportation development ~~P~~projects that consist solely of:

4.4.2.1 A modification of existing roads subject to District Rule 8061 that is not intended to increase single occupancy vehicle capacity, or,

4.4.2.2 Transportation control measures included in a District air quality attainment plan.

4.4.3 A development project on a facility whose primary functions are subject to Rule 2201 (New and Modified Stationary Source Review Rule) or Rule 2010 (Permits Required), including but not limited to the following industries:

4.4.3.1 Aggregate Mining or Processing;

4.4.3.2 Almond Hulling, Canning Operations, Food Manufacturing, Grain Processing and Storage, Vegetable Oil Manufacturing, and Wineries;

4.4.3.3 Animal Food Manufacturing;

4.4.3.4 Confined Animal Facilities;

4.4.3.5 Coatings and Graphic Arts;

4.4.3.6 Cotton Ginning Facilities;

4.4.3.7 Energy Production Plants;

4.4.3.8 Ethanol Manufacturing;

4.4.3.9 Gas Processing and Production, Oil Exploration, Production, Processing, and Refining;

4.4.3.10 Glass Plants;

4.4.3.11 Solid Waste Landfills;

4.4.3.12 Petroleum Product Transportation and Marketing Facilities.

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.

Any 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, approval from a public agency for the project. An applicant for a large development project subject to this rule under Section 2.2 who has applied for, or otherwise sought to gain, approval from a public agency for the project prior to [*insert date 90 days after rule adoption*], shall submit an AIA application prior to [*insert date 120 days after rule adoption*].

The AIA application shall be submitted on a form provided by the District and shall contain the following information:

5.1 Applicant name and address;

5.2 Detailed project description including, but not limited to:

5.2.1 Site Size;

5.2.2 Site Plans;

5.2.3 Proposed Project Schedule;

5.2.4 Associated Project;

5.2.5 If residential, the number and type of dwelling units;

5.2.6 If commercial, the type, square footage and loading facilities;

5.2.7 If industrial, the type, estimated employment per shift, and loading facilities;

5.2.8 Amount of off-street parking provided for non-residential projects;

5.3 On-site Emission Reduction Checklist (On-Site Checklist): The District shall provide an On-Site Checklist that includes quantifiable on-site measures that reduce operational NOx and/or PM10 emissions.

5.3.1 The applicant shall identify measures voluntarily selected and how those measures will be enforced. On-Site measures must be fully enforceable through permit conditions, development agreements, or other legally binding instrument entered into by the applicant and the public agency; or, if the measure is not a requirement by another public agency, by a MRS contract with the District. Enforcement mechanisms can include:

5.3.1.1 Applicable local ordinance or section of a regulation that requires the measure, if any,

5.3.1.2 A District approved MRS, as identified in Section 5.4 below.

5.3.2 The applicant shall also include justification for those measures not selected.

5.3.3 All selected on-site measures, regardless of enforcement mechanism, shall count towards on-site emission reductions.

5.4 Monitoring and Reporting Schedule (MRS): The District shall provide a standardized MRS format. The applicant shall include in the AIA application a completed proposed MRS for on-site emission reduction measures selected that are not subject to other public agency enforcement, and the timeline for submittal of the construction equipment schedule. A proposed MRS shall outline how the measures will be implemented and enforced, and will include, at minimum, the following:

5.4.1 A list of on-site emission reduction measures included;

5.4.2 Standards for determining compliance, such as funding, record keeping, reporting, installation, and/or contracting;

5.4.3 A reporting schedule;

5.4.4 A monitoring schedule;

5.4.5 Identification of the responsible entity for implementation;

5.4.6 Provisions for failure to comply;

5.4.7 Applicants proposing on-site emission reduction measures that require ongoing funding, shall provide evidence in the proposed MRS of continued funding, including, but not limited to:

5.4.7.1 Bonds; or

5.4.7.2 Community Service Districts; or

5.4.7.3 Contracts.

5.4.8 The schedule for submitting a construction equipment schedule.

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:

5.5.1 Identification of the person or entity responsible for payment;

5.5.2 Billing address;

5.5.3 Total required off-site operational emissions for the development project and any phase thereof;

5.5.4 Total required off-site construction emissions for the development project and any phase thereof;

5.5.5 Year of build-out, and any phase thereof;

5.5.6 Any applicable milestones;

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

5.5.7~~8~~ Payment schedule not to exceed or go beyond the issuance of a building permit. For development projects with multiple phases, the payment schedule shall connect fee deadlines for off-site emission reductions required by each phase prior to the issuance of building permits for those phases.

5.5.8~~9~~ The cost of reductions corresponding to the payment schedule;

5.5.9~~10~~ Applicable project termination and delay clauses; and

5.5.10~~11~~ Provisions for failure to comply.

5.6 Air Impact Assessment (AIA): An AIA shall be produced for the project from the project specific information identified in the AIA application. An AIA may be produced by or for the applicant. If an AIA is not provided by the applicant, the District shall perform the AIA during the AIA application review period. The AIA shall meet the following requirements:

5.6.1 The analysis of the proposed project shall be conducted according to the information provided in the application;

5.6.2 The analysis shall employ an APCO-approved model or calculator and include detailed documentation and reasons for all changes to the default input values;

5.6.3 If the AIA is conducted by or for the applicant, a hard copy and an electronic copy of all model runs conducted for the project and each phase thereof, shall be submitted;

5.6.4 The applicant shall include any other information and documentation that supports the calculation of emissions and emissions reductions;

5.6.5 The AIA shall quantify construction and operational NOx and PM10 emissions associated with the project. This shall include the estimated construction and operational baseline emissions, and the mitigated emissions for each applicable pollutant for the development project, or each phase thereof;

5.6.6 The AIA shall quantify the Off-Site Fee, if applicable.

6.0 General Mitigation Requirements

6.1 Construction Equipment Emissions

6.1.1 The exhaust emissions for construction equipment greater than fifty (50) horsepower used or associated with the development project shall be reduced by the following amounts from the statewide average as estimated by the ARB:

6.1.1.1 20% of the total NOx emissions, and

6.1.1.2 45% of the total PM10 exhausts emissions.

6.1.2 An applicant may reduce construction emissions on-site by using less-polluting construction equipment, which can be achieved by utilizing add-on controls, cleaner fuels, or newer lower emitting equipment.

6.2 Operational Emissions

6.2.1 NOx Emissions

Applicants shall reduce 33.3%, of the project's operational baseline NOx emissions over a period of ten years as quantified in the approved AIA as specified in Section 5.6.

6.2.2 PM10 Emissions

Applicants shall reduce of 50% of the project's operational baseline PM10 emissions over a period of ten years as quantified in the approved AIA as specified in Section 5.6.

6.3 The requirements listed in Sections 6.1 and 6.2 above can be met through any combination of on-site emission reduction measures or off-site fees.

7.0 Off-site Emission Reduction Fee (Off-Site Fee) Calculations and Fee Schedules

7.1 Off-site Fee Calculations

7.1.1 Construction Activities

7.1.1.1 NOx Emissions

The applicant shall pay to the District a monetary sum necessary to offset the required construction NOx emissions not reduced on-site. The off-site fee shall be calculated as follows:

$$CN\ OF = \sum_{i=1}^{n} \left[NACE_i - (0.8 \times NSEE_i)\right] \times CNR_i$$

Where,

CN OF = Construction NOx Off-Site Fee, in dollars

i = each phase

n = last phase

NACE = Actual Estimated Equipment NOx Emissions, as documented in the APCO approved Air Impact Assessment application, in total tons

NSEE = Statewide Average Equipment NOx Emissions, as calculated by the APCO, in total tons

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.

7.1.1.2 PM10 Emissions

The applicant shall pay a monetary sum necessary to offset the required construction PM10 exhaust emissions not reduced on-site. The off-site fee shall be calculated as follows:

$$CPM\ OF = \sum_{i=1}^{n} \left[PMACE_i - (0.55 \times PSEE_i)\right] \times CPR_i$$

Where,

CPM OF = Construction PM10 Off-Site Fee, in dollars

i = each phase

n = last phase

PMACE = Actual Estimated Equipment PM10 Emissions, as documented in the APCO approved AIA application, in total tons

PSEE = Statewide average Equipment PM10 Emissions, as calculated by the APCO, in total tons

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.

7.1.2 Operational and Area Source Activities

7.1.2.1 NOx Emissions

The applicant shall pay a monetary sum necessary to offset the excess NOx emissions not reduced on-site. The off-site fee shall be calculated as follows:

$$NOxOF = \sum_{i=1}^{n} \left[\left(\frac{NEB_i \times 7.5}{3} \right) - (NEB_i \times 7.5 \times NAPOR_i) \right] \times CNR_i$$

Where,

NOx OF = Operational NOx Off-Site Fee, in dollars

i = each phase

n = last phase

NEB = Estimated Baseline Emissions, of Operational NOx, as documented in the APCO approved AIA application, in tons per year

NAPOR = NOx Actual Percent of On-Site Reductions, as documented in the APCO approved air impact assessment application, as a fraction of one, calculated as (NEB-NOx Mitigated Baseline)/NEB

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

The applicant shall pay a monetary sum necessary to offset the excess PM10 emissions not reduced on-site for a period of ten years. The off-site fee shall be calculated as follows:

$$PM10OF = \sum_{i=1}^{n} [(PMMB - 0.5PEB_i)(10)] \times CPR_i$$

Where,

PM10 OF = Operational PM Off-Site Fee, in dollars

i = each phase

n = last phase

PEB = Estimated Baseline Emissions, of Operational PM10, as documented in the APCO approved AIA application, in tons per year

PMMB = Mitigated Baseline Emissions, as documented in the APCO approved AIA application, in tons per year

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.

7.2 Fee Schedules

7.2.1 The costs of NOx reductions are as follows:

Year	Cost of NOx~~X~~ Reductions ($/ton)
2006	$4,650.00
2007	$7,100.00
2008 and beyond	$9,350.00

7.2.2 The costs of PM10 reductions are as follows:

Year	Cost of PM10 Reductions ($/ton)
2006	$2,907.00
2007	$5,594.00
2008 and beyond	$9,011.00

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~~.

7.4 The applicant shall receive credit for any off-site emission reduction measures that have been completed and/or paid for, prior to ~~the adoption of this rule~~ December 15, 2005, if the following conditions have been met:

7.4.1 The prior off-site emission reduction measures were part of an air quality mitigation agreement with the APCO; or

7.4.2 The applicant demonstrates to the satisfaction of the APCO that the off-site emission reduction measures result in real, enforceable, and surplus reductions in emissions.

7.5 Refund: If a project is terminated or is cancelled, the building permit or use permit expires, is cancelled, or is voided, no construction has taken place, and the use has never occupied the site, the applicant is entitled to a refund of the unexpended Off-Site fees paid less any administrative costs incurred by the APCO. The applicant must provide a written request for the refund, with proof of the project termination, within thirty (30) calendar days of the termination. Proof of project termination can include a confirmation from a local agency of permit cancellation.

7.6 The APCO may adjust the cost of reductions according to the following process:

7.6.1 An Analysis shall be performed that details:

7.6.1.1 The cost effectiveness of projects funded to date;

7.6.1.2 The rule effectiveness of achieving the required emission reductions to date;

7.6.1.3 The availability of off-site emission reduction projects;

7.6.1.4 The cost effectiveness of those projects.

7.6.2 The APCO shall provide a draft revised cost effectiveness based on the analysis.

7.6.3 The process shall include at least one public workshop.

8.0 Administrative Process

8.1 Completeness of the AIA application: The APCO shall determine whether the application is complete and contains the necessary information no later than ten (10) calendar days after receipt of the application, or after such longer time as agreed to by both the applicant and the APCO.

8.1.1 Should the application be deemed incomplete, the APCO shall notify the applicant in writing of the decision and shall specify the additional information required. Resubmittal of any portion of the application begins a new ten (10) day calendar period for the determination of completeness by the APCO.

8.1.2 Completeness of an application or resubmitted application shall be evaluated on the basis of the information requirements set forth in the District Rules and Regulations as they exist on the date on which the application or resubmitted application is received.

8.1.3 The APCO shall notify the applicant in writing that the application is deemed complete.

8.2 Public Agency Review of the proposed project: The APCO shall forward a copy of the AIA application, including the MRS (if applicable) to the relevant public agencies for review. The public agencies may review and comment at any time on the provisions of the MRS. Comments received by the APCO shall be forwarded to the applicant. The proposed MRS may be modified, if necessary, based on the input from the public agency. If any changes result from their comments, the APCO shall make the appropriate changes and provide the applicant a revised Off-Site Fee, if applicable. No section or provision within this rule requires action on the part of the public agency.

8.3 APCO Evaluation of the AIA Application: The AIA application shall be evaluated for content.

8.3.1 If the applicant submits an AIA, the APCO will evaluate the modeling inputs and calculations.

8.3.2 If the applicant does not submit an AIA, the APCO will complete an AIA from the information contained in the AIA application.

8.3.3 The APCO may, during the evaluation of the application, request clarification, amplification, and any correction as needed, or otherwise supplement the information submitted in the application. Any request for such information shall not count towards the time the APCO has to provide notice of approval or disapproval. The clock shall resume once the APCO

has received the requested information.

8.4 AIA Approval: The APCO shall notify the applicant in writing of its decision regarding the AIA application and its contents within thirty (30) calendar days after determination of an application as complete and provide the following in writing to the applicant, the public agency, all interested parties as identified by the developer, and make available to the public.

8.4.1 APCO approval determination of the AIA application;

8.4.2 The required emission reductions;

8.4.3 The amount of on-site emission reduction achieved;

8.4.4 The amount of off-site emission reduction required, if applicable;

8.4.5 The required Off-Site Fee if applicable;

8.4.6 A statement of tentative rule compliance;

8.4.7 A copy of the final MRS, if applicable; and

8.4.8 An approved FDS, if applicable.

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.

8.6 Fee Deferral Schedule: In the event that the applicant had not previously submitted FDS in the AIA application, but desires one, the applicant shall ensure that the proposed FDS is submitted to the APCO no later than fifteen (15) calendar days after receipt of the AIA Approval. The District shall have fifteen (15) calendar days to approve the FDS request.

8.7 MRS Compliance: After the APCO approves the AIA application and its contents; the APCO shall enact the MRS contract, if applicable. The applicant is responsible for implementation and/or maintenance of those measures identified within the MRS. Upon completion of Monitoring and Reporting, the District shall provide to the applicant, the public agency, and make available to the public, an MRS Compliance letter.

8.7.1 Operational On-Site Measures: On-site emission reduction measures that are active operational measures, such as providing a service, must be

implemented for 10 years after buildout of the project, if applicable.

8.7.2 Construction Equipment Schedule: The construction equipment schedule shall be submitted to the District if identified in the MRS prior to the start of construction, but not to exceed the issuance of a grading permit, if applicable.

8.8 In the event the applicant significantly changes the AIA application or any portion thereof during the Administrative Process, the APCO shall re-start the evaluation process pursuant to Section 8.3.

9.0 Changes to the Project

9.1 Changes Proposed By The Applicant

9.1.1 The applicant may substitute equivalent or more effective on-site emission reduction measures upon written approval from the APCO.

9.1.2 Changes in the project or to the build-out schedule that increase the emissions associated with the project shall require submission of a new AIA application. A new AIA shall be conducted and the off-site fees shall be recalculated in accordance with the applicable provisions of this rule. The APCO shall notify the applicant of the new off-site fees, the difference of which shall be payable by the due date specified on the billing invoice.

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.

9.2 Changes Required By The Public Agency or Any Court Of Law

Project changes that result in an increase in the emissions shall require submission of a new AIA application within 60 days of said changes, or prior to the start of project construction, whichever is less. A new AIA shall be conducted and the off-site fees shall be recalculated in accordance with the applicable provisions of this rule.

10.0 APCO Administration of the Off-Site Fee Funds

10.1 The District shall establish and maintain separate accounts for NOx and for PM10 for funds collected under this rule. Any off-site fees collected by the District shall be deposited into these accounts.

10.2 The District shall utilize monies from the accounts to fund quantifiable and enforceable Off-Site projects that reduce surplus emissions of NOx and PM10 in an expeditious manner.

10.2.1 The District shall set forth funding criteria for each category of off-site projects that may be funded by this rule.

10.2.2 The District shall ensure that the emission reductions calculations for the off-site projects are accurate.

10.2.3 If the off-site project involves the replacement of existing equipment, the District shall inspect the existing equipment.

10.2.4 The District shall enter into a binding contract with the applicant of the off-site project, which will, at minimum, require an annual report from the applicant that includes information necessary to ensure that emissions reductions are actually occurring.

10.2.5 The District shall conduct inspections on the off-site project to verify that the project is installed or implemented and operating for the life of the contract.

10.2.6 The District may substitute NOx reductions for PM10 in a 1.5 to 1 ratio.

10.3 Any interest that accrues in the off-site account(s) shall remain in the account, to be used in accordance with Section 10.2 above.

10.4 The District shall prepare an annual report that will be available to the public regarding the expenditure of those funds, and shall include the following:

10.4.1 Total amount of Off-Site Fees received;

10.4.2 Total monies spent;

10.4.3 Total monies remaining;

10.4.4 Any refunds distributed;

10.4.5 A list of all projects funded;

10.4.6 Total emissions reductions realized; and

10.4.7 The overall cost-effectiveness factor for the projects funded.

~~11.0 Effective date of this rule~~

~~The provisions of this rule shall become effective on March 1, 2006.~~

APPENDIX B

Socioeconomic Analysis for Rule 9510

I. Introduction

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

II. Socioeconomic Analysis

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

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

A. Residential Development Projects

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

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

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

Table 16 from the 2005 socioeconomic analysis is shown below:

TABLE 16
Worst Case Estimate: Fee That Corresponds to A Typical Residential Development

Year	Per Unit
2006	$784.12
2007	$1,268.09
2008	$1,772

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

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

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

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

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

Industrial

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

TABLE 17
Worst Case Estimate: Fee That Corresponds To The Typical Industrial Development

Use	Average Acres	Corresponding Fee Total
2006		
Heavy Industrial	300.0	$357,394.75
Light Industrial	75.0	$240,508.75
Warehouses	25.0	$83,645.68
Misc. Industrial (industrial park)	39.0	$143.797.05
2008		
Heavy Industrial	300.0	$747,626
Light Industrial	75.0	$518,237
Warehouses	25.0	$179,956
Misc. Industrial	39.0	$309,965

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

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

Commercial

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

TABLE 18
Worst Case Estimate: Fee That Corresponds To a Typical Commercial Development

TYPE OF SHOPPING CENTERS	SIZE RANGE	TYPICAL SIZE (sq ft)	Corresponding Fee Total
	2006		
convenience shopping center	up to 30,000	20,000	$24,524.94
neighborhood shopping center	30,000 to 100,000	50,000	$61,599.54
community shopping center	100,000 to 450,000	150,000	$184,647.45
super community shopping center	200,000 to 300,000	250,000	$403,546.91
regional shopping center	300,000 to 700,000	450,000	$626,791.07
superregional shopping center	500,000 to 2 million	900,000	$1,253,582.15
	2008		
convenience shopping center	up to 30,000	20,000	$52,971.24
neighborhood shopping center	30,000 to 100,000	50,000	$131,689.99
community shopping center	100,000 to 450,000	150,000	$397,483.34
super community shopping center	200,000 to 300,000	250,000	$872,322.57
regional shopping center	300,000 to 700,000	450,000	$1,353,824.12
superregional shopping center	500,000 to 2 million	900,000	$2,708,116.82

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

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

For neighborhood shopping center development projects, the 2005 analysis projected the maximum cost of the rule on any one project to be $131,869 for years 2008 and beyond. The average over the 10 years for such projects is $76,274. However, in 2007 the District has seen one neighborhood shopping center development project subject to an ISR fee of $209,394. On the other hand, similar projects that have committed to using clean truck fleets and other mitigation measures to greatly reduce or totally eliminate fees ISR fees. On

average, neighborhood shopping center development projects paid far less than the anticipated cost per neighborhood shopping center, at an average of $76,274 per project.

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

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

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

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

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

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

C. Program Benefits

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

- Local purchases: Projects that require a purchase of equipment, materials, or services results in money being re-circulated into the regional economy.

- Local projects: It has already been stated that the program would fund local projects. This means that the school, city, industry or private group that receives the funding for an emission reduction project would benefit economically from the program.

- Job creation: The off-site funding program made possible by the ISR Program may also lead to short-term and perhaps long-term job creation. For example, for a financially strapped company or public agency, the funding allows for the purchase and installation or construction of the item (be it a school bus or road project).

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

III. Bearing on Proposed Rule 9510 Amendments

As demonstrated above, the 2005 socioeconomic analysis conservatively assessed the socioeconomic impacts that would result from the implementation of the rule on development projects meeting the applicable size square footage or

greater. In nearly every case, it over-estimated worst case impacts of District Rule 9510.

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

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

APPENDIX C

PUBLIC WORKSHOP - AUGUST 29, 2017

COMMENTS RECEIVED AND DISTRICT RESPONSES

COMMENT LETTERS RECEIVED

PUBLIC WORKSHOP - AUGUST 29, 2017

COMMENTS RECEIVED AND DISTRICT RESPONSES

COMMENT LETTERS RECEIVED

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 August 29, 2017. Summaries of comments received during the public workshop and the associated two-week commenting period following the workshop are summarized below. A copy of the comment letters received are attached at the end of this appendix.

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:

John Condas with Allen Matkins Leek Gamble Mallory & Natsis LLP

1. COMMENT: The "Grandfathered Large Development Project" definition is insufficiently broad.

Wonderful appreciates the District's continued efforts to ensure that projects with vested rights to develop and for which significant financial investments have been made - so called, Grandfathered Large Development Projects - should be exempt from application of Rule 9510 as amended by the Proposed ISR Amendment. However, the definition of a Grandfathered Large Development Project (Section 3.17 of the Proposed ISR Amendment) is not sufficiently broad to cover projects, like the Wonderful Project, which are large, multi-phase projects slated to be built out over time but for which very large initial investments are made in backbone infrastructure to support all phases of development. The economic viability of such project is predicated on an expectation that the ISR rule would not apply to the individual projects developed in the subsequent phases. Imposition of the ISR rule on these projects fundamentally impacts their financial viability and creates a serious risk that they will not go forward. Accordingly, we believe that the definition of Grandfathered Large Development Project should be re-tooled to ensure that complex, large scale, multi-phase projects for which development has commenced will be protected during all development phases.

Wonderful recommends that the following language be added to the Proposed ISR Amendment's definition of “Grandfathered Large Development Project" to ensure such multi-phase projects fall within the scope of the exemption:

> *Notwithstanding the criteria set forth in Sections 3.17.1, 3.17.2 and 3.17.3, a Grandfathered Large Development Project shall include any proposed project that is permitted by right under the applicable zoning designation and only requires non-discretionary or ministerial approvals from the local land use agency as of (rule amendment date), provided the local land use agency has confirmed in writing prior to (rule amendment date) that the project can be developed based solely on non-discretionary or ministerial approvals and no discretionary approvals are required.*

(*John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP.*)

DISTRICT RESPONSE: The District disagrees that the definition of Grandfathered Large Development Project is improved with the commenter’s suggested changes. Any exemption from the rule should entail project-specific approval by the applicable agency, not just an acknowledgment that the project is properly zoned and requires no additional discretionary approval. In fact, the commenter’s suggested language completely unravels the District’s efforts to

ensure that Rule 9510 is consistently applied to all large development projects regardless of the jurisdiction in which they are approved.

The commenter's suggested definition bases the rule exemption primarily on the zoning designation, which does not address the District's concern that large development projects may be approved by a Lead Agency without mitigating the increase in emissions associated with the project as otherwise required by the rule. The proposed rule revisions address the District's concern, while simultaneously providing for business certainty for developers that can demonstrate, for any particular project, that applying the rule would cause substantial loss to the developer, as further detailed in Section 3.17 of the draft rule.

2. COMMENT: The Socioeconomic analysis remains inadequate. As we have expressed in prior letters, Wonderful remains disappointed that the District refuses to revise the Socioeconomic Analysis for Rule 9510 to identify the projects that will be subject to Rule 9510 as a result of the Proposed ISR Amendment, which is necessary in order to fully understand the impacts of the Proposed ISR Amendment. We respectfully renew our request that the District defer consideration and approval of the Proposed ISR Amendment until its full scope and impacts on the San Joaquin Valley can be determined, based in part upon preparing an adequate effectiveness and socioeconomic impact analysis, as required by law.
(*John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP.)*

DISTRICT RESPONSE: As previously stated, the proposed amendments do not change the original intent of the rule with respect to applicability. The proposed rule amendment is designed to remove the unintended circumvention of the rule's original applicability to large development projects, and to address the inherent lack of fairness associated with unequal application of the rule depending on which local jurisdiction analyzes a project.

The District retains its position that Appendix B addresses the socioeconomic analysis for this rule amendment. This review of the economic impacts of the rule on development projects, including large development projects, demonstrates that the actual costs are below those projected in 2004 and confirms the conservative nature of the original assessment. Therefore, the conclusion of the original socioeconomic impact analysis, specifically that the rule would not have a significant impact on the industry, including on large development projects, remains relevant and accurate today.

3. COMMENT: The District has not adequately complied with CEQA in connection with adoption of the proposed ISR amendment… As discussed at length in the May 18, 2017 comment letter submitted by our office, the District must make a factual review of the record to determine whether these exemptions apply. However, the District's approach instead is to assert that the 2005 Negative Declaration adopted by the District for the original enactment of the ISR rule "remains relevant today" and that "the proposed rule amendments can have no significant impacts on the environment." The District further notes that it has conducted public workshops at which interested stakeholders were given the opportunity to provide any evidence of any potential environmental impacts but that given "the absence of any substantial evidence to the contrary," the District has concluded that the Proposed ISR Amendment will not have any significant adverse effects on the environment. In other words, the District implies that the burden of analyzing whether a project will result in environmental impacts falls upon the public. This is not correct. CEQA requires the District, as the lead agency, to assess whether a project has the potential to result in significant impacts. The cursory rationale provided in the Staff Report for the exemption determinations is inadequate to comply with CEQA.

Moreover, comments provided by Wonderful and other parties on prior versions of the Proposed ISR Amendment have actually identified potential environmental impacts that might be caused by the implementation of the Proposed ISR Amendment. However, the District has failed to take this information seriously and further assess the likelihood that those impacts will occur. The District, not Wonderful or other commenters, is best qualified to assess the scope of any potential impacts, especially because the District is in a position to identify the subset of projects expected to become subject to the ISR rule as a result of the Proposed ISR Amendment, an exercise that the District has repeatedly declined to undertake.

Although arguably the Proposed ISR Amendment may have some beneficial environmental impacts through some marginal reduction in air pollution (although to date the District has provided no evidence quantifying a possible reduction in air pollution solely attributable to adoption of the Proposed ISR Amendment), projects designed to protect or improve the environment can have collateral effects on the environment that preclude application of the exemption. Thus, the District cannot simply assume that measures intended to protect the environment are entirely benign.

Although the District has failed to list, or take an inventory of, the number, size and type of projects which would be affected by the Proposed ISR Amendment, as discussed above, requiring these projects to be subject to Rule 9510 could kill these projects, or increase the development costs substantially. These added

regulatory costs could lead to a lack of development, and possible urban decay, an impact that needs to be analyzed under CEQA. *(Bakersfield Citizens for Local Control v. City of Bakersfield (*2004) 124 Cal.App.4th 1184.) Also, such projects, if not built, may delay much-needed public improvements, which were to be funded through execution of the development of these projects. A lack of needed public improvements could lead to increased traffic congestion, worse hydrological conditions, and other negative environmental impacts.

Also, since adoption of the Proposed ISR Amendment would increase development costs and affect the competitiveness of development projects in the Central Valley when compared with projects outside the Central Valley, which would not be subject to the Proposed ISR Amendment, it is possible that there would be additional environmental impacts generated. Development which otherwise would have occurred in the Central Valley to serve the Central Valley would be developed outside the Central Valley, requiring longer trips to and from these new projects, leading to increased traffic, vehicle miles traveled, air quality and greenhouse gas impacts.
(*John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP.)*

DISTRICT RESPONSE: On the contrary, the District's CEQA analysis is more than adequate and has concluded that the rule amendments are exempt from CEQA under two separate sections of the CEQA guidelines, either of which stands on its own.

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

The District investigated the possible environmental impacts of Rule 9510 prior to the 2005 adoption of the rule, and prepared a Negative Declaration which concluded that no significant impacts could be anticipated due to the adoption of the rule. The amendments proposed in the attached proposed rule do not involve any new requirements. They merely expand the existing rule requirements to a small subset of projects that have the potential to take advantage of an unintended inconsistency in application of the rule. It should be noted that the proposed amendments to District Rule 9510 do not change the original intent of the rule, as that intent was explained and documented in the original rule development process and the associated CEQA documentation.

The District has reviewed the 2005 Negative Declaration and determined that it remains relevant today, specifically that the proposed rule amendments can have no significant impacts on the environment. (*See Friends of the College of San Mateo Gardens v. San Mateo* (2016) 1 Cal.4th 937.) The District has also conducted public workshops, and provided multiple public comment periods as a part of the rule development process, during which interested stakeholders were given the opportunity to provide any evidence of any potential environmental impacts. Based on this determination and on the absence of any substantial 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 from CEQA.

In addition, CEQA Guidelines §15308 (Actions by Regulatory Agencies for Protection of the Environment), provides a categorical exemption for "*actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption."* (*See Magan v. County of Kings* (2002) 105 Cal.App.4th 468.)

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

For further discussion of these issues, see response to Comment #16 in Appendix D.

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
1900 Main Street, 5th Floor | Irvine, CA 92614-7321
Telephone: 949.553.1313 | Facsimile: 949.553.8354
www.allenmatkins.com

John Condas
E-mail: jcondas@allenmatkins.com
Direct Dial: 949.851.5551 File Number: 373522-00001/SF1052895.02

Via Hand Delivery

August 29, 2017

Governing Board
San Joaquin Valley Air Pollution Control District
1990 E. Gettysburg Ave.
Fresno, CA 93726

Re: Comments on Proposed ISR Amendment (August 29, 2017 Draft Staff Report, Rule 9510, Indirect Source Review)

Ladies and Gentlemen:

We represent The Wonderful Company (Wonderful) in connection with the Wonderful Industrial Park (Wonderful Project) in the City of Shafter (City). This letter provides Wonderful's comments on the San Joaquin Valley Air Pollution Control District's (the District) proposed amendment to Rule 9510 as reflected in the August 29, 2017 Draft Staff Report (Proposed ISR Amendment), which governs indirect source review in the San Joaquin Valley. We request that this letter be included in the administrative record for consideration of the Proposed ISR Amendment.

This letter supplements the comment letters dated September 14, 2016, January 31, 2017, May 18, 2017, and June 1, 2017 previously submitted by our firm and the comment letters dated May 23, 2016 and August 30, 2016 previously submitted by The Roll Law Group on behalf of Wonderful, which are hereby incorporated by reference.

Wonderful continues to have the following concerns regarding the District's efforts to adopt the Proposed ISR Amendment: (1) the exemption from the rule for a "Grandfathered Large Development Project" is not sufficiently broad to protect those large development projects in the Central Valley for which significant investments in infrastructure have been made based upon the assumption that the projects would be exempt from the ISR rule; (2) the Socioeconomic Analysis remains inadequate; and (3) the District has not adequately complied with the California Environmental Quality Act (CEQA) in connection with its proposed adoption of the Proposed ISR Amendment.

I. The "Grandfathered Large Development Project" Definition Is Insufficiently Broad

Wonderful appreciates the District's continued efforts to ensure that projects with vested rights to develop and for which significant financial investments have been made – so called, Grandfathered Large Development Projects – should be exempt from application of Rule 9510 as amended by the Proposed ISR Amendment. However, the definition of a Grandfathered Large Development Project (Section 3.17 of the Proposed ISR Amendment) is not sufficiently broad to cover projects, like the Wonderful Project, which are large, multi-phase projects slated to be built out over time but for which very large initial investments are made in backbone infrastructure to support all phases of development. The economic viability of such project is predicated on an expectation that the ISR rule would not apply to the individual projects developed in the subsequent phases. Imposition of the ISR rule on these projects fundamentally impacts their financial viability and creates a serious risk that they will not go forward. Accordingly, we believe that the definition of Grandfathered Large Development Project should be re-tooled to ensure that complex, large scale, multi-phase projects for which development has commenced will be protected during all development phases.

Wonderful recommends that the following language be added to the Proposed ISR Amendment's definition of "Grandfathered Large Development Project" to ensure such multi-phase projects fall within the scope of the exemption:

> **Notwithstanding the criteria set forth in Sections 3.17.1, 3.17.2 and 3.17.3, a Grandfathered Large Development Project shall include any proposed project that is permitted by right under the applicable zoning designation and only requires non-discretionary or ministerial approvals from the local land use agency as of (rule amendment date), provided the local land use agency has confirmed in writing prior to (rule amendment date) that the project can be developed based solely on non-discretionary or ministerial approvals and no discretionary approvals are required.**

II. The Socioeconomic Analysis Remains Inadequate

As we have expressed in prior letters, Wonderful remains disappointed that the District refuses to revise the Socioeconomic Analysis for Rule 9510 (Appendix D to the August 29, 2017 Draft Staff Report) to identify the projects that will be subject to Rule 9510 as a result of the Proposed ISR Amendment, which is necessary in order to fully understand the impacts of the Proposed ISR Amendment. We respectfully renew our request that the District defer consideration and approval of the Proposed ISR Amendment until its full scope and impacts on the San Joaquin

Valley can be determined, based in part upon preparing an adequate effectiveness and socioeconomic impact analysis, as required by law.

III. The District Has Not Adequately Complied with CEQA In Connection With Adoption of the Proposed ISR Amendment

The District has properly concluded that before it can adopt the Proposed ISR Amendment, it must comply with CEQA. (Staff Report, p. 20.) In order to comply with CEQA, staff recommends that the Board determine that adoption of the Proposed ISR Amendment is exempt from CEQA under the exemption for actions by regulatory agencies for protection of the environment (CEQA Guidelines, § 15308) and "the common sense exemption" (CEQA Guidelines, § 15061(b)(3)).

As discussed at length in the May 18, 2017 comment letter submitted by our office, the District must make a factual review of the record to determine whether these exemptions apply. However, the District's approach instead is to assert that the 2005 Negative Declaration adopted by the District for the original enactment of the ISR rule "remains relevant today" and that "the proposed rule amendments can have no significant impacts on the environment." (Staff Report, p. 20.) The District further notes that it has conducted public workshops at which interested stakeholders were given the opportunity to provide any evidence of any potential environmental impacts but that given "the absence of any substantial evidence to the contrary," the District has concluded that the Proposed ISR Amendment will not have any significant adverse effects on the environment. In other words, the District implies that the burden of analyzing whether a project will result in environmental impacts falls upon the public. This is not correct. CEQA requires the District, as the lead agency, to assess whether a project has the potential to result in significant impacts. The cursory rationale provided in the Staff Report for the exemption determinations is inadequate to comply with CEQA.

Moreover, comments provided by Wonderful and other parties on prior versions of the Proposed ISR Amendment have actually identified potential environmental impacts that might be caused by the implementation of the Proposed ISR Amendment. However, the District has failed to take this information seriously and further assess the likelihood that those impacts will occur. The District, not Wonderful or other commenters, is best qualified to assess the scope of any potential impacts, especially because the District is in a position to identify the subset of projects expected to become subject to the ISR rule as a result of the Proposed ISR Amendment, an exercise that the District has repeatedly declined to undertake.

Although arguably the Proposed ISR Amendment may have some beneficial environmental impacts through some marginal reduction in air pollution (although to date the District has provided no evidence quantifying a possible reduction in air pollution solely attributable to adoption of the

Proposed ISR Amendment), projects designed to protect or improve the environment can have collateral effects on the environment that preclude application of the exemption. Thus, the District cannot simply assume that measures intended to protect the environment are entirely benign.

Although the District has failed to list, or take an inventory of, the number, size and type of projects which would be affected by the Proposed ISR Amendment, as discussed above, requiring these projects to be subject to Rule 9510 could kill these projects, or increase the development costs substantially. These added regulatory costs could lead to a lack of development, and possible urban decay, an impact that needs to be analyzed under CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184.) Also, such projects, if not built, may delay much-needed public improvements, which were to be funded through execution of the development of these projects. A lack of needed public improvements could lead to increased traffic congestion, worse hydrological conditions, and other negative environmental impacts. Also, since adoption of the Proposed ISR Amendment would increase development costs and affect the competitiveness of development projects in the Central Valley when compared with projects outside the Central Valley, which would not be subject to the Proposed ISR Amendment, it is possible that there would be additional environmental impacts generated. Development which otherwise would have occurred in the Central Valley to serve the Central Valley would be developed outside the Central Valley, requiring longer trips to and from these new projects, leading to increased traffic, vehicle miles traveled, air quality and greenhouse gas impacts.

Thank you for the opportunity to comment on the District's Proposed ISR Amendment.

Very truly yours,

Courtney Davis on behalf of

John Condas

JCC:cad

cc: John Guinn, The Wonderful Company
Jason Gremillion, The Wonderful Company
Melissa Poole, The Wonderful Company
Courtney Davis, Esq.

APPENDIX D

PUBLIC WORKSHOP – MAY 18, 2017

COMMENTS RECEIVED AND DISTRICT RESPONSES

COMMENT LETTERS RECEIVED

PUBLIC WORKSHOP – MAY 18, 2017

COMMENTS RECEIVED AND DISTRICT RESPONSES

COMMENT LETTERS RECEIVED

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 May 18, 2017. Summaries of comments received during the public workshop and the associated two-week commenting period following the workshop are summarized below. A copy of the comment letters received are attached at the end of this appendix.

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:

John Condas with Allen Matkins Leek Gamble Mallory & Natsis LLP
Mark Hendrickson, California Central Valley EDC
Paul M. Saldana, Tulare County EDC

1. **COMMENT:** The Proposed ISR Amendment would strip local decision makers of their discretion by effectively transforming what a local public agency deems a ministerial project into a discretionary project by mandating compliance with Rule 9510, which could involve implementation of mitigation and/or modifications to project design to accommodate on-site emission reduction measures. Local land use agencies are vested with the authority to determine whether, based on applicable zoning designations, proposed development within their jurisdictional boundaries requires discretionary or ministerial approvals. (See Gov. Code, §§ 65800, 65850, 65852.)

Issuance of building permits, demolition permits, and grading permits are generally considered to be ministerial if no subjective judgment is involved in the decision-making process. (CEQA Guidelines § 15268(b); see *Adams Point Preservation Society v. City of Oakland* (1987) 192 Cal.App.3d 203; *Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85; *Environmental Law Fund, Inc. v City of Watsonville* (1981) 124 Cal.App.3d 711.) CEQA provides further guidance on the authority of local land use agencies to identify approvals as either ministerial or discretionary, explaining "[t]he determination of what is 'ministerial' can most appropriately be made **by the particular public agency involved based upon its analysis of its own laws**, and each public agency should make such determination either as a part of its implementing regulations or on a case-by-case basis." (CEQA Guidelines § 15268(a), emphasis added; see also *Sierra Club v. Napa County Ed. of Supervisors* (2012) 205 Cal.App.4th 162, 178.) "Each public agency should, in its implementing regulations or ordinances, provide an identification or itemization of its projects and actions which are deemed ministerial under the applicable laws and ordinances." (CEQA Guidelines § 15268(c).)

Acting within the scope of its police powers, the City (and countless other Central Valley cities and counties) has determined that certain types of development do not require discretionary approvals under certain zoning designations. In addition, like virtually all Central Valley cities and counties, the City has determined the issuance of building permits is a ministerial approval. The Proposed ISR Amendment contravenes the authority of local public agencies and CEQA by usurping local public agencies' power to make the determination whether discretionary or ministerial permits are required for development, substituting the District's judgment for that of the public agency. *(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)*

DISTRICT RESPONSE: Contrary to the commenter's claim, the District is not questioning or changing any land use agency's authority to determine the discretionary nature of any development project. In our role as a public health agency, the District's goal with these rule amendments is to ensure consistent

air quality mitigation for large development projects in all Valley communities. To that end, Rule 9510 provides multiple paths to provide that air quality mitigation. While we agree that complying with this rule through design changes that reduce air quality impacts of a development is a preferred path to compliance, we disagree that such changes inherently change a ministerial project approval process to a discretionary approval process. There is no discretion in complying with a regulatory obligation and we believe that public agencies would not consider efforts to comply with Rule 9510 as introducing any discretionary decisions into their approval process.

However, where a public agency does make a determination that incorporating clean air design changes into a project because of Rule 9510 also changes the nature of the project such that its approval must be considered a discretionary decision, the rule offers a mitigation fee compliance path that introduces no possible conclusion that it involves a discretionary decision. Under this path, project proponents need only to pay a mitigation fee to the District that is used by the District to fund emission reduction projects to achieve the required mitigation on the project proponent's behalf. This compliance path does not involve the respective public agency's decision making process in any way and therefore cannot create a discretionary decision making process where none existed before.

2. **COMMENT:** As acknowledged in the Staff Report, the Proposed ISR Amendment imposes an administrative burden on local public agencies by requiring tracking and sharing of information with the District regarding issuance of ministerial permits, which do not generally involve a public process or notice. Significant staff time and/or monetary investment in specialized electronic tracking software will be required to track whether projects applying for grading and building permits have previously received discretionary entitlements and if not, to ensure that the District is notified when an application for a ministerial permit is filed.

In addition to imposing additional administrative burdens on public agencies, the Proposed ISR Amendment exposes public agencies to significant litigation risk associated with enforcement or non-enforcement of its requirements. This litigation risk stems from the fact that even if an applicant meets all the requirements for issuance of a ministerial permit under the public agency's applicable regulations, the agency would be obligated to withhold issuance of the permit until the applicant has complied with Rule 9510, including paying any required fees. The risks and burdens which would be placed upon public agencies warrants additional consideration and potentially further revisions to the Proposed ISR Amendment to address these issues.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)

DISTRICT RESPONSE: While we are not aware that the commenter has any standing to provide comments on behalf of public agencies, the District does not anticipate public agencies to change their current process of informing the applicant to contact the District for compliance with Rule 9510. As such, the proposed rule amendment should pose no additional administrative burden on public agencies and we are not aware of any reason that the proposed amendments would require "an investment in specialized electronic tracking software."

3. **COMMENT:** The Staff Report identifies several bases on which Options 1 and 2 were rejected in lieu of Option 3 for the Proposed ISR Amendment, but fails to recognize that Option 3 suffers from these same flaws. In discussing Option 1 the Staff Report notes that applying Rule 9510 at the building permit stage is generally too late in the process for a project proponent to consider and incorporate project design elements that would contribute to reducing emissions from the development project. *(Id.,* p. 4.) However, the Staff Report fails to acknowledge that for those projects that are permitted by right based on zoning designations in effect after March 1, 2006 (i.e., would otherwise require no discretionary approvals) but have not yet received a non-discretionary permit (e.g., a building permit), the practical effect of the Proposed ISR Amendment is to apply Rule 9510 at the building permit stage. In the words of the staff, this is "too late in the process for a project proponent to consider and incorporate project design elements that would contribute to reducing emissions from the development project," leaving project proponents faced with the prospect of potentially paying significant off-site mitigation fees or spending more time and money re-designing the project to comply with a rule from which it was previously exempt. By the time ministerial approvals are being sought (e.g., grading and building permits), those projects have been fully designed.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)

DISTRICT RESPONSE: See Staff Report for further details describing why option 3 was chosen. However, the discussion under option 1 that concluded that a building permit was a late stage of the development process to be changing air quality related design elements was not based on an analysis of the differences in cost of the different options, but was based on an analysis of the ease at which project proponents can incorporate their own clean air design elements. But in fact the ISR rule provides for alternative paths to compliance for project proponents who cannot or don't implement clean air design elements. The District preference is always to avoid emissions rather than mitigating them after they occur, so our support for option 3 was aimed at providing more time for people to incorporate clean air design element in the project. Note that, with respect to the reference to

"undue delay", the processing of an ISR application has not historically resulted in any undue delays. The District has been able to process ISR applications within 1 day in most cases when presented with an urgent request by a developer. Of course, ISR applications are supposed to be filed at the time approval is sought, so these situations only arise when the developer has not filed a timely application.

4. **COMMENT:** If application of Rule 9510 effectively dictates that the project be re-designed, this potentially forces the project proponents to go to the public agency for a discretionary approval and possible CEQA compliance, even though no modifications to the project are contemplated by the developer. In cases where project re-design is not feasible and payment of impacts fees is required, this will cause delays in development since these fees will not have been accounted for in project budgeting.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)

DISTRICT RESPONSE: As discussed above, Rule 9510 does not dictate that a project be redesigned, and therefore cannot "force" a discretionary decision approval process be initiated.

In fact, the District has added to the rule a specific exemption for those projects that have reached a point in their approval process such that they have a vested right to develop. That exemption was proposed as Section 2.3.2, "*An approval that is not discretionary, including but not limited to a building permit or other Vested Right to Develop, has been received for the development project from a public agency prior to (rule amendment date).*"

If there is no vested right to develop, the proposed amendments provide ample opportunity for applicants to comply with Rule 9510. For large development projects that have not yet applied for approval from a public agency, applicants may wait until such application to also apply to the District with an ISR application. For a large development project which the developer has applied for approval from a public agency but has not yet received it by the date of rule adoption, the developer has 30 days after the rule effective date to file the ISR application. Again, this transition period only applies to large development projects which are being approved without a discretionary decision and which have not established a right to proceed with the development. The intent of this rule amendment has always been to require such projects to mitigate their potentially significant air quality impacts in the same way as similar projects subject to discretionary approval in neighboring jurisdictions.

To further clarify this exemption for projects with a vested right to develop, the District is proposing to expand it and include the concept of a development project

qualifying as a "Grandfathered Large Development Project", defined as below:

3.17 Grandfathered Large Development Project: a large development project that meets the following to the satisfaction of the APCO:

3.17.1 The large development project must be identified by the applicant and be a particular and defined large development project meeting at least one of the land use categories in Section 2.2; and

3.17.2 The applicant provides written confirmation from the public agency responsible for project-level building permits, conditional use permits, or similar approvals, that the large development project identified under Section 3.17.1 has received a land-use entitlement and requires no discretionary approval prior to starting construction; and

3.17.3 Prior to [insert date 90 days after rule adoption], and in reliance upon the land use entitlement, the applicant has entered into binding agreements or contractual obligations for the large development project identified under Section 3.17.1, which cannot be canceled or modified without substantial loss to the applicant, for designing, developing, or constructing the large development project.

As such, the "Vested Right to Develop" is now removed and the proposed Section 2.3 would now read as follow:

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

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

2.3.2 The large development project requires or required a discretionary approval and is subject to the rule under Section 2.1; or

2.3.3 Prior to [insert date 90 days after rule adoption], the applicant received project-level building permits, a conditional use permit, or similar approvals for the particular large development project; or

2.3.4 The large development project qualifies as a Grandfathered Large Development Project.

5. **COMMENT:** In discussing Option 2, the Staff Report explains that because the District does not currently receive information regarding all approvals from the public agency, requiring local agencies to report on non-discretionary approvals would create a significant and costly burden on public agencies and the District to ensure that all approvals (discretionary and non-discretionary) are communicated to the District for evaluation. *(Id.,* pp. 4-5.) The Staff Report overlooks that issuance of ministerial permits, including grading and building permits, is generally not a public process for which public notice is given; thus the Proposed ISR Amendment also would require local public agencies to expend significant time and money to develop and administer a process to notify the District of every ministerial approval and permit issued by the agency.

As demonstrated above, the Proposed ISR Amendment, Option 3, suffers from the same shortcomings and complications cited as reasons for rejecting Options 1 and 2. In light of this, the Staff Report's conclusion that Option 3 is the most workable solution is unsupported.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)

DISTRICT RESPONSE: On the contrary, the rule contains no obligation that would require local public agencies to develop and administer a process to notify the District of every ministerial approval and permit issued by the agency, nor is the rule applicable to each and every ministerial approval or permit issued. Rather, the rule is applicable one time for the Development Project as defined by the rule. The District does not anticipate public agencies to change their current process of informing the applicant to contact the District for information and applicability determinations relative to Rule 9510. Therefore, the amendments should pose no additional administrative burden to local public agencies.

In conclusion, the District continues to believe that Option 3 is the best option for addressing the current inequities in application of the rule across Valley jurisdictions.

6. **COMMENT:** Other than the Coalition for Clean Air v. Visalia case (which ultimately involved improper application of CEQA), none of the materials provided to the public in connection with the Proposed ISR Amendment (including the Staff Report) provide evidence that local land use agencies have demonstrated a pattern of inconsistently applying the definition of "ministerial" in order to avoid application of Rule 9510 to development projects. Local land use agencies are vested with the authority to dete1mine whether, based on zoning designations, discretionary or ministerial approvals are required for certain types of development with their jurisdictional boundaries. (See Gov. Code §§ 65800, 65850, 65852.)

In other words, the District has offered no evidence that local land use agencies are taking advantage of this so-called "loophole" the District has identified, and proposes to remedy with the Proposed ISR Amendment, by improperly classifying approvals as ministerial in order to intentionally circumvent application of Rule 9510 to development projects.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)

DISTRICT RESPONSE: The commenter claims that the District has failed to justify the necessity of the proposed amendments with evidence demonstrating that local land use agencies have inconsistently applied the definition of "ministerial," other than the Coalition for Clean Air v. Visalia case. In order to establish necessity for the rule amendments, the District is not required to show a widespread "pattern of inconsistently applying the definition of 'ministerial'." It is enough to demonstrate that the potential exists for such inconsistent application. (See, e.g., California Assn of Medical Products Suppliers v. Maxwell-Jolly (2011) 199 Cal.App.4th 286, 316-317 [holding that closing a loophole is, by itself, substantial evidence to support the reasonable necessity for a rule, even if no evidence existed that anyone had exploited the loophole.]) Pursuant to California Health and Safety Code § 40728.5, there are a number of required analyses that must be made prior to rule adoption (which are included in the District's staff report), but there is no requirement to identify specific projects that would be subject to a regulatory amendment.

Rule 9510 is designed to reduce indirect emissions of NOx and PM10 from mobile sources resulting from new development projects of a certain size and character. The proposed amendments are designed to insure that Rule 9510 applies consistently throughout the San Joaquin Valley to all similarly-situated projects. The City of Visalia case provides adequate evidence of the potential for the rule to be applied inconsistently for projects that were originally intended to be subject to the rule. To the extent that Rule 9510, in the absence of the amendments, has the potential to be applied inconsistently in other jurisdictions, the rule amendments are rationally designed to address that issue.

7. **COMMENT:** Due to its interference with investment-backed expectations, the Proposed ISR Amendment may constitute a taking under the U.S. Constitution's Fifth Amendment, for which the government must provide compensation. As the Court recognized in *Pennsylvania Central Transportation Co. v. New York City* (1978) 438 U.S. 104, in determining whether a taking has occurred, the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectations are relevant considerations. Here, the Proposed ISR Amendment

will interfere with investment-backed expectations either by increasing project costs, thereby diminishing the profits accruing to owners/developers, or by rendering projects so costly that they are no longer economical and are abandoned. At the time such projects were proposed, Rule 9510 either was not in existence, or did not apply to such projects. Now, if the Proposed ISR Amendment is adopted, the effect of the adoption on such projects would lead to huge regulatory costs, in the form of possible project redesigns, and/or the payment of substantial fees. District staff has articulated these same problems in its discussion of Option 1, as noted above.

Though the District has failed to identify which projects would be covered by the Proposed ISR Amendment that are not covered by the current version of Rule 9510, it is likely that the Proposed ISR Amendment will apply Rule 9510 to several projects that have been in the planning pipeline for a significant portion of the last decade. For projects that only require ministerial approvals to develop, the financial viability of these projects has been assessed based on the assumption that the project would be exempt from Rule 9510 and the associated ISR fees. The imposition of ISR fees pursuant to the Proposed ISR Amendment on these projects will greatly increase project costs and diminish profits earned by owners/developers and may make it uneconomical to develop the projects at all. For example, in cases where the project is rendered uneconomical due to the imposition of ISR fees under the Proposed ISR Amendment and the developer has already expended funds on design and other pre-construction costs, the would-be developer will incur financial losses from abandoning the project. At a minimum, the Proposed ISR Amendment would result in increased project costs, resulting in diminished profits to the owners/developers. In the industrial building market, these reduced profits are likely to take the form of decreased market value prices in the sale and rental markets due to buyers demanding lower sale prices or rents based on the expectation that they will need to pay significant ISR fees when they construct their facilities or otherwise develop the property.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)

DISTRICT RESPONSE*:* Regulatory mitigation fees are valid, and not an unconstitutional taking, where "such fees bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development." San Remo Hotel L.P. v. City and County of San Francisco (2002) 27 Cal.4th 643, 671. The fees paid under Rule 9510, if any, are directly proportional to tons of NOx and PM10 that are attributable to the project but not mitigated by the developer through on-site features and, as such, are valid regulatory fees. California Bldg. Industry Ass'n v. San Joaquin Valley Air Poll. Contr. Dist. (2009) 178 Cal.App.4th 120, 128, 131. Furthermore, the fact that a planned development project may interfere with investment-backed expectations does not, in and of

itself, constitute a taking, particularly where the developer has not acquired a vested right to build. Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal.3d 785. The proposed amendments expressly exempt projects which have acquired a vested right to proceed with the project development.

The proposed amendments expressly exempt projects that are in the planning stages qualifying as a "Grandfathered Large Development Project", as defined below.

3.17 Grandfathered Large Development Project: a large development project that meets the following to the satisfaction of the APCO:

3.17.1 The large development project must be identified by the applicant and be a particular and defined large development project meeting at least one of the land use categories in Section 2.2; and

3.17.2 The applicant provides written confirmation from the public agency responsible for project-level building permits, conditional use permits, or similar approvals, that the large development project identified under Section 3.17.1 has received a land-use entitlement and requires no discretionary approval prior to starting construction; and

3.17.3 Prior to [insert date 90 days after rule adoption], and in reliance upon the land use entitlement, the applicant has entered into binding agreements or contractual obligations for the large development project identified under Section 3.17.1, which cannot be canceled or modified without substantial loss to the applicant, for designing, developing, or constructing the large development project.

Accordingly, the District disagrees that the rule amendments constitute an unlawful taking.

8. COMMENT: Due to its failure to identify the small subset of projects that will become subject to Rule 9510 as a result of the Proposed ISR Amendment, the Socioeconomic Impact Analysis does not meet the requirements of Health and Safety Code sections 40920.6(a) and 40728.5.

As previously noted, the Proposed ISR Amendment involves a smaller fixed set of fully entitled properties (and some projects in the development pipeline that are

presently permitted by right) that can easily be identified and analyzed but the District has continually declined to identify that subset of projects for the public. *(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)*

DISTRICT RESPONSE: Contrary to this comment, with 60-plus cities and counties in the Valley, and a continuously evolving level of development activity in each of those jurisdictions, it is no simple matter to maintain complete identification of all pending projects that may be subject to the proposed ISR amendments. Furthermore as demonstrated in our response to comment 6 above, it is not necessary to do so.

9. **COMMENT:** Accordingly, the Socioeconomic Impact Analysis fails to evaluate the costs and benefits associated with its implementation of the Proposed ISR Amendment, which can only be accurately measured by assessing impacts to that subset of projects. It merely restates the 2005 analysis and compares the predictions set forth in the 2005 analysis with the actual fees paid by projects that were subject to Rule 9510 during the last decade. *(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)*

DISTRICT RESPONSE: While the District disagrees that there is any requirement to prepare an evaluation of the costs and benefits beyond the socioeconomic impact analysis prepared by the District, it is interesting to note that the ISR Rule contains a specific measure of cost/benefit which is not being altered with these rule amendments. The Rule identifies a specific dollar-cost per ton of emissions generated by a development, based on the District's analysis of the cost to generate emissions reductions sufficient to mitigate the development's increased emissions.

10. **COMMENT:** In response to the CPRA request submitted on behalf of Wonderful requesting any studies, reports, or other documentation analyzing and identifying how many projects are expected to be subject to the Proposed ISR Amendment, the District reiterated its assertion (made in the Staff Report) that the original analysis prepared at adoption of Rule 9510 in 2005 remains relevant because the original rule was intended to cover the projects to be included under the Proposed ISR Amendment and accordingly, no further analysis is required. However, as pointed out by the California Central Valley Economic Development Corporation (EDC) in their January 30, 2017 comment letter on the Proposed ISR Amendment, the record reveals that the original intent of Rule 9510 was not to cover projects only requiring ministerial approvals and that it would apply to only those projects requiring "discretionary approval." As noted by EDC, when the District originally adopted Rule 9510 in

late 2005, it considered and rejected the option of basing applicability of the rule on building permit issuance (rather than discretionary approval). (See Final Draft Staff Report for Proposed Rule 9510 and Rule 3190, December 15, 2005 [2005 Staff Report].) Instead, the District elected to establish the issuance of a discretionary approval as the trigger for applicability of Rule 9510, noting that "the District chose to craft the ISR rules to be compatible with local land-use authorities decision-making processes, and to have the ability to be worked into CEQA documents at the Lead Agencies' discretion." (2005 Staff Report, p. 9.)

The Staff Report claims that since the Proposed ISR Amendment does not change the original intent of Rule 9510, as set forth 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. *(Id.,* p. 17.) This is not correct. As Rule 9510 was originally drafted, it did not apply to the subset of projects deemed to be ministerial projects; under the Proposed ISR Amendment such projects will now be subject to Rule 9510. The number of such projects that will be affected by the Proposed ISR Amendment is not identified in the Staff Report or the Socioeconomic Analysis for Rule 9510 attached to the Staff Report. Nonetheless, there will be some quantifiable change in air emissions under the original Rule 9510 and the Proposed ISR Amendment associated with this unidentified set of projects. Likewise, the ministerial projects that would fall within the Proposed ISR Amendment will be required to incur costs either through costly project redesign measures or through payment of substantial off-site impact fees, or both. Accordingly, cost-benefit and socioeconomic impact analyses need to be prepared to inform both the public and this Board of the expected air quality gains anticipated from extending Rule 9510 to ministerial projects and the financial and socioeconomic costs associated with implementation, which is likely to hinder the diversification of the San Joaquin Valley's economy. Failure to do so both contravenes the express text of Health and Safety Code sections 40920.6(a) and 40728.5 and deprives the public and the District Board from the benefit of understanding the impacts of adopting the Proposed ISR Amendment.

The District must prepare and disclose socioeconomic and cost-benefit analyses prior to moving forward with adoption of the Proposed ISR Amendment. Because the District has failed to prepare the required analysis, if the Proposed ISR Amendment is adopted, the adoption would be invalidated pursuant to a writ of mandate. *(See, e.g., City of Dinuba v County of Tulare* (2007) 41 Cal.4th 859, 868 [county may be compelled to correctly allocate and distribute tax revenues].)
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)

DISTRICT RESPONSE: As previously stated, and contrary to the comment above, the proposed amendments do not change the original intent of the rule with respect to applicability. At the time the original rule was adopted, the District did not understand that some land use jurisdictions would find it appropriate to approve large development projects, with potentially significant impacts on the Valley's air quality, without exercising their oversight capacity through a discretionary decision making process. However, now that the District understands that some jurisdictions do approve large development projects without a discretionary decision, it is our obligation to remove the loophole that allows such potentially significant impacts on the Valley's air quality to circumvent the mitigation requirements of ISR. The proposed rule amendment is designed to remove this unintended circumvention of the rule's intended original applicability to all large development projects and to address the inherent lack of fairness associated with unequal application of the rule depending on which local jurisdiction analyzes a project.

11. COMMENT: The Proposed ISR Amendment's conditioning issuance of non-ministerial permits such as building permits on payment of the ISR fee for a subset of projects transforms Rule 9510's ISR fee into a development fee. "A fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relationship to the development's probable costs to the community and benefits to the developer." (California Building Assn. v. San Joaquin Valley Air Pollution Control Dist. (2009) 178 Cal.App.4th 120, 130 [CBJA v. SJVAPCD], citing Sinclair Paint v. State Bd. of Equalization (1997) 15 Ca1.4th 866, 875.) Although the CBJA v. SJVAPCD court ruled that the ISR fee imposed under the existing Rule 9510 was a valid regulatory fee charged to cover the reasonable cost of a service or program connected to a particular activity, the court's holding was based, in part, on the fact that under that framework, "[t]he ISR fees are not exacted in return for permits or other governn1ent privileges." (178 Cal.App.4th 120, 213.) By contrast, for developments that only require ministerial approvals, the Proposed ISR Amendment conditions issuance of building permits for those projects on payment of the ISR fee. Thus, the Proposed ISR Amendment transforms the ISR fee into a development fee for which compliance with the Mitigation Fee Act is required 3

The District has failed to comply with the Mitigation Fee Act in connection with the Proposed ISR Amendment. Before imposing this new development fee (i.e., the ISR fee) upon those projects requiring only ministerial approval, the District must: identify the purpose of the fee; identify the use to which the fee is to be put; determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and determine how there is a reasonable relationship between the need for the public facility and the type

of development project on which the fee is imposed. (Gov. Code,§ 66001(a).) With respect to the subset of projects to be affected by the Proposed ISR Amendment, the District has neither determined that the ISR fee bears a reasonable relationship to the type of development project on which the fee is imposed nor determined how there is a reasonable relationship between the need for the air emission reduction services provided by the District and the type of development project on which the fee is imposed. In fact, the District's failure to identify the subset of development projects likely to be affected by the Proposed ISR Amendment precludes it from undertaking such an analysis.

Prior to adopting the Proposed ISR Amendment, the District must comply with the Mitigation Fee Act by making the determinations outlined above.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP)

DISTRICT RESPONSE: The commenter is incorrect that the proposed amendment conditions issuance of building permits for those projects on payment of the ISR fee. The District has no authority over land-use approval and is therefore unable to place conditions on building permits issued by a land use agency. Considering the building permit to be a trigger to the ISR applicability determination process is not a condition to the building permit itself. It is established law that the ISR fees required by Rule 9510, and, by extension, any additional fees collected by the proposed amendments, are not development fees subject to the Mitigation Fee Act, but rather are valid regulatory fees. California Building Industry Association v. San Joaquin Valley Air Pollution Control District (2009) 178 Cal.App.4th 120.

12. COMMENT: As we have expressed in prior letters, Wonderful remains disappointed that the District refuses to revise the Socioeconomic Analysis for Rule 9510 to identify the projects that will be subject to Rule 9510 as a result of the Proposed ISR Amendment, which is necessary in order to fully understand the impacts of the Proposed ISR Amendment. We respectfully renew our request that the District defer consideration of the Proposed ISR Amendment until its full scope and impacts on the San Joaquin Valley can be determined, based in part upon preparing an adequate effectiveness and socioeconomic impact analysis, as required by law.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP.)

DISTRICT RESPONSE: As previously stated, the proposed amendments do not change the original intent of the rule with respect to applicability. The proposed rule amendment is designed to remove the unintended circumvention of the rule's original applicability to large development projects, and to address the inherent lack of fairness associated with unequal application of the rule depending on which

local jurisdiction analyzes a project. Therefore, the proposed changes do not result in new costs or socioeconomic effects as compared to those assessed at the time the rule was adopted, regardless of their applicability to pending projects.

Appendix B in this final draft staff report addresses the socioeconomic analysis based on the analysis that was originally conducted for the rule. This review of the actual economic impacts of the rule on development projects, including large development projects, demonstrates that the actual costs are below those projected in 2004 and confirms the conservative nature of the original assessment. Therefore, the conclusion of the original socioeconomic impact analysis, specifically that the rule would not have a significant impact on the industry, including on large development projects, remains relevant and accurate today.

13. COMMENT: Wonderful appreciates the District's recognition that projects with vested rights to develop should be exempt from application of Rule 9510 as amended by the Proposed ISR Amendment. However, we believe that if the District proceeds with consideration of the Proposed ISR Amendment, the proposed definition of "Vested Right to Develop" must be modified to more broadly define the group of projects that fall within the scope of that exemption. To that end, Wonderful proposes the following definition for "Vested Right to Develop" (Section 3.36 of the Proposed ISR Amendment):

> Vested Right to Develop: <u>Proposed projects that are permitted by right under the applicable zoning designation and only require non-discretionary or ministerial approvals from the local land use agency as of (rule amendment date) shall be considered to have a vested right to develop, provided the local land use agency has confirmed in writing prior to (rule amendment date) that only non-discretionary approvals are required.</u>

(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP

DISTRICT RESPONSE: The District disagrees that the definition of Vested Right to Develop is improved with the commenter's suggested changes. The District believes that any exemption should entail project specific approval by the applicable agency, not just an acknowledgment that the project is properly zoned and requires no additional discretionary approval. In fact, the commenter's suggested language completely unravels the District's efforts to ensure that Rule 9510 is consistently applied to all large development projects regardless of the jurisdiction in which they are approved.

However, after careful consideration of the comment received, the District is proposing to further clarify this exemption for projects with a vested right to develop by expanding it and including the concept of a development project qualifying as a "Grandfathered Large Development Project", defined as below:

3.17 Grandfathered Large Development Project: a large development project that meets the following to the satisfaction of the APCO:

3.17.1 The large development project must be identified by the applicant and be a particular and defined large development project meeting at least one of the land use categories in Section 2.2; and

3.17.2 The applicant provides written confirmation from the public agency responsible for project-level building permits, conditional use permits, or similar approvals, that the large development project identified under Section 3.17.1 has received a land-use entitlement and requires no discretionary approval prior to starting construction; and

3.17.3 Prior to [insert date 90 days after rule adoption], and in reliance upon the land use entitlement, the applicant has entered into binding agreements or contractual obligations for the large development project identified under Section 3.17.1, which cannot be canceled or modified without substantial loss to the applicant, for designing, developing, or constructing the large development project.

As such, the "Vested Right to Develop" is now removed and the proposed Section 2.3 would now read as follow:

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

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

2.3.2 The large development project requires or required a discretionary approval and is subject to the rule under Section 2.1; or

2.3.3 Prior to [insert date 90 days after rule adoption], the applicant received project-level building permits, a conditional use permit, or similar approvals for the particular large development project; or

2.3.4 The large development project qualifies as a Grandfathered Large Development Project.

14. COMMENT: The currently proposed text of Section 2.2 which would be added by the Proposed ISR Amendment, fails to clearly identify which projects would be exempt from Rule 9510, as amended. While Wonderful appreciates the drafting challenges involved in identifying exemptions from a rule in the same section that establishes the rule, Wonderful believes Section 2.2 needs to provide greater clarity regarding which projects are exempt.

In addition, Section 2.2 does not provide definitions for the land use classifications that are referenced in defining a "large development project."

Assuming the District undertakes the required analyses outlined above and determines based on that information that an amendment to Rule 9510 is still required, Wonderful recommends that some additional language be added to Section 4.5 of Rule 9510 to clarify the meaning and scope of the Section 2.2 exemption that applies when a project has obtained "an approval that is not discretionary ...prior to (rule amendment date)."
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP.)

RESPONSE: The commenter appears to be commenting on the prior version of the proposed amendments. The version of the proposed amendments workshopped on May 18, 2017, was released for public review on May 9, 2017, but this comment appears to be based on a prior version. For instance, Section 2.2 now only defines applicability of the rule to large development projects. Section 2.3, on the other hand, now provides rule language that clarifies exceptions with the necessary “clarity regarding which projects are exempt.” The commenter failed to point out any specific lack of clarity that they feel exists, and did not suggest any potential revised language. Finally, all of the land use classifications that are referenced in Section 2.2 have been utilized in Section 2.1 since the Rule’s inception and are defined in Section 3.0 of the Rule. These classifications have been implemented without difficulty since that time, so no additional definitions are necessary.

15. COMMENT: To remedy the lack of clarity in Section 2.2 regarding which development projects would be exempt from Rule 9510 as amended by the Proposed ISR Amendment, and to clarify that large development projects comprised of two or more contiguous parcels under common ownership for which ministerial approvals have been received prior to the rule amendment date are exempt from Rule 9510, Wonderful urges the District to make the following revisions (shown in underline and bold) to Rule 9510 Section 4.5 as part of the Proposed ISR Amendment:

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. **For any large development project (as defined in Section 2.2) comprised of contiguous or adjacent property under common ownership, this exemption shall extend to all contiguous or adjacent parcels under common ownership provided a building permit or other final construction authorization has been obtained for at least one of those parcels prior to (rule amendment date), except that if a discretionary approval is thereafter sought for development of any individual parcel then this rule shall apply with respect to that parcel only.** This exemption shall not apply to development projects that failed to comply with applicable requirements of the prior version of this rule.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP.)

RESPONSE: While hypothetical situations such as the one described are difficult to analyze, the District points the commenter to Section 3.36 of the proposed rule:

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

This section addresses the hypothetical situation presented by the commenter. Under Section 2.3 of the Rule, projects that have acquired a "Vested Right to Develop" are not subject to the rule. Applying this to the hypothetical situation a building permit for one parcel would not appear to provide a vested right to develop a neighboring property. On the other hand a "contract, tentative map approval, or other form of approval" that predated the amended rule adoption date and covered both parcels would provide a vested right to develop both parcels.

16. COMMENT: The District has properly concluded that before it can adopt the Proposed ISR Amendment, it must comply with CEQA. (Staff Report, p. 17.) In order to comply with CEQA, staff recommends that the Board determine that adoption of the Proposed ISR Amendment is exempt from CEQA **"....** 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))." *(Id.)* This exemption is known as "the common sense exemption." *(See Muzzy Ranch Co. v Solano County Airport Land Use Comm.* (2007) 41 Cal.4th 372.)

In making the required determination that there is no possibility that the activity in question may have a significant effect on the environment, the lead agency, here, the District, must make a factual review of the record to determine whether the exemption applies. As the California Supreme Court stated in *Muzzy Ranch,* "whether a particular activity qualifies for the common sense exemption presents an issue of fact, and the agency invoking the exemption has the burden of demonstrating that it applies." (41 Cal.4th at 386.)

Although arguably the Proposed ISR Amendment may have some beneficial environmental impacts through some marginal reduction in air pollution (although to date the District has provided no evidence quantifying a possible reduction in air pollution solely attributable to adoption of the Proposed ISR Amendment), projects designed to protect or improve the environment can have collateral effects on the environment that preclude application of the exemption. Thus, the District cannot simply assume that measures intended to protect the environment are entirely benign.

For example, the court in *Dunn-Edwards Corp. v Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644 overturned amendments to air district regulations designed to reduce the amount of volatile organic carbons (VOCs) in paint and other architectural coatings for failure to comply with CEQA. Because there was evidence that the new regulations would require lower quality products that would result in a net increase in VOC emissions, use of the common sense exemption was held to be improper. *(See also Wildlife Alive v Chickering* (1976) 18 Cal.3d 190 [Fish and Game Commission action setting fishing and hunting seasons has potential for both beneficial and adverse effects on survival of certain species]; *Building Code Action v Energy Resources Conserv. & Dev. Comm.* (1980) 102 Cal.App.3d 577 [adoption of energy conservation regulations establishing double-glazing standards for new residential construction could have significant impact on air quality as result of increased glass production].)

There is absolutely no support in the Staff Report for the exemption determination. The Staff Report indicates District staff reviewed the 2005 Negative Declaration prepared for the adoption of the original Rule 9510 and determined it remains relevant today, "specifically that the proposed rule amendments can have no significant impacts on the environment." (Staff Report, p. 18.) Based on this determination and lack of evidence to the contrary, staff concluded that the Proposed ISR Amendment will not have any significant adverse effects on the environment. *(Id.)* This cursory statement (though somewhat improved from the support provided in the District's September 2016 staff report on the same topic) is inadequate support for an exemption determination.

Although the District has failed to list, or take an inventory of, the number, size and type of projects which would be affected by the Proposed ISR Amendment, as discussed above, requiring these projects to be subject to Rule 9510 could kill these projects, or increase the development costs substantially. These added regulatory costs could lead to a lack of development, and possible urban decay, an impact that needs to be analyzed under CEQA. *(Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184.) Also, such projects, if not built, may delay much-needed public improvements, which were to be funded through execution of the development of these projects. A lack of needed public improvements could lead to increased traffic congestion, worse hydrological conditions, and other negative environmental impacts. Also, since adoption of the Proposed ISR Amendment would increase development costs and affect the competitiveness of development projects in the Central Valley when compared with projects outside the Central Valley, which would not be subject to the Proposed ISR Amendment, it is possible that there would be additional environmental impacts generated. Development which otherwise would have occurred in the Central Valley to serve the Central Valley would be developed outside the Central Valley, requiring longer trips to and from these new projects, leading to increased traffic, vehicle miles traveled, air quality and greenhouse gas impacts…

As the California Supreme Court has held, a lead agency, here the District, has the burden to demonstrate that adoption of the Proposed ISR Amendment will not have any significant environmental impacts. At this stage, the District has failed to meet this burden.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP.)

RESPONSE: The commenter argues that the District cannot simply assume that the proposed amendments pose no possibility of any significant adverse environmental effects, but must conduct an analysis of the inventory, number, size and type of projects that may be affected by the proposed amendments, and the potential for the amendments to kill projects, thus leading to a lack of development and possible urban decay. The cases cited by the commenter, however, are distinguishable.

In Dunn-Edwards Corp. v. Bay Area AQMD (1992) 9 Cal.App.4th 644, the petitioners challenged BAAQMD's amendments to its regulations covering architectural coatings limiting the amount of solvent in coatings to reduce VOC emissions. The court found there was substantial evidence that the amendments might have an adverse impact on the environment by requiring lower quality products that would have to be used more often, thus resulting in a net increase in emissions from VOC's. According, the court held that the

district failed to produce supporting data for its allegations of a lack of adverse impact. In Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, the Supreme Court rejected an argument that the Department of Fish and Game's decisions setting hunting and fishing seasons were exempt under CEQA, observing that hunting and fishing, by their nature, inherently can cause adverse environmental impacts. In Building Code Action v. Energy Resources Conservation & Dev. Com. (1980) 102 Cal.App.3d 577, a regulation requiring double-glazing standards for new windows had the potential for increased glass production, and thus a significant air pollution impact.

Such cases are distinguishable from the District's proposed ISR amendments. Despite staff's own evaluation, as well as an extensive public process involving no less than 3 public workshops at which interested stakeholders had the opportunity to provide information, no evidence has been identified of potential adverse environmental impacts resulting from the proposed ISR amendments.

The District also disagrees that it is required to evaluate the possibility of urban decay in the context of the proposed rule amendments. Where there is evidence "'that economic and social effects caused by a project . . . could result in a reasonably foreseeable indirect environmental impact, such as urban decay or deterioration, then the CEQA lead agency is obligated to assess this indirect environmental impact. [Citations.] An impact "which is speculative or unlikely to occur is not reasonably foreseeable.' [Citation.]"'" Joshua Tree Downtown v. County of San Bernardino (2016) 1 Cal.App.4th 677, 684.

The case cited by the commenter, Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184 addressed the potential for a large, proposed shopping center to start an economic chain reaction of business closures and eventual physical deterioration of the downtown shopping area to lead to urban decay. Such situation is in stark contrast with commenter's claim that the absence of development will contribute to urban decay, an outcome which the District considers to be speculative, at best, and not reasonably foreseeable.

17. COMMENT: As commented by Tulare County, the Proposed ISR Amendment's revised definitions of "transportation project" and "transit project" would require such beneficial public projects to be subject to Rule 9510 (although the District claims that these definitions merely clarify the District's interpretation of Rule 9510). (Staff Report, p. A-20.) If Tulare County's interpretation is correct, beneficial transportation and transit projects would be delayed or possibly not built due to the need to comply with Rule 9510. If this were to happen, there would be less transportation improvements

and less vehicles removed from the road which otherwise would be displaced by these projects. This could result in increased traffic congestion, increased air pollution and increased greenhouse gas production.
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP.)

RESPONSE: As we told Tulare County at the time, in January of 2017, their interpretation is incorrect (see response to comment #17 in Appendix G).

18. COMMENT: As explained in detail above, the District has not identified the projects that would be subject to Rule 9510 under the Proposed ISR Amendment and has failed to demonstrate that the extension of Rule 9510 to projects requiring only ministerial approvals would result in measurable air quality improvements. Adoption of the Proposed ISR Amendment without identifying the projects to be impacted by the rule change and without demonstrating that the change is rationally related to a legitimate governmental interest would be arbitrary and capricious. (See generally *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330.)
(John Condas with Allen, Matkins, Leck, Gamble, Mallory, and Natsis, LLP.)

RESPONSE: In order to establish necessity for the rule amendments, the District is not required to identify any specific projects that would be impacted by the rule change. Rather, it is sufficient to describe the types of projects impacted by the rule amendment. Specifically, the rule amendment is designed to insure that large development projects are all subject to the requirements of the rule, regardless of whether the land use agency has issued a ministerial or a discretionary approval of the project, in order to avoid inconsistent application of the rule. (See, e.g., California Assn of Medical Products Suppliers v. Maxwell-Jolly (2011) 199 Cal.App.4th 286, 316-317 [holding that closing a loophole is, by itself, substantial evidence to support the reasonable necessity for a rule, even if no evidence existed that anyone had exploited the loophole.]) Rule 9510 is designed to reduce indirect emissions of NOx and PM10 from mobile sources resulting from new development projects of a certain size and character. The proposed amendments are designed to insure that Rule 9510 applies consistently throughout the San Joaquin Valley to all similar projects. The City of Visalia case provides adequate evidence of the potential for the rule to be applied inconsistently for projects that were originally intended to be subject to the rule. To the extent that the rule allows this inconsistency, and in fact has been applied inconsistently, the rule amendments are rationally designed to address that issue, and close the associated loophole.

The case cited by the commenter, Arnel Development Co., is inapplicable. Although the Arnel court applied the general rule that a land use ordinance is

invalid only if arbitrary, discriminatory and bears no reasonable relationship to a legitimate public interest, the Arnel court did not indicate that there is any need to identify specific projects that would be subject to a regulation, as the commenter seems to suggest. The rezoning in Arnel was invalidated because it was made without consideration of appropriate planning or land use criteria, and had the sole and specific purpose of precluding any future development that would include affordable housing in a high-demand area (deemed discriminatory by the Arnel court). (Ibid at 340.) Whereas Arnel ignored the public interest in favor of the private interests of adjoining landowners, if an express public welfare concern drives rezoning, it will not be invalided as arbitrary and capricious. (See Arcadia Development Co. v. City of Morgan Hill (2011) 197 Cal.App.4th 1526, 1538.)

19. COMMENT: The amended rule will have an adverse impact on projects that are currently in the building permit review process. The implementation of this amendment, as proposed, would subject projects that are in the building permit application process to the rule, thereby requiring them to completely redesign their project, causing unnecessary delay and increased costs to the project. At a minimum, the exemption should extend to any project that has applied for a building permit prior to the rule amendment date. This would ensure that these job producing projects can continue to move forward under the current regulatory environment.
(Mark Hendrickson, CA Central Valley EDC)

DISTRICT RESPONSE: The proposed rule amendments would impact a small subset of development projects and only apply to the large development projects, as identified in section 2.2 that receive a non-discretionary approval.

In general, project proponents who received a discretionary approval for a project prior to March 1, 1006, are not subject to the rule. Those who received a discretionary approval after March 1, 2006 are subject to the rule. There is no change to this existing applicability mechanism. As such, the development projects identified in section 2.1 are not affected by the rule amendments.

Furthermore, per the proposed Section 2.3.2, the rule does not apply to large development projects that have received an approval that is not discretionary, including but not limited to a building permit or other Vested Right to Develop from a public agency prior to the adoption date of the proposed amended rule. A "Vested Right to Develop" is defined as "for the purposes of this rule, a contract, tentative map approval, or other form of approval received from a governmental agency, which authorizes a guaranteed legal right to proceed with the Development Project, provided any such approval was not a discretionary decision."

However, after careful consideration of the comment received, the District is proposing to further clarify this exemption for projects with a vested right to develop by expanding it and including the concept of a development project qualifying as a "Grandfathered Large Development Project", defined as below:

3.17 Grandfathered Large Development Project: a large development project that meets the following to the satisfaction of the APCO:

3.17.1 The large development project must be identified by the applicant and be a particular and defined large development project meeting at least one of the land use categories in Section 2.2; and

3.17.2 The applicant provides written confirmation from the public agency responsible for project-level building permits, conditional use permits, or similar approvals, that the large development project identified under Section 3.17.1 has received a land-use entitlement and requires no discretionary approval prior to starting construction; and

3.17.3 Prior to [insert date 90 days after rule adoption], and in reliance upon the land use entitlement, the applicant has entered into binding agreements or contractual obligations for the large development project identified under Section 3.17.1, which cannot be canceled or modified without substantial loss to the applicant, for designing, developing, or constructing the large development project.

As such, the "Vested Right to Develop" is now removed and the proposed Section 2.3 would now read as follow:

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

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

2.3.2 The large development project requires or required a discretionary approval and is subject to the rule under Section 2.1; or

2.3.3 Prior to [insert date 90 days after rule adoption], the applicant received project-level building permits, a conditional use permit, or similar approvals for the particular large development project; or

2.3.4 The large development project qualifies as a Grandfathered Large Development Project.

20. COMMENT: CCVEDC fundamentally remains opposed to the rule amendment as it targets projects that received their discretionary approvals prior to March 1, 2006, yet because the projects had not submitted for building permits until years after they received discretionary approval, the District is attempting to retroactively implement the rule through the building permit process. These property owners, who rightfully applied for and received discretionary approvals and as such retain their vested right to develop. The only example that the District has cited was a property that had a vested right to develop, receiving their discretionary approval prior to March 1, 2006 and therefore proceeded to apply for and obtain a building permit.

This proposal, while on the surface claims to maintain the March 1, 2006 "exemption", redefines the Rule so that it can apply to projects that have a March 1, 2006 "exemption" under the discretionary permit definition of the rule, but not the newly added exemption for any non-discretionary approval after the rule amendment date.

(Mark Hendrickson, CA Central Valley EDC)

DISTRICT RESPONSE: The commenter is incorrect that the rule amendments target projects that received their discretionary approvals prior to March 1, 2006. The proposed rule amendments only apply to the large development projects, as identified in section 2.2 that received a non-discretionary approval. There is no change to this existing applicability mechanism based on the final discretionary approval. Project proponents who received a final discretionary approval for a project prior to March 1, 1006 are not subject to the rule. Those who received a final discretionary approval after to March 1, 2006 are subject to the rule. As such, the development projects identified in section 2.1 are not affected by the rule amendments.

21. COMMENT: We join with other private property owners, cities, counties and economic development organizations who are opposed to the rule amendment and urge the District Board to maintain the original intent of the rule to apply to projects which are subject to discretionary permits after March 1, 2006. This would avoid unnecessary litigation that will be costly to the District and property owners.
(Mark Hendrickson, CA Central Valley EDC)

DISTRICT RESPONSE: As previously stated, the proposed amendments do not change the original intent of the rule with respect to applicability. The proposed rule amendment is designed to remove the unintended circumvention of the rule's original applicability to large development projects, and to address the inherent lack of fairness associated with unequal application of the rule depending on which local jurisdiction analyzes a project.

22. COMMENT: The proposed amendment seeks to modify the original intent of the rule by extending the rule to projects that are otherwise exempt from the rule as originally approved. For example, a property that has gone through all discretionary actions by a local agency, received all applicable approvals prior to the original March 1, 2006 effective date, will now be required to implement the rule in order to exercise their vested right to a building permit. The staff report claims that the proposed amendment is to capture projects that could "be approved without a discretionary decision". However, projects that received a discretionary decision prior to March 1, 2006 would only need a building permit in order to develop, as staff noted in the example of the Ulta retail center "Ulta facility was constructed received its final discretionary decision prior to the effective date of the rule, so all of the construction within that development is exempt from the requirements of the ISR rule". The rule amendment, however, seeks to now make these projects subject to the rule. The often-cited example of VWR's facility in Visalia was exempt under the same scenario as Ulta, as all discretionary approvals had been previously completed. The same is the case for many properties throughout the region who completed discretionary approvals prior to March 1, 2006 and through their vested rights, simply need to apply for a building permit. Understand, as the amendment is currently constituted, that if a property has received all discretionary approvals prior to March 1, 2006, they will now be obligated to conform to the rule. The rule amendment is a new rule, not a clarification of the current one, and should be subject to all standards, regulations and review for a new regulation, including CEQA review and socioeconomic analysis. Further, the staff should publicly identify all properties and projects that are impacted by the rule amendment.
(Paul Saldana, Economic Development Corporation)

DISTRICT RESPONSE: The commenter is incorrect that the rule amendments target projects that received their discretionary approvals prior to March 1, 2006. The proposed rule amendments only apply to the large development projects, as identified in section 2.2 that received a non-discretionary approval. There is no change to this existing applicability mechanism based on the final discretionary approval. Project proponents who received a final discretionary approval for a project prior to March 1, 1006 are not subject to the rule. Those who received a final discretionary approval after March 1, 2006 are subject to the rule. As such, the development projects identified in section 2.1 are not affected by the rule amendments.

23. COMMENT: The proposed amendment recommends "option 3" which is triggered by the application for a building permit from a local agency. However, the staff report indicates in "option 1" that "it would be too late for the project proponent to consider and incorporate project design elements" if the rule were implemented in the building permit issuance process. This acknowledgement in the staff report is

an indication that the implementation of the proposed amendment will cause considerable financial harm and undue delay to projects that are currently exempt from the rule. In fact, the staff report further states that the other options would "result in less opportunity to modify a proposals design to provide on-site or would cause agencies, including the District, to expend considerable resources for little additional positive air quality impact".
(Paul Saldana, Economic Development Corporation)

DISTRICT RESPONSE: See Staff Report for further details describing why option 3 was chosen. However, the discussion under option 1 that concluded that a building permit was a late stage of the development process to be changing air quality related design elements was not based on cost. The ISR rule provides for alternative paths to compliance for project proponents who cannot or don't implement clean air design elements. The District preference is always to avoid emissions rather than mitigating them after they occur, so our support for option 3 was aimed at providing more time for people to incorporate clean air design elements in the project. Note that, with respect to the reference to "undue delay", the processing of an ISR application has not historically resulted in any undue delays. The District has been able to process ISR applications within 1 day in many cases when presented with an urgent request by a developer. Of course, ISR applications are supposed to be filed at the time approval is sought, so these situations only arise when the developer has not filed a timely application.

24. COMMENT: The proposed amendment would cause projects that are currently exempt from the rule and who have current building permit applications, to modify their building permit applications as well as file an ISR application within 30 days after the rule amendment date. At a minimum, this rule amendment should not apply to any project for which a building permit application has been submitted. The staff report should identify all current building permit applications within the region that are impacted by the rule amendment.
(Paul Saldana, Economic Development Corporation)

DISTRICT RESPONSE: To clarify, for the type of projects subject to these amendments, if a developer has received a building permit for a project prior to the adoption of the proposed rule amendments, that project is exempt from this rule.

Instead, the rule amendments apply only to large development projects that are being approved without any discretionary decision and only to project proponents who have not yet received a building permit or some other vested right to develop prior to the adoption of the proposed rule amendments.

The commenter suggests that the District should consider the filing an application for a building permit to somehow create a vested right to proceed that protects an applicant from new requirements on their projects, including ISR. The District disagrees. Cities, counties, and other public agencies commonly apply conditions of approval to building permits and there is well settled precedence for doing so.

Finally, exempting project proponents from ISR for simply filling an application for a building permit is an invitation for widespread circumvention of the requirements of the rule.

25. COMMENT: The staff report indicates that the "District staff is proposing to continue to work on the proposed amendment and to engage the public on how the proposed amendments might be adequately limited to prevent undue impingement upon vested development rights". While the intent is admirable, more work needs to be done to outreach to affected property owners. There are several within our county alone who have not been contacted by the District to inform them of the impact this would have on their development opportunities. It is evidentiary that the lack of attendance and responsiveness from property owners at the public workshop(s) demonstrates the need for a more aggressive outreach to affected property owners. The District should not wait until after the rule amendment is adopted to "engage the public" but do so aggressively until it has undoubtedly received input from affected property owners.
(Paul Saldana, Economic Development Corporation)

DISTRICT RESPONSE: The District's public engagement obligations are found in Health & Safety Code §§40725 and 40726. Health & Safety Code § 40275 requires the District to hold a public hearing prior to adopting, amending or repealing any rule or regulation. Notice of the time and place of the public hearing "must be given not less than 30 days prior thereto to the state board, which notice shall include a copy of the rule or regulation . . . and a summary description of the effect of the proposal," In addition, this section requires that for districts which include portions of more than one county, the notice must be published in each county not less than 30 days prior to the date of the hearing.

Government Code §6061 provides, "Publication of notice pursuant to this section shall be for one time." By reference, §6061 is incorporated within §6060, which provides that "[w]henever any law provides that publication of notice shall be made pursuant to a designated section of this article, such notice shall be published in a newspaper of general circulation for the period prescribed, number of times, and in the manner provided in that section." By incorporating Gov. Code §6061, and by extension §6060, public rule adoption hearings held pursuant to Health & Safety

Code §40725 must be published in a newspaper of general circulation in each county for not less than 30 days prior to the date of the hearing.

Health & Safety Code §40726 requires the District to hold an additional public hearing if, prior to the adoption of the proposed rule, the District "makes changes in the text originally made available to the public that are so substantial as to significantly affect the meaning of the proposed rule or regulation."

The District well exceeded its obligations to engage the public on the proposed rule amendments. The District hosted three workshops over the past year to present and discuss the proposed amendments, followed by several public comment periods. The workshop dates were April 26, 2016, January 17, 2017, and May 18, 2017. The public workshops were also held via video teleconferencing in all three District offices and were also livestreamed using the webcast.

All public workshop announcements were posted on the District website. In addition, the District e-mailed the notice to those subscribed to the District public mailing lists (e.g. ISR and CEQA list serves). These lists total approximately 380 members, largely comprised of consultants used by stakeholders and developers for projects throughout the Valley. Approximately 12% of the ISR list-serve members are developers and builders who requested membership for notifications. Also, the District initially emailed approximately 1,150 contacts as found in its ISR project database and emailed approximately 110 land use and public agencies in all notifications.

Lastly, newspapers of general circulation in each affected county, such as the Merced Sun Star, The Visalia Times-Delta, the Hanford Sentinel, The Record, in Stockton, The Bakersfield Californian, the Fresno Bee, The Modesto Bee and The Madera Tribune, were used to publish the public notices related to rule 9510 beyond what was required by the District.

Therefore, the District believes that property owners also had several opportunities to be aware of the proposed rule amendment and to provide comments.

26. COMMENT: The staff report continues to lack a demonstration of how jurisdictions have been inconsistent in the application of the rule, that agencies are actively engaged in circumventing the rule, and/or bypassing normal CEQA obligations, all claims the District have made that is a primary cause for the rule amendment. The District should demonstrate how widespread this concern is throughout the region or that the intent is more targeted at the City of Visalia, who is the jurisdiction targeted by the proposed amendment.
(Paul Saldana, Economic Development Corporation)

DISTRICT RESPONSE: The commenter claims that the District has failed to justify the necessity of the proposed amendments with evidence demonstrating that local land use agencies have inconsistently applied the definition of "ministerial," other than the Coalition for Clean Air v. Visalia case. In order to establish necessity for the rule amendments, the District is not required to show a widespread pattern of inconsistently applying the definition of "ministerial". It is enough to demonstrate that the potential exists for such inconsistent application. (See, e.g., California Assn of Medical Products Suppliers v. Maxwell-Jolly (2011) 199 Cal.App.4th 286, 316-317 [holding that closing a loophole is, by itself, substantial evidence to support the reasonable necessity for a rule, even if no evidence existed that anyone had exploited the loophole.]) Pursuant to California Health and Safety Code § 40728.5, there are a number of required analyses that must be made prior to rule adoption (which are included in the District's staff report), but there is no requirement to identify specific projects that would be subject to a regulatory amendment.

Rule 9510 is designed to reduce indirect emissions of NOx and PM10 from mobile sources resulting from new development projects of a certain size and character. The proposed amendments are designed to insure that Rule 9510 applies consistently throughout the San Joaquin Valley to all similarly-situated projects. The City of Visalia case provides adequate evidence of the potential for the rule to be applied inconsistently for projects that were originally intended to be subject to the rule. To the extent that Rule 9510, in the absence of the amendments, has the potential to be applied inconsistently in other jurisdictions, the rule amendments are rationally designed to address that issue.

27. COMMENT: The staff report should also demonstrate how the proposed amendment is consistent with the State Implementation Plan (SIP) and the Clean Air Act (CAA) and should clearly outline for the Board and the public the process for review and consideration of the proposed amendment by the Air Resources Board and the Environmental Protection Agency. Since the proposed amendment will require state and federal review and is very likely to be challenged legally, the effective date should be when all regulatory and legal reviews have been completed.
(Paul Saldana, Economic Development Corporation)

DISTRICT RESPONSE: There is no requirement for the referenced regulatory and legal reviews to have been completed prior to a rule amendment becoming effective. It is also not efficient for a regulation to become effective upon completion of legal reviews as these may take years to resolve. This would unnecessarily extend the length of time of the inconsistency and unfair application

of the rule requirements, and would also cause missed opportunities to achieve emission reductions that are intended to protect public health.

In addition, as to the legality of the rule, both state and federal courts upheld the legality of the original rule. California Building Industry Ass'n v. San Joaquin Valley Air Poll. Contr. Dist. (2009) 178 Cal.App.4th 120; National Ass'n of Home Builders v. San Joaquin Valley Air Poll. Control Dist. (9th Cir. 2009) 627 F.3d 730. The District prevailed on all issues in all courts, and appeals to the state and federal supreme courts were rejected without hearing. These amendments do not substantially change the intent or substance of the rule and therefore we expect a similar outcome if and when any lawsuit is filed challenging the legality of the amendments. Similarly, since the original rule was approved by ARB and EPA as part of the SIP approval process, we expect the same outcome for the amendments.

28. COMMENT: Finally, we support the disclosure and production of the comments and letters received in support of or opposition of this rule amendment. Staff claims that providing this information to the Board and public can be "excessively cumbersome". All letters and transcripts of verbal comments should, at a minimum, be posted on the District's website so that the Board and public can view the verbatim comments rather than a staff digest of the comments made.
(Paul Saldana, Economic Development Corporation)

DISTRICT RESPONSE: We are happy to fulfill this unusual request and have included copies of all comment letters in the appropriate appendices to the staff report corresponding to the timeframe of the receipt.

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
1900 Main Street, 5th Floor | Irvine, CA 92614-7321
Telephone: 949.553.1313 | Facsimile: 949.553.8354
www.allenmatkins.com

John Condas
E-mail: jcondas@allenmatkins.com
Direct Dial: 949.851.5551 File Number: 373522-00001/SF1030121.03

Via Hand Delivery

May 18, 2017

Governing Board
San Joaquin Valley Air Pollution Control District
1990 E. Gettysburg Ave.
Fresno, CA 93726

Re: Comment Letter Regarding Proposed Amendments to SJVAPCD Rule 9510

Ladies and Gentlemen:

We represent The Wonderful Company (Wonderful) in connection with the Wonderful Industrial Park (Wonderful Project) in the City of Shafter (City). This letter provides Wonderful's comments on the San Joaquin Valley Air Pollution Control District's (the District) proposed amendment to Rule 9510 (Proposed ISR Amendment), which governs indirect source review in the San Joaquin Valley. We request that this letter be included in the administrative record for consideration of the Proposed ISR Amendment.

This letter supplements the comment letters dated September 14, 2016 and January 31, 2017 previously submitted by our firm and the comment letters dated May 23, 2016 and August 30, 2016 previously submitted by The Roll Law Group on behalf of Wonderful, which are hereby incorporated by reference.

On behalf of Wonderful, our firm also submitted a California Public Records Act (CPRA) request to the District on January 19, 2017 to obtain all documents prepared by the District in connection with the Proposed ISR Amendment. The District provided a limited number of responsive documents on January 27 and February 1, 2017, which were reviewed in connection with preparation of this letter.

I. Executive Summary

Wonderful questions the need for and the propriety of the Proposed ISR Amendment. Before Rule 9510 was adopted in 2006, and during virtually this entire 11-year period it has been in effect, the District has continually taken the position that Rule 9510 was only to be applicable to projects which required discretionary approvals after Rule 9510 was adopted. Cities, counties and

the development community relied upon the District's assurances concerning the applicability of Rule 9510 solely on projects requiring discretionary approvals. However, through its promulgating the Proposed ISR Amendment, the District is attempting to unilaterally undo its consistent prior position, to the detriment of local governments and the development community.

In addition, despite various groups' and Wonderful's repeated requests for the District to provide a rationale for why the Proposed ISR Amendment is needed, and for the District to provide an estimate of how much air pollution would be reduced if the Proposed ISR Amendment were adopted, the District has yet to provide such information. The District continues to provide information only about *Rule 9510*, and has not provided any specific information as to how the *Proposed ISR Amendment* would generate any positive benefits. Presently, no one knows whether implementing the Proposed ISR Amendment would have any noticeable impact on reducing air pollution. Yet it is clear and unequivocal that adoption of the Proposed ISR Amendment will have meaningful negative impacts on cities, counties, the development community and Wonderful.

The Proposed ISR Amendment strips local land use agencies of their authority to make decisions regarding whether development requires discretionary or ministerial approvals while also imposing additional administrative burdens and litigation risk on those same agencies. It further burdens projects that have received all discretionary approvals to date but have not yet received building permits.

The Proposed ISR Amendment and the supporting documentation produced to date, including the Draft Staff Report, Rule 9510 Indirect Source Review, May 18, 2017 (Staff Report), also suffer from evidentiary and legal inadequacies. The District has provided no evidence that local land use agencies are inconsistently applying the definition of "ministerial approval" in order to avoid application of Rule 9510 to projects. Due to the Proposed ISR Amendment's interference with investment-backed expectations, the amendment may be considered a taking that requires just compensation. In addition, the revised Socioeconomic Impact Analysis remains inadequate because it still fails to identify the small subset of projects that will become subject to Rule 9510 as a result of the Proposed ISR Amendment, which in turn precludes any meaningful understanding of the associated costs and benefits.

The Proposed ISR Amendment's conditioning of building permit issuance on the payment of the ISR fee for those projects only requiring ministerial approvals transforms the ISR fee into a development fee for which compliance with the Mitigation Fee Act is required. The District must comply with the Mitigation Fee Act prior to adopting the Proposed ISR Amendment.

Assuming the District undertakes the required analyses outlined above and determines based on that information that an amendment to Rule 9510 is still required, Wonderful recommends that some additional language be added to Section 4.5 of Rule 9510 to clarify the meaning and scope of the Section 2.2 exemptions.

The District must also properly comply with CEQA in connection with the Proposed ISR Amendment. The CEQA compliance strategy outlined in the Staff Report does not comply with the substantive requirements of CEQA and is not legally defensible.

Failure to remedy the shortcomings outlined above prior to adopting the Proposed ISR Amendment, or any other amendment to Rule 9510, would render the District's actions arbitrary and capricious and subject to invalidation.

II. The Wonderful Industrial Park[1]

The Wonderful Project is slated to be constructed on parcels zoned Industrial under the City's Zoning Code. The Wonderful Project parcels located south of Express Avenue were zoned Industrial prior to March 1, 2006. The Wonderful Project parcels located north of Express Avenue were zoned Industrial on March 21, 2006 by adoption of Shafter Ordinance No. 06-580 (An Ordinance of the City Council of the City of Shafter Approving Zone Change No. 06-37 As Set Forth in Exhibit "1(a)" Through "1(e)").

Per City staff, no formal Design Review or Site Plan Review approval will be required for development of industrial projects, such as the Wonderful Project, on parcels zoned Industrial. (See Shafter Municipal Code, § 2.80.) According to City Planning Department staff, these projects will instead be subject to a Ministerial Planning Director Plan Check prior to issuance of a building permit to assure compliance with City Codes and Design Standards. Accordingly, development of the Wonderful Project will require no discretionary approvals from the City.

III. Proposed ISR Amendment Strips Local Land Use Agencies of Their Authority To Determine Whether Development Requires Ministerial or Discretionary Approvals

The Proposed ISR Amendment would strip local decision makers of their discretion by effectively transforming what a local public agency deems a ministerial project into a discretionary project by mandating compliance with Rule 9510, which could involve implementation of mitigation and/or modifications to project design to accommodate on-site emission reduction measures. Local land use agencies are vested with the authority to determine whether, based on applicable zoning designations, proposed development within their jurisdictional boundaries requires discretionary or ministerial approvals. (See Gov. Code, §§ 65800, 65850, 65852.)

Issuance of building permits, demolition permits, and grading permits are generally considered to be ministerial if no subjective judgment is involved in the decision-making process. (CEQA Guidelines § 15268(b); see *Adams Point Preservation Society v. City of Oakland* (1987) 192 Cal.App.3d 203; *Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85; *Environmental*

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[1] A map of the Wonderful Project can be accessed online at: http://www.wonderfulindustrialpark.com/tour-the-park.html.

Law Fund, Inc. v City of Watsonville (1981) 124 Cal.App.3d 711.) CEQA provides further guidance on the authority of local land use agencies to identify approvals as either ministerial or discretionary, explaining "[t]he determination of what is 'ministerial' can most appropriately be made **by the particular public agency involved based upon its analysis of its own laws**, and each public agency should make such determination either as a part of its implementing regulations or on a case-by-case basis." (CEQA Guidelines § 15268(a), emphasis added; see also *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 178.) "Each public agency should, in its implementing regulations or ordinances, provide an identification or itemization of its projects and actions which are deemed ministerial under the applicable laws and ordinances." (CEQA Guidelines § 15268(c).)

Acting within the scope of its police powers, the City (and countless other Central Valley cities and counties) has determined that certain types of development do not require discretionary approvals under certain zoning designations. In addition, like virtually all Central Valley cities and counties, the City has determined the issuance of building permits is a ministerial approval. The Proposed ISR Amendment contravenes the authority of local public agencies and CEQA by usurping local public agencies' power to make the determination whether discretionary or ministerial permits are required for development, substituting the District's judgment for that of the public agency.

IV. Proposed ISR Amendment Imposes on Local Agencies Additional Administrative Burden and Litigation Risk

As acknowledged in the Staff Report, the Proposed ISR Amendment imposes an administrative burden on local public agencies by requiring tracking and sharing of information with the District regarding issuance of ministerial permits, which do not generally involve a public process or notice. Significant staff time and/or monetary investment in specialized electronic tracking software will be required to track whether projects applying for grading and building permits have previously received discretionary entitlements and if not, to ensure that the District is notified when an application for a ministerial permit is filed.

In addition to imposing additional administrative burdens on public agencies, the Proposed ISR Amendment exposes public agencies to significant litigation risk associated with enforcement or non-enforcement of its requirements. This litigation risk stems from the fact that even if an applicant meets all the requirements for issuance of a ministerial permit under the public agency's applicable regulations, the agency would be obligated to withhold issuance of the permit until the applicant has complied with Rule 9510, including paying any required fees. The risks and burdens which would be placed upon public agencies warrants additional consideration and potentially further revisions to the Proposed ISR Amendment to address these issues.

V. Proposed ISR Amendment Unduly Burdens Projects That Are Permitted By RightBut Have Not Yet Received Building Permits

The Staff Report identifies several bases on which Options 1 and 2 were rejected in lieu of Option 3 for the Proposed ISR Amendment, but fails to recognize that Option 3 suffers from these same flaws.[2] In discussing Option 1 the Staff Report notes that applying Rule 9510 at the building permit stage is generally too late in the process for a project proponent to consider and incorporate project design elements that would contribute to reducing emissions from the development project. (*Id.*, p. 4.) However, the Staff Report fails to acknowledge that for those projects that are permitted by right based on zoning designations in effect after March 1, 2006 (i.e., would otherwise require no discretionary approvals) but have not yet received a non-discretionary permit (e.g., a building permit), the practical effect of the Proposed ISR Amendment is to apply Rule 9510 at the building permit stage. In the words of the staff, this is "too late in the process for a project proponent to consider and incorporate project design elements that would contribute to reducing emissions from the development project," leaving project proponents faced with the prospect of potentially paying significant off-site mitigation fees or spending more time and money re-designing the project to comply with a rule from which it was previously exempt. By the time ministerial approvals are being sought (e.g., grading and building permits), those projects have been fully designed. If application of Rule 9510 effectively dictates that the project be re-designed, this potentially forces the project proponents to go to the public agency for a discretionary approval and possible CEQA compliance, even though no modifications to the project are contemplated by the developer. In cases where project re-design is not feasible and payment of impacts fees is required, this will cause delays in development since these fees will not have been accounted for in project budgeting.

In discussing Option 2, the Staff Report explains that because the District does not currently receive information regarding all approvals from the public agency, requiring local agencies to report on non-discretionary approvals would create a significant and costly burden on public agencies and the District to ensure that all approvals (discretionary and non-discretionary) are communicated to the District for evaluation. (*Id.*, pp. 4-5.) The Staff Report overlooks that issuance of ministerial permits, including grading and building permits, is generally not a public process for which public notice is given; thus the Proposed ISR Amendment also would require local public agencies to expend significant time and money to develop and administer a process to notify the District of every ministerial approval and permit issued by the agency.

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[2] Option 1 involved using a lead agency's issuance of a building permit as the trigger for application of Rule 9510. Option 2 involved using the initial public agency approval (ministerial or discretionary) for the project, rather than the final discretionary approval, as the trigger for application of Rule 9510. Option 3 (which was selected as the Proposed ISR Amendment) involves the addition of a second trigger for application of Rule 9510 for large development projects that did not require a discretionary approval.

As demonstrated above, the Proposed ISR Amendment, Option 3, suffers from the same shortcomings and complications cited as reasons for rejecting Options 1 and 2. In light of this, the Staff Report's conclusion that Option 3 is the most workable solution is unsupported.

VI. The District Fails to Provide Evidence that Local Land Use Agencies Inconsistently Apply the Definition of Ministerial Approval to Avoid Application of Rule 9510

Other than the *Coalition for Clean Air v. Visalia* case (which ultimately involved improper application of CEQA), none of the materials provided to the public in connection with the Proposed ISR Amendment (including the Staff Report) provide evidence that local land use agencies have demonstrated a pattern of inconsistently applying the definition of "ministerial" in order to avoid application of Rule 9510 to development projects. Local land use agencies are vested with the authority to determine whether, based on zoning designations, discretionary or ministerial approvals are required for certain types of development with their jurisdictional boundaries. (See Gov. Code, §§ 65800, 65850, 65852.)

In other words, the District has offered no evidence that local land use agencies are taking advantage of this so-called "loophole" the District has identified, and proposes to remedy with the Proposed ISR Amendment, by improperly classifying approvals as ministerial in order to intentionally circumvent application of Rule 9510 to development projects.

VII. Proposed ISR Amendment May Constitute a Taking Under *Penn Central* by Interfering with Investment-Backed Expectations

Due to its interference with investment-backed expectations, the Proposed ISR Amendment may constitute a taking under the U.S. Constitution's Fifth Amendment, for which the government must provide compensation. As the Court recognized in *Pennsylvania Central Transportation Co. v. New York City* (1978) 438 U.S. 104, in determining whether a taking has occurred, the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectations are relevant considerations. Here, the Proposed ISR Amendment will interfere with investment-backed expectations either by increasing project costs, thereby diminishing the profits accruing to owners/developers, or by rendering projects so costly that they are no longer economical and are abandoned. At the time such projects were proposed, Rule 9510 either was not in existence, or did not apply to such projects. Now, if the Proposed ISR Amendment is adopted, the effect of the adoption on such projects would lead to huge regulatory costs, in the form of possible project redesigns, and/or the payment of substantial fees. District staff has articulated these same problems in its discussion of Option 1, as noted above.

Though the District has failed to identify which projects would be covered by the Proposed ISR Amendment that are not covered by the current version of Rule 9510, it is likely that the Proposed ISR Amendment will apply Rule 9510 to several projects that have been in the planning pipeline for a significant portion of the last decade. For projects that only require ministerial

approvals to develop, the financial viability of these projects has been assessed based on the assumption that the project would be exempt from Rule 9510 and the associated ISR fees. The imposition of ISR fees pursuant to the Proposed ISR Amendment on these projects will greatly increase project costs and diminish profits earned by owners/developers and may make it uneconomical to develop the projects at all. For example, in cases where the project is rendered uneconomical due to the imposition of ISR fees under the Proposed ISR Amendment and the developer has already expended funds on design and other pre-construction costs, the would-be developer will incur financial losses from abandoning the project. At a minimum, the Proposed ISR Amendment would result in increased project costs, resulting in diminished profits to the owners/developers. In the industrial building market, these reduced profits are likely to take the form of decreased market value prices in the sale and rental markets due to buyers demanding lower sale prices or rents based on the expectation that they will need to pay significant ISR fees when they construct their facilities or otherwise develop the property.

VIII. The District's Socioeconomic Impact Analysis Remains Inadequate

Due to its failure to identify the small subset of projects that will become subject to Rule 9510 as a result of the Proposed ISR Amendment, the Socioeconomic Impact Analysis does not meet the requirements of Health and Safety Code sections 40920.6(a) and 40728.5.

As previously noted, the Proposed ISR Amendment involves a smaller fixed set of fully entitled properties (and some projects in the development pipeline that are presently permitted by right) that can easily be identified and analyzed but the District has continually declined to identify that subset of projects for the public. Accordingly, the Socioeconomic Impact Analysis fails to evaluate the costs and benefits associated with its implementation of the Proposed ISR Amendment, which can only be accurately measured by assessing impacts to that subset of projects. It merely restates the 2005 analysis and compares the predictions set forth in the 2005 analysis with the actual fees paid by projects that were subject to Rule 9510 during the last decade.

In response to the CPRA request submitted on behalf of Wonderful requesting any studies, reports, or other documentation analyzing and identifying how many projects are expected to be subject to the Proposed ISR Amendment, the District reiterated its assertion (made in the Staff Report) that the original analysis prepared at adoption of Rule 9510 in 2005 remains relevant because the original rule was intended to cover the projects to be included under the Proposed ISR Amendment and accordingly, no further analysis is required. However, as pointed out by the California Central Valley Economic Development Corporation (EDC) in their January 30, 2017 comment letter on the Proposed ISR Amendment, the record reveals that the original intent of Rule 9510 was not to cover projects only requiring ministerial approvals and that it would apply to only those projects requiring "discretionary approval." As noted by EDC, when the District originally adopted Rule 9510 in late 2005, it considered and rejected the option of basing applicability of the rule on building permit issuance (rather than discretionary approval). (See Final Draft Staff Report

for Proposed Rule 9510 and Rule 3190, December 15, 2005 [2005 Staff Report].) Instead, the District elected to establish the issuance of a discretionary approval as the trigger for applicability of Rule 9510, noting that "the District chose to craft the ISR rules to be compatible with local land-use authorities decision-making processes, and to have the ability to be worked into CEQA documents at the Lead Agencies' discretion." (2005 Staff Report, p. 9.)

The Staff Report claims that since the Proposed ISR Amendment does not change the original intent of Rule 9510, as set forth 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. (*Id.*, p. 17.) This is not correct. As Rule 9510 was originally drafted, it did not apply to the subset of projects deemed to be ministerial projects; under the Proposed ISR Amendment such projects will now be subject to Rule 9510. The number of such projects that will be affected by the Proposed ISR Amendment is not identified in the Staff Report or the Socioeconomic Analysis for Rule 9510 attached to the Staff Report. Nonetheless, there will be some quantifiable change in air emissions under the original Rule 9510 and the Proposed ISR Amendment associated with this unidentified set of projects. Likewise, the ministerial projects that would fall within the Proposed ISR Amendment will be required to incur costs either through costly project redesign measures or through payment of substantial off-site impact fees, or both. Accordingly, cost-benefit and socioeconomic impact analyses need to be prepared to inform both the public and this Board of the expected air quality gains anticipated from extending Rule 9510 to ministerial projects and the financial and socioeconomic costs associated with implementation, which is likely to hinder the diversification of the San Joaquin Valley's economy. Failure to do so both contravenes the express text of Health and Safety Code sections 40920.6(a) and 40728.5 and deprives the public and the District Board from the benefit of understanding the impacts of adopting the Proposed ISR Amendment.

The District must prepare and disclose socioeconomic and cost-benefit analyses prior to moving forward with adoption of the Proposed ISR Amendment. Because the District has failed to prepare the required analysis, if the Proposed ISR Amendment is adopted, the adoption would be invalidated pursuant to a writ of mandate. (*See, e.g., City of Dinuba v County of Tulare* (2007) 41 Cal.4th 859, 868 [county may be compelled to correctly allocate and distribute tax revenues].)

IX. Proposed ISR Amendment Transforms ISR Fee Into Development Fee Subject to the Mitigation Fee Act

The Proposed ISR Amendment's conditioning issuance of non-ministerial permits such as building permits on payment of the ISR fee for a subset of projects transforms Rule 9510's ISR fee into a development fee. "A fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relationship to the development's probable costs to the community and benefits to the developer." (*California Building Assn. v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178

Cal.App.4th 120, 130 [*CBIA v. SJVAPCD*], citing *Sinclair Paint v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 875.) Although the *CBIA v. SJVAPCD* court ruled that the ISR fee imposed under the existing Rule 9510 was a valid regulatory fee charged to cover the reasonable cost of a service or program connected to a particular activity, the court's holding was based, in part, on the fact that under that framework, "[t]he ISR fees are not exacted in return for permits or other government privileges." (178 Cal.App.4th 120, 213.) By contrast, for developments that only require ministerial approvals, the Proposed ISR Amendment conditions issuance of building permits for those projects on payment of the ISR fee. Thus, the Proposed ISR Amendment transforms the ISR fee into a development fee for which compliance with the Mitigation Fee Act is required[3].

The District has failed to comply with the Mitigation Fee Act in connection with the Proposed ISR Amendment. Before imposing this new development fee (i.e., the ISR fee) upon those projects requiring only ministerial approval, the District must: identify the purpose of the fee; identify the use to which the fee is to be put; determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed. (Gov. Code, § 66001(a).) With respect to the subset of projects to be affected by the Proposed ISR Amendment, the District has neither determined that the ISR fee bears a reasonable relationship to the type of development project on which the fee is imposed nor determined how there is a reasonable relationship between the need for the air emission reduction services provided by the District and the type of development project on which the fee is imposed. In fact, the District's failure to identify the subset of development projects likely to be affected by the Proposed ISR Amendment precludes it from undertaking such an analysis.

Prior to adopting the Proposed ISR Amendment, the District must comply with the Mitigation Fee Act by making the determinations outlined above.

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[3] The Mitigation Fee Act defines a "fee" as a "monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project." (Gov. Code, § 66000(b).) "Public facilities" is defined as "public improvements, public services, and community amenities." (Gov. Code, § 66000(d).) Here, the District is exacting a monetary payment from developers as a condition of building permit issuance in order to defray the costs of the air emission reduction services provided by the District.

X. Proposed ISR Amendment's Section 2.2 Fails to Clearly Identify Projects Exempt From Rule 9510

The currently proposed text of Section 2.2[4], which would be added by the Proposed ISR Amendment, fails to clearly identify which projects would be exempt from Rule 9510, as amended. While Wonderful appreciates the drafting challenges involved in identifying exemptions from a rule in the same section that establishes the rule, Wonderful believes Section 2.2 needs to provide greater clarity regarding which projects are exempt. In addition, Section 2.2 does not provide definitions for the land use classifications that are referenced in defining a "large development project."

Assuming the District undertakes the required analyses outlined above and determines based on that information that an amendment to Rule 9510 is still required, Wonderful recommends that some additional language be added to Section 4.5 of Rule 9510 to clarify the meaning and scope of the Section 2.2 exemption that applies when a project has obtained "an approval that is not discretionary…prior to (rule amendment date)."

XI. Wonderful's Proposed Text Amendment to Rule 9510

To remedy the lack of clarity in Section 2.2 regarding which development projects would be exempt from Rule 9510 as amended by the Proposed ISR Amendment, and to clarify that large development projects comprised of two or more contiguous parcels under common ownership for which ministerial approvals have been received prior to the rule amendment date are exempt from Rule 9510, Wonderful urges the District to make the following revisions (shown in underline and bold) to Rule 9510 Section 4.5 as part of the Proposed ISR Amendment:

> 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. **For any large development project (as defined in Section 2.2) comprised of contiguous or adjacent property under common ownership, this exemption shall extend to all contiguous or adjacent parcels under common ownership provided a building permit or other final construction authorization has been obtained for at least one of those parcels prior to (rule amendment date), except that if a discretionary approval is thereafter sought for development of any individual parcel then this rule shall apply with respect to that parcel only.** This exemption shall not apply to development projects

[4] The proposed text for Section 2.2 was revised after the September 2016 version of the Proposed ISR Amendment was circulated. Unless indicated otherwise, this letter discusses the January 2017 version of the Proposed ISR Amendment.

that failed to comply with applicable requirements of the prior version of this rule.

XII. The District Has Not Adequately Complied with CEQA In Connection With Adoption of the Proposed ISR Amendment

The District has properly concluded that before it can adopt the Proposed ISR Amendment, it must comply with CEQA. (Staff Report, p. 17.) In order to comply with CEQA, staff recommends that the Board determine that adoption of the Proposed ISR Amendment is exempt from CEQA ". . . . 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))." (*Id.*) This exemption is known as "the common sense exemption." (*See Muzzy Ranch Co. v Solano County Airport Land Use Comm.* (2007) 41 Cal.4th 372.)

In making the required determination that there is no possibility that the activity in question may have a significant effect on the environment, the lead agency, here, the District, must make a factual review of the record to determine whether the exemption applies. As the California Supreme Court stated in *Muzzy Ranch*, "whether a particular activity qualifies for the common sense exemption presents an issue of fact, and the agency invoking the exemption has the burden of demonstrating that it applies." (41 Cal.4th at 386.)

Although arguably the Proposed ISR Amendment may have some beneficial environmental impacts through some marginal reduction in air pollution (although to date the District has provided no evidence quantifying a possible reduction in air pollution solely attributable to adoption of the Proposed ISR Amendment), projects designed to protect or improve the environment can have collateral effects on the environment that preclude application of the exemption. Thus, the District cannot simply assume that measures intended to protect the environment are entirely benign.

For example, the court in *Dunn-Edwards Corp. v Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644 overturned amendments to air district regulations designed to reduce the amount of volatile organic carbons (VOCs) in paint and other architectural coatings for failure to comply with CEQA. Because there was evidence that the new regulations would require lower quality products that would result in a net increase in VOC emissions, use of the common sense exemption was held to be improper. (*See also Wildlife Alive v Chickering* (1976) 18 Cal.3d 190 [Fish and Game Commission action setting fishing and hunting seasons has potential for both beneficial and adverse effects on survival of certain species]; *Building Code Action v Energy Resources Conserv. & Dev. Comm.* (1980) 102 Cal.App.3d 577 [adoption of energy conservation regulations establishing double-glazing standards for new residential construction could have significant impact on air quality as result of increased glass production].)

There is absolutely no support in the Staff Report for the exemption determination. The Staff Report indicates District staff reviewed the 2005 Negative Declaration prepared for the adoption of

the original Rule 9510 and determined it remains relevant today, "specifically that the proposed rule amendments can have no significant impacts on the environment." (Staff Report, p. 18.) Based on this determination and lack of evidence to the contrary, staff concluded that the Proposed ISR Amendment will not have any significant adverse effects on the environment. (*Id.*) This cursory statement (though somewhat improved from the support provided in the District's September 2016 staff report on the same topic) is inadequate support for an exemption determination.

Although the District has failed to list, or take an inventory of, the number, size and type of projects which would be affected by the Proposed ISR Amendment, as discussed above, requiring these projects to be subject to Rule 9510 could kill these projects, or increase the development costs substantially. These added regulatory costs could lead to a lack of development, and possible urban decay, an impact that needs to be analyzed under CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184.) Also, such projects, if not built, may delay much-needed public improvements, which were to be funded through execution of the development of these projects. A lack of needed public improvements could lead to increased traffic congestion, worse hydrological conditions, and other negative environmental impacts. Also, since adoption of the Proposed ISR Amendment would increase development costs and affect the competitiveness of development projects in the Central Valley when compared with projects outside the Central Valley, which would not be subject to the Proposed ISR Amendment, it is possible that there would be additional environmental impacts generated. Development which otherwise would have occurred in the Central Valley to serve the Central Valley would be developed outside the Central Valley, requiring longer trips to and from these new projects, leading to increased traffic, vehicle miles traveled, air quality and greenhouse gas impacts.

As commented by Tulare County, the Proposed ISR Amendment's revised definitions of "transportation project" and "transit project" would require such beneficial public projects to be subject to Rule 9510 (although the District claims that these definitions merely clarify the District's interpretation of Rule 9510). (Staff Report, p. A-20.) If Tulare County's interpretation is correct, beneficial transportation and transit projects would be delayed or possibly not built due to the need to comply with Rule 9510. If this were to happen, there would be less transportation improvements and less vehicles removed from the road which otherwise would be displaced by these projects. This could result in increased traffic congestion, increased air pollution and increased greenhouse gas production.

As the California Supreme Court has held, a lead agency, here the District, has the burden to demonstrate that adoption of the Proposed ISR Amendment will not have any significant environmental impacts. At this stage, the District has failed to meet this burden.

XIII. The District's Adoption of the Proposed ISR Amendment Would Be Arbitrary and Capricious

As explained in detail above, the District has not identified the projects that would be subject to Rule 9510 under the Proposed ISR Amendment and has failed to demonstrate that the extension of Rule 9510 to projects requiring only ministerial approvals would result in measurable air quality improvements. Adoption of the Proposed ISR Amendment without identifying the projects to be impacted by the rule change and without demonstrating that the change is rationally related to a legitimate governmental interest would be arbitrary and capricious. (See generally *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330.)

XIV. Conclusion

The Proposed ISR Amendment and supporting documentation produced to date suffer from various inadequacies that must be remedied in order for the District's adoption of the amendment to be factually supported and legally defensible. The District's failure to identify the projects that will be impacted by the Proposed ISR Amendment and analyze the impacts in the context of those affected projects is a significant weakness that precludes meaningful analysis of the Proposed ISR Amendment.

Assuming the District undertakes the required analyses outlined above and determines based on that information that an amendment to Rule 9510 is still required, some revisions to the proposed language should be made to clarify the scope of exemptions from Rule 9150. The District must also properly comply with CEQA. Failure to remedy the shortcomings outlined above prior to adopting the Proposed ISR Amendment, or any other amendment to Rule 9510, would render the District's actions arbitrary and capricious and subject to invalidation.

Thank you for the opportunity to comment on the District's Proposed ISR Amendment.

Very truly yours,

John Condas

JCC:cad

cc: John Guinn, The Wonderful Company
Jason Gremillion, The Wonderful Company
Melissa Poole, The Wonderful Company
Courtney Davis, Esq.

ECONOMIC DEVELOPMENT CORPORATION
serving Tulare County

June 1, 2017

Board of Directors
San Joaquin Valley Air Pollution Control District
The Honorable Oliver L. Baines, Chairman
1990 East Gettysburg Ave.
Fresno, CA 93726

Regarding: Opposition to Amendment to Rule 9510

Chairman Baines & Members of the Board:

The Tulare County Economic Development Corporation joins with the California Central Valley Economic Development Corporation and other organizations and property owners in continued opposition to the proposed amendment to Rule 9510.

The proposed amendment seeks to modify the original intent of the rule by extending the rule to projects that are otherwise exempt from the rule as originally approved. For example, a property that has gone through all discretionary actions by a local agency, received all applicable approvals prior to the original March 1, 2006 effective date, will now be required to implement the rule in order to exercise their vested right to a building permit. The staff report claims that the proposed amendment is to capture projects that could "be approved without a discretionary decision". However, projects that received a discretionary decision prior to March 1, 2006 would only need a building permit in order to develop, as staff noted in the example of the Ulta retail center "Ulta facility was constructed received its final discretionary decision prior to the effective date of the rule, so all of the construction within that development is exempt from the requirements of the ISR rule". The rule amendment, however, seeks to now make these projects subject to the rule. The often-cited example of VWR's facility in Visalia was exempt under the same scenario as Ulta, as all discretionary approvals had been previously completed. The same is the case for many properties throughout the region who completed discretionary approvals prior to March 1, 2006 and through their vested rights, simply need to apply for a building permit. Understand, as the amendment is currently constituted, that if a property has received all discretionary approvals prior to March 1, 2006, they will now be obligated to conform to the rule. **The rule amendment is a new rule, not a clarification of the current one, and should be subject to all standards, regulations and review for a new regulation, including CEQA review and socioeconomic analysis. Further, the staff should publicly**

identify all properties and projects that are impacted by the rule amendment.

The proposed amendment recommends "option 3" which is triggered by the application for a building permit from a local agency. However, the staff report indicates in "option 1" that "it would be too late for the project proponent to consider and incorporate project design elements" if the rule were implemented in the building permit issuance process. This acknowledgement in the staff report is an indication that the implementation of the proposed amendment will cause considerable financial harm and undue delay to projects that are currently exempt from the rule. In fact, the staff report further states that the other options would "result in less opportunity to modify a proposals design to provide on-site or would cause agencies, including the District, to expend considerable resources for little additional positive air quality impact".

The proposed amendment would cause projects that are currently exempt from the rule and who have current building permit applications, to modify their building permit applications as well as file an ISR application within 30 days after the rule amendment date. **At a minimum, this rule amendment should not apply to any project for which a building permit application has been submitted. The staff report should identify all current building permit applications within the region that are impacted by the rule amendment**

The staff report indicates that the "District staff is proposing to continue to work on the proposed amendment and to engage the public on how the proposed amendments might be adequately limited to prevent undue impingement upon vested development rights". While the intent is admirable, more work needs to be done to outreach to affected property owners. There are several within our county alone who have not been contacted by the District to inform them of the impact this would have on their development opportunities. It is evidentiary that the lack of attendance and responsiveness from property owners at the public workshop(s) demonstrates the need for a more aggressive outreach to affected property owners. **The District should not wait until after the rule amendment is adopted to "engage the public" but do so aggressively until it has undoubtedly received input from affected property owners.**

The staff report continues to lack a demonstration of how jurisdictions have been inconsistent in the application of the rule, that agencies are actively engaged in circumventing the rule, and/or bypassing normal CEQA obligations, all claims the District have made that is a primary cause for the rule amendment. **The District should demonstrate how widespread this concern is throughout the region or that the intent is more targeted at the City of Visalia, who is the jurisdiction targeted by the proposed amendment.**

The staff report should also demonstrate how the proposed amendment is consistent with the State Implementation Plan (SIP) and the Clean Air Act (CAA) and should clearly outline for the Board and the public the process for review and consideration of the proposed amendment by the Air Resources Board and the Environmental Protection Agency. **Since the proposed amendment will require state and federal review and is very likely to be challenged legally, the effective date should be when all regulatory and legal reviews have been completed.**

Finally, we support the disclosure and production of the comments and letters received in support of or opposition of this rule amendment. Staff claims that providing this information to the Board and public can be "excessively cumbersome". **All letters and transcripts of verbal comments should, at a minimum, be posted on the District's website so that the Board and public can view the verbatim comments rather than a staff digest of the comments made.**

For the reasons stated above, we remain opposed to proposed amendment to Rule 9510 and encourage you to vote against the amendment.

Very truly yours,

Paul M. Saldana
President & CEO

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
1900 Main Street, 5th Floor | Irvine, CA 92614-7321
Telephone: 949.553.1313 | Facsimile: 949.553.8354
www.allenmatkins.com

John Condas
E-mail: jcondas@allenmatkins.com
Direct Dial: 949.851.5551 File Number: 373522-00001/SF1043813.01

June 1, 2017

Governing Board
San Joaquin Valley Air Pollution Control
District
1990 E. Gettysburg Ave.
Fresno, CA 93726

Re: Supplemental Comments on Proposed ISR Amendment (May 18, 2017 Draft Staff Report, Rule 9510, Indirect Source Review)

Ladies and Gentlemen:

We represent The Wonderful Company (Wonderful) in connection with the Wonderful Industrial Park (Wonderful Project) in the City of Shafter (City). This letter provides Wonderful's supplemental comments on the San Joaquin Valley Air Pollution Control District's (the District) proposed amendment to Rule 9510 as reflected in the May 18, 2017 Draft Staff Report (Proposed ISR Amendment), which governs indirect source review in the San Joaquin Valley. We request that this letter be included in the administrative record for consideration of the Proposed ISR Amendment.

This letter supplements the comment letters dated September 14, 2016, January 31, 2017, and May 17, 2017 previously submitted by our firm and the comment letters dated May 23, 2016 and August 30, 2016 previously submitted by The Roll Law Group on behalf of Wonderful, which are hereby incorporated by reference.

As we have expressed in prior letters, Wonderful remains disappointed that the District refuses to revise the Socioeconomic Analysis for Rule 9510 (Appendix D to the May 18, 2017 Draft Staff Report) to identify the projects that will be subject to Rule 9510 as a result of the Proposed ISR Amendment, which is necessary in order to fully understand the impacts of the Proposed ISR Amendment. We respectfully renew our request that the District defer consideration of the Proposed ISR Amendment until its full scope and impacts on the San Joaquin Valley can be determined, based in part upon preparing an adequate effectiveness and socioeconomic impact analysis, as required by law.

Wonderful appreciates the District's recognition that projects with vested rights to develop should be exempt from application of Rule 9510 as amended by the Proposed ISR Amendment. However, we believe that if the District proceeds with consideration of the Proposed ISR

Amendment, the proposed definition of "Vested Right to Develop" must be modified to more broadly define the group of projects that fall within the scope of that exemption. To that end, Wonderful proposes the following definition for "Vested Right to Develop" (Section 3.36 of the Proposed ISR Amendment):

> Vested Right to Develop: **Proposed projects that are permitted by right under the applicable zoning designation and only require non-discretionary or ministerial approvals from the local land use agency as of (rule amendment date) shall be considered to have a Vested Right to Develop, provided the local land use agency has confirmed in writing prior to (rule amendment date) that only non-discretionary approvals are required.**

Thank you for the opportunity to comment on the District's Proposed ISR Amendment.

Very truly yours,

Courtney Davis on behalf of

John Condas

JCC:cad

cc: John Guinn, The Wonderful Company
Jason Gremillion, The Wonderful Company
Melissa Poole, The Wonderful Company
Courtney Davis, Esq.

CENTRAL
CALIFORNIA
Center Yourself.

June 1, 2017

Board of Directors
San Joaquin Valley Air Pollution Control District
The Honorable Oliver L. Baines, Chairman
1990 East Gettysburg Ave.
Fresno, CA 93726

Regarding: Opposition to Amendment of Rule 9510

The California Central Valley Economic Development Corporation, representing economic development organizations in the San Joaquin Valley, remains opposed to the amendment of Rule 9510. CCVEDC believes that the rule will cause unnecessary regulatory burden and increased cost to development for industrial job producing projects that have hold a "vested right" to development.

The amended rule will have an adverse impact on projects that are currently in the building permit review process. The implementation of this amendment, as proposed, would subject projects that are in the building permit application process to the rule, thereby requiring them to completely redesign their project, causing unnecessary delay and increased costs to the project. At a minimum, the exemption should extend to any project that has applied for a building permit prior to the rule amendment date. This would ensure that these job producing projects can continue to move forward under the current regulatory environment.

CCVEDC fundamentally remains opposed to the rule amendment as it targets projects that received their discretionary approvals prior to March 1, 2006, yet because the projects had not submitted for building permits until years after they received discretionary approval, the District is attempting to retroactively implement the rule through the building permit process. These property owners, who rightfully applied for and received discretionary approvals and as such retain their vested right to develop. The only example that the District has cited was a property that had a vested right to develop, receiving their discretionary approval prior to March 1, 2006 and therefore proceeded to apply for and obtain a building permit.

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This proposal, while on the surface claims to maintain the March 1, 2006 "exemption", redefines the Rule so that it can apply to projects that have a March 1, 2006 "exemption" under the discretionary permit definition of the rule, but not the newly added exemption for any non-discretionary approval after the rule amendment date.

We join with other private property owners, cities, counties and economic development organizations who are opposed to the rule amendment and urge the District Board to maintain the original intent of the rule to apply to projects which are subject to discretionary permits after March 1, 2006. This would avoid unnecessary litigation that will be costly to the District and property owners.

Regards,

Mark Hendrickson,
Internal Affairs Chairman
California Central Valley EDC

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California Central Valley EDC
P.O. Box 11445 Bakersfield, CA 93389
888-998-2345 www.centralcalifornia.org

APPENDIX E

PUBLIC WORKSHOP – JANUARY 17, 2017

COMMENTS RECEIVED AND DISTRICT RESPONSES

COMMENT LETTERS RECEIVED

PUBLIC WORKSHOP – JANUARY 17, 2017

COMMENTS RECEIVED AND DISTRICT RESPONSES

COMMENT LETTERS RECEIVED

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

EPA REGION IX COMMENTS:

No comments were received from EPA Region IX.

ARB COMMENTS:

No comments were received from ARB.

PUBLIC COMMENTS:

Comments were received from the following:

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

1. COMMENT: The Wonderful Company believes that the District should defer adoption of the rule until all concerns are addressed. Projects that have already received discretionary approval should remain exempt, regardless of further ministerial approvals. The Wonderful Company feels that the amendment unjustifiably burdens large projects and are advocating for a more narrow amendment that would not capture these projects.
(Melissa Poole, The Wonderful Company; Courtney Davis for John Condas with Allen, Matkins, Leck, Gamble, Mallory & Natsis, LLP)

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

2. COMMENT: Proposed amendment will subject projects to costly redesigns. Proposed amendment could cost $350K on a one million square foot refrigeration warehouse that has already been planned.
(Melissa Poole, The Wonderful Company)

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

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

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

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

3. COMMENT: The Wonderful Company also feels that the previous socio-economic analysis is inadequate and is requesting a socio-economic analysis specific to "large" projects. The Wonderful Company also wants to know if any projects other than Wonderful Company projects would be "caught" under the amendment.

The Wonderful Company also thinks that today's setting is completely different than the 2005-2006 timeframe and that the socioeconomic study should be viewed in today's setting. There's been a tremendous amount of investment over the last ten years based on the rule as it currently stands. In addition, the Wonderful Company has concerns about CEQA compliance for the rule relating to the complete socio economic analysis of the amendment.
(Melissa Poole, The Wonderful Company; Courtney Davis for John Condas with Allen, Matkins, Leck, Gamble, Mallory & Natsis, LLP)

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

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

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

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

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

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

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

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

6. COMMENT: I want to support what the Wonderful Company is saying regarding previously approved projects that have already been designed. There's a lot that goes into revising a project, including environmental review and project re-design which can potentially cost 100's of thousands of dollars. Maybe there's a way to

have a little flexibility- Perhaps, a project that has passed a certain percent in the design process (ie-60% of design) can be exempt.
(Jesse Madsen)

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

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

DISTRICT RESPONSE: The current ISR applicability thresholds for development projects are based on an estimated projection of two tons of NOx or PM10 project-related emissions. 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, bringing the estimated project emissions to 10 tons of NOx or PM10. A number of District rules and policies are aligned in considering 10 tons of emissions of any one pollutant a large or significant source of emissions.

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

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

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

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

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

While the rule does not call for netting of emissions, its practical application generally results in limiting a project proponent's obligation under the rule to mitigating an increase in emissions for projects that are expanding an existing facility or utilizing an existing facility for the same or similar use, when the existing facility has already been subject to ISR in the past. As to the legality of the rule, both state and federal courts ruled in favor of the District in response to lawsuits challenging the rule. The District prevailed on all issues in all courts, and appeals to the state and federal supreme courts were rejected without hearing.

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

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

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

DISTRICT RESPONSE: This proposed rule revision is to address an unanticipated loophole in the original rule. We believe the loophole has only applied to the large projects that are addressed by this rule revision, and we are

certain that applying the revised rule to large projects in the future will capture the vast majority of emissions from development in the San Joaquin Valley. Because this rule revision is only intended to address this loophole, we will not be addressing the appropriateness of the applicability thresholds at this time.

12. COMMENT: The Organizations also opposes any retroactive immunity. As the rule notes that the amendment is to address an unintended circumvention of the rule, the District should not grant blanket pardons for past violations of the law. Furthermore, such pardons would not be lawful under the Clean Air Act- the 1990 Supreme Court Case of General Motors vs the United States, even if an air district changes a Clean Air Act rule, the change does not excuse violations of the EPA approved SIP.
(Genevieve Gale, Coalition for Clean Air; Dolores Weller, Central Valley Air Quality Coalition; Bill Magavern, Coalition for Clean Air; Kevin Hamilton, Central California Asthma Collaborative; American Lung Association in California; Tom Frantz, Association of Irritated Residents)

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

13. COMMENT: The Organizations also believe that PM2.5 limits should be included in the ISR rule. PM2.5 is one of the deadliest forms of pollution and the Valley is in non-attainment for the annual and 24 hour standard. As we work on a new PM2.5 attainment strategy, including it in the ISR rule could help.
(Genevieve Gale, Coalition for Clean Air CCA; Dolores Weller, Central Valley Air Quality Coalition; Bill Magavern, Coalition for Clean Air; Kevin Hamilton, Central California Asthma Collaborative; American Lung Association in California; Tom Frantz, Association of Irritated Residents)

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

the emissions increases may be PM10 larger than the PM2.5 fraction, those increases get offset by reductions in PM2.5 resulting in a net air quality benefit.

14. COMMENT: I feel strongly that PM 2.5 emissions should be part of the ISR permitting process which is presently limited to PM-10 and NOx. I assume the NOx is expected to control the PM 2.5, however directly emitted PM 2.5 is the largest source of this criteria pollutant and so should be called out rather than just assumed to be captured as a subset of PM-10, or prevented through the NOx limitation on Ammonium Nitrate formation. NOx also neglects Ammonium Sulfate formation which directly contributes to violations of both Annual PM 2.5 standards. *(Kevin D. Hamilton, Central California Asthma Collaborative)*

DISTRICT RESPONSE: See the response above.

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

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

15. COMMENT: Tulare County has some concerns regarding proposed changes. Of particular concern is the applicability of ISR to public benefit projects and lack of exemption for certain projects of those types, such as waste water systems and bridge replacements. These projects include the installation of new sewer/sewerage collection pipes for compliance with current regulations, flood control detention/retention basins, flood control berms, installation of sidewalks and bike lanes for pedestrian safety, public parks, fires stations, and road improvements or other improvements to comply with current state/federal requirements for road safety. Public benefits projects are often required by state or federal regulations and they often receive state or federal funding, so our concern is why are certain transportation projects requiring conformity analysis such as projects on the regional transportation plan, the state implementation plan,

or the federal transportation implementation plan are not exempted. The County may receive air quality improvement funds, such as Congestion Mitigation and Air Quality Improvement Program and Tulare County's Measure R and/or other state or federal funding. The County believes that projects receiving these funds should be exempt from ISR. While the County appreciates the Districts efforts, we request that you re-examine some of your exemptions status's for these projects or other form of special consideration for public benefits projects.
(Jessica Willis, Tulare County Resource Management Agency; Michael Washam, Tulare County Resource Management Agency)

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

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

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

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

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

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

DISTRICT RESPONSE: It has been our experience that a condition of receiving state or federal funds is a commitment to meet all local regulations and a certification of having done so. Therefore, we believe the cost of meeting the requirements of this regulation, if any, should be built into the original project proposals that are receiving state or federal funds. Fortunately, as discussed above, recent trends indicate that a significant number of projects proponents have been using Clean Construction Fleet to satisfy ISR requirements. Also please note that the District has found that using a clean construction fleet is neither excessively costly nor difficult to do, but has significant positive air quality impact on the Valley, and should therefore be considered for any project, regardless of whether required by ISR.

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

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

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

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

benefit" projects. The County is also requesting what percentage of the 25% increase in the use of clean fleets and how many tons of reductions are attributable to "construction only" or "public benefits" projects.
(Michael Washam, Tulare County Resource Management Agency)

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

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

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

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

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

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

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

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

The offsite mitigation fee was originally based on the projected cost of providing an equivalent amount of reductions through the District's voluntary incentive grant program. As discussed above, the District provides an annual ISR report that presents the revenues, expenditures, and emission reductions achieved. One hundred percent (100%) of all off-site mitigation fees are used by the District to fund emission reduction projects through its Incentives Programs, achieving emission reductions on behalf of the project proponent. Examples of types of emission reduction projects are replacement of old trucks with new low-emission vehicles, repair or repair older high-polluting vehicles/school buses, and electrification or replacement of existing diesel-powered off-road equipment. For the 2016 fiscal year, the District achieved emission reductions totaling 322 tons NOx and 12 tons PM_{10}, for a combined total of 334 tons. As demonstrated on an annual basis in the ISR report, the cost effectiveness ($/ton) of projects funded to achieve the targeted emission reductions has been met since the rule adoption. The ISR Annual Reports can be found at: http://www.valleyair.org/ISR/ISRResources.htm#ISRReports.

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

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

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

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

If an existing building is being brought up to code to meet the 2016 CBC and Title 24 energy usage requirements, the redevelopment project should not be held to an ISR fee.
(James S. Sanders, Paynter Realty & Investments, Inc.)

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

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

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

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

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

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

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

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

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

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

25. COMMENT: The proposed rule significantly changes the "original intent" of the Rule and is therefore subject to CEQA and other federal and state regulations. The claim by the District staff that the amendment does not change the "original intent" is not correct. The District did consider the option of applying the Rule as part of the building permit process and chose the current rule as constructed to "be compatible with local land use authorities' decision making processes, and to have the ability to be worked into CEQA documents at the Lead Agencies' discretion" (emphasis added). Likewise, litigation that followed the initial adoption of Rule 9510 also noted that the Rule was applicable for "projects" seeking "discretionary approval". Staff presentations in 2011 and the District's "Frequently Asked Questions Regarding Indirect Source Rule" even go as far as to emphasize "final discretionary approval" either by bolding or underlining the text. District staff has "expertise in application of the California Environmental Quality Act ("CEQA") and is knowledgeable of the land use planning and entitlement processes". This is evident in the responses found on page A-18 of the draft staff report regarding "discretionary action" and "discretionary approval". That being the case, District staff is aware of the definitions regarding "ministerial" and "ministerial projects" as codified in CEQA regulations and guidelines. Consequently, District staff knows that CEQA guidelines state "similar projects may be subject to discretionary controls in one city or county and only ministerial controls in another". The attempt to use the argument that the "original intent" was to include ministerial projects along with discretionary projects therefore is not a valid argument to approve the proposed amendment. Likewise, the District is thereby establishing a new rule by now making projects categorically exempt from CEQA subject to CEQA mitigation measures. The District has not demonstrated it has the legal authority to render categorically exempt projects subject to CEQA nor has it demonstrated any evidence that it is following all state and federal laws and regulations which provide the authority to make such an overreach of authority. In approving the original Rule for incorporation into the California State Implementation Plan, the Environmental Protection Agency consistently recognized the Rule applied to

applicants seeking "final discretionary approval". If original intent was ministerial projects, then it would have been noted in the EPA's final approval of the Rule.

To claim that the amendment "does not change the original intent of the rule" is not true and therefore should be deleted from the staff report and the District should follow the process for establishing a new rule, including demonstrating it clearly has the authority to subject non-CEQA ministerial projects to CEQA, as well as complete a new CEQA document, economic impact analysis and conformity report to the Clean Air Act.
(Lee Ann Eager, California Central Valley Economic Development Corporation. (CCVEDC))

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

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

DISTRICT RESPONSE: The commenter claims that the District "has not demonstrated" inconsistency in application of the rule. Staff disagrees, as is explained above in the discussion of the City of Visalia case. In fact, the District believes that most jurisdictions in the Valley properly approve large projects as a

discretionary decision. To the extent that application of the rule has been inconsistent, the rule amendments will address at least the issue that was brought to our attention by the City of Visalia warehouse project discussed above.

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

DISTRICT RESPONSE: The commenter claims that the District "has not demonstrated" that local jurisdictions circumvented or bypassed normal CEQA processes. However, the District is not concerned about individual land-use agencies application of, and compliance with, CEQA, and the rule amendments are not intended to compel compliance with CEQA. In fact, the District's approach to remedying the rule is intended to ensure that large projects' air quality impacts are mitigated regardless of a local jurisdiction's application of, or adherence to, CEQA.

28. COMMENT: Committing to revise a rule prior to public input process and off agenda violates Ralph M. Brown Act. The District states that it "made a commitment to revise the rule after the resolution of the legal case to ensure that large projects are treated uniformly throughout the San Joaquin Valley" (emphasis added). The Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code) requires that decisions be made in an open and public setting. There is no evidence that a public meeting took place prior to the District's commitment to revise the rule. The "commitment to revise the rule" denied the public the opportunity for due process and from participating in the rule making process. As such, the process that has taken place thus far has been to formalize a decision that the District staff has already made, as it is clear that

the District's intent is to approve the Rule amendment, regardless of what testimony may be provided by the public. The District is not under any judicial or regulatory mandate to amend the Rule; however, it appears that the decision of the District is already pre-determined to meet the "commitment" made by the District. It would be more appropriate for the District to have taken the position to consider a proposal to revise the rule rather than make an outright commitment to do so. The staff report should make clear what commitments were made and to whom staff made those commitments to.
(Lee Ann Eager, CCVEDC)

DISTRICT RESPONSE: The commenter claims that the District somehow violated the Brown Act by committing to revise the rule without public input. However, the District has complied with all applicable public notification and Brown Act requirements throughout the entire process, in addition to satisfying the notice and comment rule adoption requirements of Health & Safety Code §§ 40725 *et. seq*. This issue was publicly discussed at the Governing Board's May 6 and 7, 2015 Study Session, where the District Board directed staff to propose and workshop potential amendments to the rule to address the inconsistency in application of the rule discussed above. The District's intent to develop proposed amendments to Rule 9510 for the Board's consideration and possible adoption has subsequently been disclosed in virtually every Governing Board meeting agenda since June of 2015. Proposed changes to the rule have been publicly workshopped twice, to date, with at least one more to come. No final decision on the adoption of a modified rule has been made by the District Governing Board. The opportunity by the public to weigh in before a final decision has not been sidestepped, and in fact the opportunity for public input continues as of this writing and will continue until the District Board takes final action on the rule later this year. Public input will continue to be accepted during that Board hearing, and the final decision, approval or denial, is not pre-ordained.

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

permit and as such, imposing an additional burden after discretionary action has been completed would constitute a taking.
(Lee Ann Eager, CCVEDC)

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

30. COMMENT: Proposed amendment opens District and local jurisdictions to challenges under Government Code Section 66020. Property owners are afforded the right to challenge the validity of conditions imposed on a building permit that divest them of "money or a possessory interest in property". Since the District is proposing to extend the Rule to previously exempt ministerial projects, particularly those in the application process, building permit applicants will be able to challenge the validity of the conditions imposed by the District on their building permit. While case law may show the right of the District to implement the Rule on "discretionary" actions, there is no mention in any District report, state, federal or legal filings or court opinions to support the District and as such every property owner who has a right to ministerial permits could bring a challenge to both the local jurisdiction and the District. Therefore, the District, by extending the rule on previously exempt ministerial projects, is exposing itself and local jurisdictions to legal challenges by property owners. At a minimum, the Rule should include indemnification for local jurisdictions from legal challenges for implementing the Rule.
(Lee Ann Eager, CCVEDC)

DISTRICT RESPONSE: The District has no authority over land-use approval. As such, the District does not and is not able to place conditions on building permits issued by a land use agency. Considering the building permit to be a trigger to the ISR applicability determination process is not a condition to the building permit itself. Moreover, the ISR fees required by Rule 9510 are not development fees subject to the Mitigation Fee Act, but rather are valid regulatory fees (California Building Industry Association v. San Joaquin Valley Air Pollution Control District

(2009) 178 Cal.App.4th 120.). As such, Government Code Section 66020 is not applicable as a remedy to protest the validity of any ISR fees required by the rule.

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

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

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

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

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

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

fees would have rendered the project unfeasible and consequently, the project would not have been built. Ulta is just the example of one retailer who will be unduly harmed by the implementation of this new Rule.
(Lee Ann Eager, CCVEDC)

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

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

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

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

DISTRICT RESPONSE: Comment noted.

January 30, 2017

San Joaquin Valley Air Pollution Control District
Governing Board
The Honorable Oliver L. Baines, III, Chairman
1990 E. Gettysburg Avenue
Fresno, CA 93726-0244

REGARDING: OPPOSITION TO PROPOSED AMENDMENTS TO RULE 9510

Mr. Baines & Board Members:

The Economic Development Corporation Serving Tulare County, on behalf of itself and the Central Valley Economic Development Corporation, OR The members of the California Central Valley Economic Development Corporation OPPOSE the planned amendment to Rule 9510. The extension of the rule on ministerial projects will render many projects throughout the San Joaquin Valley as no longer economically viable and will result in projects either being cancelled or moved to more competitive areas outside of the Valley. The loss of new economic investment, new jobs, should strongly be considered before approving this regulatory overreach beyond the original intent of the Rule.

The San Joaquin Valley Air Pollution Control District ("District") should not approve the recommended changes for the reasons enumerated below. Likewise, we take issue with erroneous and accusatory statements against local jurisdictions and strongly request that these statements be removed from the final staff report.

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

[1] San Joaquin Valley Air Pollution Control District Draft (SJVAPD) Staff Report, January 17, 2017, A-17

2. ***The proposed amendment constitutes a taking and is in violation of Amendment 5 of the US Constitution.*** The amendment proposes to extend the Rule to previously exempt ministerial projects, including ministerial projects that are already in the review process. By the time an applicant has submitted a building permit, their project design, cost estimates, including fees, are known and anticipated. The approval of the amended Rule would "interfere with distinct investment backed expectations"[2] and thereby denying property owners "economically viable use of his land"[3]. Land owners who have received their discretionary approval for projects have a vested right to a building permit and as such, imposing an additional burden after discretionary action has been completed would constitute a taking. We agree with the Wonderful Company and other property owners comments that singling out previously exempt projects violates the equal protection clause as well as a violation of due process.[4]

3. ***Proposed amendment opens District and local jurisdictions to challenges under Government Code Section 66020.*** Property owners are afforded the right to challenge the validity of conditions imposed on a building permit that divest them of "money or a possessory interest in property". Since the District is proposing to extend the Rule to previously exempt ministerial projects, particularly those in the application process, building permit applicants will be able to challenge the validity of the conditions imposed by the District on their building permit. While case law may show the right of the District to implement the Rule on "discretionary" actions, there is no mention in any District report, state, federal or legal filings or court opinions to support the District and as such every property owner who has a right to ministerial permits could bring a challenge to both the local jurisdiction and the District. Therefore, the District, by extending the rule on previously exempt ministerial projects, is exposing itself and local jurisdictions to legal challenges by property owners. At a minimum, the Rule should include indemnification for local jurisdictions from legal challenges for implementing the Rule.

4. ***The proposed rule extends to any and all actions by a local jurisdiction that are categorically exempt under CEQA.*** Many jurisdictions in the Valley have economic incentive programs as well as use other tools to attract new business investment. Often times these incentive "agreements" are offered to companies prior to a formal announcement of the project. Under section 15061(b)(3) of the CEQA guidelines, action on these types of agreements are exempt from CEQA. However, as the current amendment is constituted it applies to "any project or portion thereof that is subject to approval by a public agency and will ultimately result in the construction of a new building, facility, or structure"[5]. Since the approval of an incentive agreement, or a reimbursement agreement, or for that matter, any categorically exempt action taken by a local agency would "ultimately

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[2] 438 U.S. at 124
[3] 447 U.S. 255,260 (1980)
[4] SJVAPCD, Draft Staff Report, January 17, 2017, A-3
[5] Ibid, Section 3.13

result in" the construction of a new facility, that would then require a local jurisdiction to levy the fee on a project before they even make a decision for building in that jurisdiction.

5. ***The proposed rule will require adoption by the California Building Codes Commission prior to being effective.*** Government Code section 18944.5 binds all public agencies to the California Building Standards Law[6]. Since the District is imposing a new "standard" on building permit applicants and requiring local jurisdictions to enforce this standard on building permit applicants, the Rule would therefore require the approval of the California Building Standards Commission and must meet the review consideration and factual determinations as outlined in the Law. The staff report should fully outline how the proposed Rule meets the factual determinations as well as the analysis required by the California Building Standards Commission. No public agency is permitted to add to the building permit process absent approval from the Commission.

6. ***The proposed rule significantly changes the "original intent" of the Rule and is therefore subject to CEQA and other federal and state regulations.*** The claim by the District that the amendment does not change the "original intent" is not correct. The District did consider the option of applying the Rule as part of the building permit process[7] and chose the current rule as constructed to "be compatible with local land use authorities' decision making processes, and to have the ability to be worked into CEQA documents at the Lead Agencies' discretion"[8] (emphasis added). Likewise, litigation that followed the initial adoption of Rule 9510 also noted that the Rule was applicable for "projects" seeking "discretionary approval". Staff presentations in 2011[9] and the District's "Frequently Asked Questions Regarding Indirect Source Rule" even go so far as to emphasize "final discretionary approval"[10] either by bolding or underlining the text. District staff has "expertise in application of the California Environmental Quality Act ("CEQA") and is knowledgeable of the land use planning and entitlement processes"[11]. This is evident in the responses found on page A-18 of the draft staff report regarding "discretionary action" and "discretionary approval"[12]. That being the case, District staff is aware of the definitions regarding "ministerial" and "ministerial projects" as codified in CEQA regulations and guidelines[13]. Consequently, District staff knows that CEQA guidelines state "similar projects may be subject to discretionary controls in one city or county and only ministerial controls in another"[14]. The attempt to use the argument that the "original intent" was to include ministerial projects along with discretionary projects therefore is not a valid argument to approve the proposed amendment. Likewise, the District is thereby establishing a new rule by now making projects categorically exempt from CEQA subject to CEQA mitigation

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[6] Health & Safety Code Division 13, Part 2.5
[7] San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD), Final Draft Staff Report (December 15, 2005), 8.
[8] Ibid, 9
[9] Arnard Marjollet presentation to the Air & Waste Management Association (February 21, 2011)
[10] SJVAPCD, Frequently Asked Questions Regarding Indirect Source Review (2012)
[11] SJVAPCD, Implementation of the Indirect Source Review Program Staff Report (November 24, 2010)
[12] SJVAPCD, Final Draft Staff Report (December 15, 2015), 17 (also A-18)
[13] CEQA Guidelines, Section 15268, 15022
[14] Ibid, section 15002(i)(2)

measures. The District has not demonstrated it has the legal authority to render categorically exempt projects subject to CEQA nor has it demonstrated any evidence that it is following all state and federal laws and regulations which provide the authority to make such an overreach of authority. In approving the original Rule for incorporation into the California State Implementation Plan, the Environmental Protection Agency consistently recognized the Rule applied to applicants seeking "final discretionary approval"[15]. If original intent was ministerial projects, then it would have been noted in the EPA's final approval of the Rule.

To claim that the amendment "does not change the original intent of the rule"[16] is not true and therefore should be deleted from the staff report and the District should follow the process for establishing a new rule, including demonstrating it clearly has the authority to subject non-CEQA ministerial projects to CEQA.

7. ***District does not demonstrate inconsistency in the application rule across the Valley.*** District staff purports that Rule 9510 has been inconsistently applied throughout the valley[17]. However, the District does not provide any specific cases in which the Rule, as currently written, has not been applied to discretionary actions by local agencies. The only case that is used to justify this amendment is a ministerial action by a single jurisdiction in the valley in which was arbitrated and to which the District respondent. Likewise, as noted in point 6 above, CEQA guidelines clearly state that a project that is subject to discretionary action in one jurisdiction may be ministerial in another. As such, the staff report should remove all references that there is inconsistent application of the Rule unless it can provide evidence that local jurisdictions took discretionary action to which the Rule was not applied.

8. ***District does not demonstrate that local jurisdictions "circumvented" or "bypassed normal CEQA" obligations.*** District staff implies that local jurisdictions have been taking actions to circumvent the Rule as well as CEQA in making their land use decisions. Accusing local jurisdictions of avoiding the regulation and or violating CEQA without substantiating these statements with facts is unwarranted. The District staff relies on a single legal challenge that was filed against a company by a union that claimed jobs would be lost at another facility the company operated, as a result of the new facility.[18] While the Staff Report makes conjunctures of how the legal challenge would have turned out, there is no evidence that any local jurisdiction used the "exemption of non-discretionary projects" to "circumvent rule applicability by bypassing normal CEQA obligations"[19] and as such, these statements should be removed from the staff report. It should be noted that an injunction to halt the project in order to conduct further environmental review was denied as the

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[15] Environmental Protection Agency, 76 Fed. Reg.89 (May 9, 2011) (amending 40 CFR Part 52, [EPA-R09-OAR-2010-430; FRL-9292-7])
[16] SJVAPCD, Draft Staff Report (January 17, 2017), A-27
[17] Ibid, 1
[18] Coalition for Clean Air et al v. City of Visalia, 42 ELR 20191 No. F062983, (Cal. Ct. App. 5th Dist., 09/14/2012)
[19] SJVAPCD, Draft Staff Report (January 17, 2017), A-27

request "failed to present "clear showing" of entitlement to the extraordinary remedy of preliminary injunctive relief"[20].

It would be warranted to provide some examples of how this rule goes beyond the original scope and intention. Ulta, a beauty products retailer, recently constructed new store that exceeded the 10,000 square foot threshold. They located in a shopping center that was originally subject to CEQA and received its discretionary permits in accordance with state and local regulations and ordinances. Ulta located on the last remaining development pad within the retail center. Had the proposed amendment been in place at the time of Ulta's submission of a building permit, they would have been forced to pay mitigation fees, as their ability to institute mitigation measures within an built out retail center would have not been possible. The addition of thousands of dollars in mitigation fees would have rendered the project unfeasible and consequently, the project would like have not been built. There are dozens of situations like this throughout the San Joaquin Valley where companies like Ulta and other retailers will no longer be able to develop new stores without paying the mitigation fee, even though they are locating in a project development that has already received its discretionary approval. Likewise, there are master planned industrial parks in which approved specific plans exist and all discretionary permits and environmental mitigation measures have been approved and incorporated into the master design of the industrial park. Under the proposed amendment, job producing companies would have to go through an additional discretionary process by the District and pay additional fees, which they would not have to do anywhere else in California nor in competitive states surrounding us.

Finally, the staff report only provides selected comments from letters received from commentators and has not provided the Board or the public access to the full comments that have been provided and as such, there is no way of knowing if commentators made comments in which the District staff did not respond to. As such, the final staff report should include full copies of all comments the District received regarding the proposed amendments so that a full and complete record of the process is available for review.

We encourage the Board to vote against the proposed amendments to Rule 9510. Subjecting the District and local jurisdictions to lengthy legal challenges as a result of the proposed amendments as well as the loss of commercial and industrial businesses that will result from this regulatory overreach can be avoided by maintaining the Rule as it currently exists and has been uniformly and consistently implemented throughout the San Joaquin Valley.

Very truly yours,

Ideally, signature of all CCVEDC members
President & CEO

cc: San Joaquin Valley Congressional Delegation

[20] Coalition for Clean Air, et. al v. VWR, 1:12-CV-01569-LJO-BAM (E.D. Cal. 2013)

Catherine McCabe, Acting Administrator, Environmental Protection Agency
Alexis Strauss, Acting Regional Administrator, Environmental Protection Agency, Region 9
Members of the California Senate & Assembly from San Joaquin Valley
California State Association of Counties
California League of Cities, Central Valley & South San Joaquin Valley Chapters
San Joaquin Valley Economic Development Corporations
California Building Industry Association
California Association of Relators
International Council of Shopping Centers
Society of Industrial & Office Relators (SIOR)
National Association of Industrial and Office Parks (NAIOP)

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January 30, 2017

San Joaquin Valley Air Pollution Control District
The Honorable Oliver L. Baines, III, Chairman
1990 E. Gettysburg Avenue
Fresno, CA 93726-0244

REGARDING: OPPOSITION TO PROPOSED AMENDMENTS TO RULE 9510

Mr. Baines & Board Members:

The California Central Valley Economic Development Corporations (EDC's) represents the EDC's of Fresno, Kern, Kings, Madera, Merced, San Joaquin, Stanislaus and Tulare Counties. We join other industrial and commercial property owners and developers in opposing the planned amendments to Rule 9510. The extension of the rule on ministerial projects will render many projects throughout the San Joaquin Valley as no longer economically viable and will result in projects being cancelled or moved to more competitive areas outside of the Valley. The loss of new economic investment and new jobs should strongly be considered before approving this regulatory overreach beyond the original intent of the Rule.

The San Joaquin Valley Air Pollution Control District ("District") should not approve the recommended changes for the reasons enumerated below.

1. ***The proposed rule significantly changes the "original intent" of the Rule and is therefore subject to CEQA and other federal and state regulations.*** The claim by the District staff that the amendment does not change the "original intent" is not correct. The District did consider the option of applying the Rule as part of the building permit process[1] and chose the current rule as constructed to "be compatible with local land use authorities' decision making processes, and to have the ability to be worked into CEQA documents at the Lead Agencies' discretion"[2] (emphasis added). Likewise, litigation that followed the initial adoption of Rule 9510 also noted that the Rule was applicable for "projects" seeking "discretionary approval". Staff presentations in 2011[3] and the District's "Frequently Asked Questions Regarding Indirect Source Rule" even go as far as to emphasize "final discretionary approval"[4] either by bolding or underlining the text. District staff has "expertise in application of the California Environmental Quality Act ("CEQA") and is knowledgeable of the land use planning and entitlement processes"[5]. This is evident in the

[1] San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD), Final Draft Staff Report (December 15, 2005), 8.
[2] Ibid, 9
[3] Arnard Marjollet presentation to the Air & Waste Management Association (February 21, 2011)
[4] San Joaquin Valley Air Pollution Control District Draft (SJVAPD), Frequently Asked Questions Regarding Indirect Source Review (2012)
[5] SJVAPCD, Implementation of the Indirect Source Review Program Staff Report (November 24, 2010)

responses found on page A-18 of the draft staff report regarding "discretionary action" and "discretionary approval"[6]. That being the case, District staff is aware of the definitions regarding "ministerial" and "ministerial projects" as codified in CEQA regulations and guidelines[7]. Consequently, District staff knows that CEQA guidelines state "similar projects may be subject to discretionary controls in one city or county and only ministerial controls in another"[8]. The attempt to use the argument that the "original intent" was to include ministerial projects along with discretionary projects therefore is not a valid argument to approve the proposed amendment. Likewise, the District is thereby establishing a new rule by now making projects categorically exempt from CEQA subject to CEQA mitigation measures. The District has not demonstrated it has the legal authority to render categorically exempt projects subject to CEQA nor has it demonstrated any evidence that it is following all state and federal laws and regulations which provide the authority to make such an overreach of authority. In approving the original Rule for incorporation into the California State Implementation Plan, the Environmental Protection Agency consistently recognized the Rule applied to applicants seeking "final discretionary approval"[9]. If original intent was ministerial projects, then it would have been noted in the EPA's final approval of the Rule.

To claim that the amendment "does not change the original intent of the rule"[10] is not true and therefore should be deleted from the staff report and the District should follow the process for establishing a new rule, including demonstrating it clearly has the authority to subject non-CEQA ministerial projects to CEQA, as well as complete a new CEQA document, economic impact analysis and conformity report to the Clean Air Act.

2. ***District does not demonstrate inconsistency in the application rule across the Valley.*** District staff purports that Rule 9510 has been inconsistently applied throughout the Valley[11]. However, the District does not provide any specific cases in which the Rule, as currently written, has not been applied to discretionary actions by local agencies. The only case that is used to justify this amendment is a ministerial action by a single jurisdiction in the Valley in which was litigated and which the District was a co-respondent. Likewise, as noted in point 1 above, CEQA guidelines clearly state that a project that is subject to discretionary action in one jurisdiction may be ministerial in another. As such, the staff report should remove all references that there is inconsistent application of the Rule unless it can provide evidence that local jurisdictions took discretionary action to which the Rule was not applied.

3. ***District does not demonstrate that local jurisdictions "circumvented" or "bypassed normal CEQA" obligations.*** District staff implies that local jurisdictions have been taking

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[6] SJVAPCD, Final Draft Staff Report (December 15, 2015), 17 (also A-18)
[7] CEQA Guidelines, Section 15268, 15022
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[10] SJVAPCD, Draft Staff Report (January 17, 2017), A-27
[11] Ibid, 1

actions to circumvent the Rule as well as CEQA in making their land use decisions. Accusing local jurisdictions of avoiding the regulation and or violating CEQA without substantiating these statements with facts is unwarranted. The District staff relies on a single legal challenge that was filed against a company by a union that claimed jobs would be lost at another facility the company operated, as a result of the new facility.[12] While the Staff Report makes conjunctures of how the legal challenge would have turned out, there is no evidence that any local jurisdiction used the "exemption of non-discretionary projects" to "circumvent rule applicability by bypassing normal CEQA obligations"[13] and as such, these statements should be removed from the staff report. It should be noted that an injunction to halt the project in order to conduct further environmental review was denied as the request "failed to present "clear showing" of entitlement to the extraordinary remedy of preliminary injunctive relief"[14].

4. ***Committing to revise a rule prior to public input process and off agenda violates Ralph M. Brown Act.*** The District states that it "made a commitment to revise the rule after the resolution of the legal case to ensure that large projects are treated uniformly throughout the San Joaquin Valley"[15] (emphasis added). The Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code) requires that decisions be made in an open and public setting. There is no evidence that a public meeting took place prior to the District's commitment to revise the rule. The "commitment to revise the rule" denied the public the opportunity for due process and from participating in the rule making process. As such, the process that has taken place thus far has been to formalize a decision that the District staff has already made, as it is clear that the District's intent is to approve the Rule amendment, regardless of what testimony may be provided by the public. The District is not under any judicial or regulatory mandate to amend the Rule; however, it appears that the decision of the District is already pre-determined to meet the "commitment" made by the District. It would be more appropriate for the District to have taken the position to consider a proposal to revise the rule rather than make an outright commitment to do so. The staff report should make clear what commitments were made and to whom staff made those commitments to.

5. ***The proposed amendment constitutes a taking and is in violation of Amendment 5 of the US Constitution.*** We agree with the Wonderful Company and other property owners' comments that singling out previously exempt projects violates the equal protection clause as well as a violation of due process.[16] The amendment proposes to extend the Rule to previously exempt ministerial projects, including ministerial projects that are already in the review process. By the time an applicant has submitted a building permit, their project design, cost estimates, including fees, are known and anticipated. The approval of the

[12] Coalition for Clean Air et al v. City of Visalia, 42 ELR 20191 No. F062983, (Cal. Ct. App. 5th Dist., 09/14/2012)
[13] SJVAPCD, Draft Staff Report (January 17, 2017), A-27
[14] Coalition for Clean Air, et. al v. VWR, 1:12-CV-01569-LJO-BAM (E.D. Cal. 2013)
[15] SJVAPCD, Draft Staff Report (January 17, 2017), A-17
[16] Ibid, A-3

amended Rule would "interfere with distinct investment backed expectations"[17] and thereby denying property owners "economically viable use of his land"[18]. Land owners who have received their discretionary approval for projects have a vested right to a building permit and as such, imposing an additional burden after discretionary action has been completed would constitute a taking.

6. ***Proposed amendment opens District and local jurisdictions to challenges under Government Code Section 66020.*** Property owners are afforded the right to challenge the validity of conditions imposed on a building permit that divest them of "money or a possessory interest in property". Since the District is proposing to extend the Rule to previously exempt ministerial projects, particularly those in the application process, building permit applicants will be able to challenge the validity of the conditions imposed by the District on their building permit. While case law may show the right of the District to implement the Rule on "discretionary" actions, there is no mention in any District report, state, federal or legal filings or court opinions to support the District and as such every property owner who has a right to ministerial permits could bring a challenge to both the local jurisdiction and the District. Therefore, the District, by extending the rule on previously exempt ministerial projects, is exposing itself and local jurisdictions to legal challenges by property owners. At a minimum, the Rule should include indemnification for local jurisdictions from legal challenges for implementing the Rule.

7. ***The proposed rule extends to any and all actions by a local jurisdiction that are categorically exempt under CEQA.*** Many jurisdictions in the Valley have economic incentive programs as well as use other tools to attract new business investment. Often times these incentive "agreements" are offered to companies prior to a formal announcement of the project. Under section 15061(b)(3) of the CEQA guidelines, action on these types of agreements are exempt from CEQA. However, as the current amendment is constituted it applies to "any project or portion thereof that is subject to approval by a public agency and will ultimately result in the construction of a new building, facility, or structure"[19]. Since the approval of an incentive agreement, or a reimbursement agreement, or for that matter, any categorically exempt action taken by a local agency would "ultimately result in" the construction of a new facility, that would then require a local jurisdiction to levy the fee on a project before they even make a decision for building in that jurisdiction.

8. ***The proposed rule will require adoption by the California Building Codes Commission prior to being effective.*** Government Code section 18944.5 binds all public agencies to the California Building Standards Law[20]. Since the District is imposing a new "standard" on building permit applicants and requiring local jurisdictions to enforce this standard on building permit applicants, the Rule would therefore require the approval of the

[17] 438 U.S. at 124
[18] 447 U.S. 255,260 (1980)
[19] SJVAPCD, Draft Amendments to Rule 9510 (January 17, 2017), 9510-3
[20] Health & Safety Code Division 13, Part 2.5

California Building Standards Commission and must meet the review consideration and factual determinations as outlined in the Law. The staff report should fully outline how the proposed Rule meets the factual determinations as well as the analysis required by the California Building Standards Commission. No public agency is permitted to add to the building permit process absent approval from the Commission.

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

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

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

Sincerely,

Lee Ann Eager
Co-Chair, California Central Valley Economic Development Corporation

cc: San Joaquin Valley Congressional Delegation
Catherine McCabe, Acting Administrator, Environmental Protection Agency
Alexis Strauss, Acting Regional Administrator, Environmental Protection Agency, Region 9
San Joaquin Valley Assembly & Senate Delegation

Cherie Clark

Subject: FW: ISR 9510

From: Kevin Hamilton [mailto:kevin.hamilton@centralcalasthma.org]
Sent: Tuesday, January 3, 2017 5:42 PM
To: Cherie Clark <Cherie.Clark@valleyair.org>
Subject: Re: ISR 9510

Thanks Cherie.

My comment is very simple so I will just type it here if that's ok.

I feel strongly that PM 2.5 emissions should be part of the ISR permitting process which is presently limited to PM-10 and NOx. I assume the NOx is expected to control the PM 2.5, however directly emitted PM 2.5 is the largest source of this criteria pollutant and so should be called out rather than just assumed to be captured as a subset of PM-10, or prevented through the NOx limitation on Ammonium Nitrate formation. NOx also neglects Ammonium Sulfate formation which directly contributes to violations of both Annual PM 2.5 standards.
Kevin D. Hamilton, RRT
CEO Central California Asthma Collaborative

CENTRAL CALIFORNIA ASTHMA COLLABORATIVE

COALITION FOR CLEAN AIR

CVAQ

AMERICAN LUNG ASSOCIATION® IN CALIFORNIA

January 31, 2017

Ms. Cherie Clark
San Joaquin Valley Air Pollution Control District
1990 East Gettysburg
Fresno, CA 93726

RE: DRAFT RULE AMENDMENT: RULE 9510 (INDIRECT SOURCE RULE)

Ms. Clark:

On behalf of the undersigned organizations, we thank you for the opportunity to submit comments on the San Joaquin Valley Air Pollution Control District's (District) proposed amendment to Rule 9510 - the Indirect Source Rule (ISR). In general, we support the amendment and thank the District for its actions in remediating a known problem with the rule. However, we believe there are multiple ways in which this rule can be strengthened. In a region failing to attain both ozone and PM2.5 health-based standards, any opportunity to strengthen a rule should be seized.

Foremost, we appreciate the new large project overlay. We believe this change represents a huge improvement to the Indirect Source Rule and we congratulate the District for its actions.

However, we ask that the overlay not apply only to large projects, but to all projects covered by ISR. The District should simply remove the discretionary permit requirement entirely, rather than removing it for large projects only. This would make Rule 9510 work just like all

other Clean Air Act rules. In the alternative, a lower "large source" threshold should be applied. For example, the ISR should be triggered for heavy industrial projects at least 250,000 square feet, rather than 500,000 square feet.

We'd also like to note that we are opposed to proposals that offer retroactive immunity to the rule. The District should not be in the business of granting blanket pardons for past violations of the law. Furthermore, we do not think this would be lawful under the Clean Air Act. Under the Supreme Court case of General Motors v. United States, 496 U.S. 530 (1990), even if an air district changes a Clean Air Act rule, the change does not excuse violations of the EPA-approved SIP rule.

Lastly, we believe PM2.5 limits should be included in the ISR. PM2.5 is the deadliest form of pollution and the Valley is in nonattainment for both the annual and 24-hour standards. We ask that limits on PM2.5 are immediately instituted within the ISR for all new developments.

Thank you again for the opportunity to comment and we hope to see the rule further strengthened.

Sincerely,

D. Weller

Dolores Weller
Director, Central Valley Air Quality Coalition

Bill Magavern
Policy Director, Coalition for Clean Air

Kevin Hamilton
Executive Director, Central California Asthma Collaborative

Bonnie Holmes-Gen
Senior Director, Air Quality & Climate Change, American Lung Association in California

Tom Frantz
President, Association of Irritated Residents

Cherie Clark

From: Devon Jones <Devon.Jones@visalia.city>
Sent: Tuesday, January 17, 2017 2:45 PM
To: WebCast
Subject: Question ISR workshop

To be clear, are projects that had been previously approved ministerially that would now trigger ISR fees going to have to retroactively pay ISR fees?

Devon Jones, Economic Development Manager
City of Visalia
220 N. Santa Fe Street
Visalia, CA 93292
(559) 713-4190
(559) 709-3452 (c)
(559) 713-4800 (f)
Like us on Facebook
Follow us on Twitter
Find me on LinkedIn
PLEASE NOTE: My email address has changed to: devon.jones@visalia.city

RESOURCE MANAGEMENT AGENCY

5961 SOUTH MOONEY BLVD
VISALIA, CA 93277
PHONE (559) 624-7000
FAX (559) 730-2653

Michael Washam — Economic Development and Planning
Reed Schenke — Public Works
Sherman Dix — Fiscal Services

BENJAMIN RUIZ, JR., DIRECTOR

January 31, 2017

Ms. Cherie Clark
San Joaquin Valley Unified
Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno, CA 93726

RE: Comments to Proposed Amendments to Rule 9510 (Indirect Source Review)

Dear Ms. Clark,

The County of Tulare (County) Resource Management Agency (RMA), Economic Development and Planning Branch thanks you for another opportunity to comment on the Proposed Amendments to Rule 9510 (Indirect Source Review) and supporting staff report. The County appreciates the District's responses to our earlier comments (dated June 3, 2016); however, we still have concerns regarding some of the proposed changes to the Rule. In addition to our previously written comments, and verbal comments provided during the public workshop on January 17, 2017, the County offers the following comments.

Public Benefit Projects:

The County appreciates the District's consideration of our previous comments and the inclusion of seismic safety projects to the list of exempted projects. However, as previously commented, many of the projects undertaken by the County are considered "public benefits" projects that result in minimal (less than two tons per year)-to-no ongoing operational emissions. These projects include: installation of new sewage/sewerage collection pipes for compliance with current regulations (such as reducing risk of rupture and surface exposure of seweage); flood control detention/retention basins, flood control berms; installation of sidewalks and bike lanes for pedestrian safety; public parks; fire stations; and road improvements (such as widening existing vehicle lanes, reconfiguring geometrics of existing lanes (for example turning radii, installing dedicated left/right turn lanes), or other improvements) to comply with current state/federal requirements for road safety. For the reasons identified below, the County requests that the District re-evaluate the effectiveness of the inclusion of these types of projects in the Rule, and the inclusion of a definition of "Public Benefit Projects" and an exemption, or other form of special case-by-case consideration, for these types of projects.

- Public benefit projects are intended to comply with current state/federal safety regulations, meet current state/federal standards, replace obsolete (but equivalent) facilities or equipment, result in repair of vital facilities or equipment, or provide other

public benefits (as agreed to by the District) to ensure the general safety and welfare of the public. Often, these public benefit projects are predominantly or fully funded by state/federal monies and would not be undertaken unless mandated by the State or federal agencies, or if grant monies are not available. Public benefit projects subject to Rule 9510 that are reliant upon grant funding would have to submit an AIA application prior to completion of the grant application or any agency approval in order to account for and include the cost of ISR fees (which could range in the tens of thousands of dollars) in the funding request. If an agency is not awarded a grant, agencies would have paid an ISR fee for projects that may never occur resulting in a total, non-recoverable loss of public funds. As such, a lack of exemption for such projects would place an unnecessary and potentially significant financial burden on agencies.

- For example, the County was mandated by the State to construct a new jail facility in the County to house inmates in their local area (the South County Detention Facility in Porterville, CA). The jail project would likely not have been undertaken without the State's mandate and the subsequent funding that was granted for the project, which did not include the cost of compliance with ISR. As such, the County incurred an ISR fee of over $18,000 for the project. Furthermore, although there are construction-related and on-site operations-related emissions associated with the jail, the facility reduces overall VMT within Tulare County and the San Joaquin Valley as inmates are housed locally rather than being transported to other counties, and potentially beyond the San Joaquin Valley. The new facility will also reduce, by approximately 1/3, the total inmates housed in other Tulare County facilities as approximately 1/3 of inmates originate within proximity of Porterville thereby reducing VMT and associated vehicle-related emissions of law enforcement, attorneys, vendors, vistiors, etc. having to travel to more distant County detention facilties (anywhere from 45-60 miles, each way).

- Often, these public benefit projects receive air quality improvement funds, such as Congestion Mitigation and Air Quality (CMAQ) Improvement Program and Tulare County's Measure R (transportation measure) and/or other state/federal funding programs. These funds are awarded to projects that can demonstrate that the project will not have an adverse (negative) impact on air quality. As these types of projects can demonstrate an air quality benefit; we believe such projects meet the Air District's goals of reducing overall criteria pollutant emissions. Examples of projects receiving such funds include:

  - The Complete Streets Program which funds installation of bike lanes, curbs, gutters, and sidewalks to improve pedestrian safety and reduce vehicle-related emissions by providing safe pedestrian access to public facilities (such as schools and playgrounds). These projects are not growth inducing as the improvements accommodate the existing unsafe pedestrian activity, and they reduce overall vehicle miles travelled (VMT) as they provide the small

communities with a reasonable, safe and affordable alternative to driving to existing public or private facilities.

- Construction/installation of new wastewater collection systems to replace aging septic systems within existing communities with new pipelines that connect to existing wastewater treatment facilities. The pipelines are required for compliance with current regulations and/or to reduce risks from rupture and surface exposure of sewerage. These projects improve public safety as well as reduce air emissions through reduction of the number of septic failures (sewage on the surface) and treatment through treatment plants, which are regulated through the District's permitting process. Further, these projects are not growth inducing and would not be funded if that was the objective. They are merely consolidation, collection, and diversion of effluent that would normally be accommodated by septic systems to an existing wastewater treatment facility. We acknowledge that short-term and temporary contruction-related emissions will occur; however, by their nature, operational emissions from the small communities' wastewater collection systems will be very minimal (if any) with no possibility of approaching or exceeding Air District thresholds.

- Public benefit projects often are included in State and local agency plans to reduce impacts on air quality and greenhouse gas (GHG) emissions. Although ISR does not evaluate GHG emissions, projects reducing GHG emissions often have a co-benefit of reducing criteria pollutant emissions. While the Rule includes an exemption for projects consisting of transportation control measures included in a District air quality attainment plan, there are no exemptions for "clean air" or transportation control measure (TCM) projects that are included in similar plans adopted by other agencies. It is counterproductive to exclude agency-adopted plans from the exemption list as it does not provide incentive nor does it encourage agencies to undertake more of these "clean air" projects if they are not fully funded by outside sources.

    - For example, construction of compressed natural gas (CNG) or electric charging stations are necessary to fuel alternative transit vehicles for both the public and private sectors. The facilities are vital to providing the fuels necessary to operate transit vehicles, such as city and regional buses, for persons using public transportation and destination fuel/plug-in availability for private automobile travel. Although "new" alternative fuel facilities will have construction-related and some on-site operational emissions associated with them, the facilities would reduce and remove substantial amounts of off-site emissions in the San Joaquin Valley from gasoline and diesel powered motors that would otherwise be used.

Socioeconomic Impact and Cost Effectiveness Analysis:

The County's public benefit projects are intended to remedy existing problematic issues (such as unsafe roadways and failing sewage systems) or to proactively ensure the safety of the public during natural disaster (such as building flood protection berms). As such, these types of projects should not be included in the same category as that of the "land development industry" subject to the Rule. The County maintains the position that transportation and transit projects are growth accommodating rather than contributing to growth in the San Joaquin Valley and that construction-related emissions reductions play an important role in reducing air quality impacts. However, the public benefits projects that the County is requesting to exempt, or receive another form of special case-by-case consideration, do not contribute to growth as they accommodate only existing conditions. As such, the County maintains that the Rule as written, without exemptions (or other form of special case-by-case consideration) for public benefit projects, places an unfair economic burden on agencies that are not part of the "land development industry". Public benefit projects are not in any way similar to the "land development industry" as public benefit projects are responses to needs (such as wastewater treatment, new wells to replacing failing or contaminated wells, etc.) that are absent, obsolete, deteriorating, etc., in typically existing disadvantaged communities. Conversely, the "land development industy" typically results in truly new (that is, previously non-existent) developments in response to market demands.

The County previously commented requesting documentation demonstrating that public benefit projects, including transit and transportation-related projects, emit sufficient amounts of criteria pollutants necessary to not exempt them from applicability to the Rule. The *Draft Staff Report for Proposed Amendments to Rule 9510* (page 3) states that the use of clean construction fleets has increased from 14% to 39% since the adoption of the Rule resulting in the elimination of 1,227 tons of PM10 and NOx emissions from the construction, and that incorporation of "clean" design elements hase eliminated more than 10,000 tons of NOx and PM10 combined. The District has included a Socioeconomic Analysis for the proposed amendments to the Rule (Appendix B of the Draft Staff Report). However, these statistics and the analyses did not fully address the County's concerns. The County reiterates its request that the District re-evaluate the need to include public benefit projects in the applicability to the Rule. Specifically, this evaluation should include documentation regarding the emissions reductions efficiencies, cost-effectiveness of public benefits projects, and any potential impacts to agencies as a result of not exempting, or proving another form of special case-by-case consideration, for these projects from the Rule as follows:

- The statistics on page 3 (of the *Draft Staff Report for Proposed Amendments to Rule 9510*) do not indicate what percentage of clean fleets or total tons of construction-related emissions are attributable to "construction only" or "public benefit" projects such as bridge replacements, installation of utility/sewer lines, new road surfaces, etc. Of the 25% increase in the use of clean fleets, what percentage is attributable to "construction only" projects and to "public benefits" projects? Of the 1,227 tons reduced, what are the

actual emissions reductions attributable to "construction only" projects and to "public benefits" projects?

- The statistics on page 3 do not indicate the duration or intensity of construction-related activities included in the calculated reductions. Development projects can have longer construction periods or higher intensity construction activities than "construction only" or "public benefit" projects. What are the reductions attributable to shorter periods of construction? What are the reductions attributable to less intensive construction?

- The Socioeconomic Analysis in the Draft Staff Report is based upon the previous analysis conducted in 2005. The current analysis in Section II is separated into two categories, residential development projects and industrial/commercial development projects, both which include both construction and operational related emissions. A category for transit and transportation projects, which are often not part of residential or industrial/commercial developments and should be considered their own category, is not included; nor is there a category for "construction only" or "public benefits" projects. Furthermore, the Socioeconomic Analysis provided in 2005 (Appendix F of the 2005 Staff Report) estimated cost of construction for commercial/industrial based on units of a per square foot and per acre of building developed. Transportation and transit projects were not separated evaluated as their own land use or development type. As such, the Socioeconomic Analysis does not demonstrate that public benefit projects, including transit and transportation-related projects, emit sufficient amounts of criteria pollutants necessary to include them in the applicability to the Rule.

As previously noted, there are many types of public benefit projects in addition to seismic safety projects that are intended to provide public safety and do not result in increased operational emissions or VMT. These types of projects are similar to seismic retrofits/rebuilds in that they are intended to provide public safety, the only new emissions are from the project are associated with short-term, temporary construction-related activities, and their development often are funded wholly or in large part by state or federal monies. If the requested evaluation of "construction only" and "public benefits" emissions reductions indicate that they contribute only a small portion of the overall emissions reductions, the County requests that the District consider including an exemption (or other form of special case-by-case consideration) for public benefit projects as suggested earlier.

The Socioeconomic Analysis indicates that the actual cost of reductions over a 10-year period are considerably less than what was projected in 2005. If the District determines that an exemption for public benefits projects is not warranted, the County requests the District consider a reduction in the amount of off-site mitigation fees for these types of projects consistent with the actual costs of reductions, not the estimated $9,500/tons projected in 2005.

Although Tulare County does not speak for the Air District's other 58 cities, 7 counties, other state or federal agencies, school districts, etc.; rest assured that these other agencies are likely also mandated to provide public benefits projects. We are not in the business to profit, we are

however, obligated to provide for the well being and general welfare of our respective citizenry (just as the Air District is obligated to comply the Clean Air Act) and this effort will require contruction-related activities such as installation of new sewage/sewerage collection systems; flood control-related projects; pedestrian safety; public parks; fire stations; transit-related facilities; road improvements, etc. As such, we reiterate our request that the Air District consider an exemption (or other form of special case-by-case consideration) for public benefits projects.

In closing, I would like to thank you for the opportunity to participate and comment in the Rule 9510 amendment process. Please contact Mr. Hector Guerra, Chief Environmental Planner, by phone at (559) 624-7121 or via email at hguerra@co.tulare.ca.us if you have any questions or would like to discuss these comments. Lastly, please notify Mr. Guerra regarding the date and time when the Rule will be considered by your Governing Board.

Sincerely,

Michael Washam
Assistant Director - Economic Development and Planning Branch
Tulare County Resource Management Agency

Cherie Clark

From: Jim Sanders <JSanders@paynterrealty.com>
Sent: Tuesday, January 17, 2017 2:40 PM
To: WebCast
Subject: Webcast Question

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

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

Sincerely,
James S. Sanders
Vice President of Development
Paynter Realty & Investments, Inc.
17671 Irvine Blvd, Ste. 204
Tustin, CA 92780
PH: (714) 731-8892
FX: (714) 731-8993
EM: jsanders@paynterrealty.com

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
1900 Main Street, 5th Floor | Irvine, CA 92614-7321
Telephone: 949.553.1313 | Facsimile: 949.553.8354
www.allenmatkins.com

John Condas
E-mail: jcondas@allenmatkins.com
Direct Dial: 949.851.5551 File Number: 373522-00001/SF1031505.01

Via Electronic Mail (cherie.clark@valleyair.org)

January 31, 2017

San Joaquin Valley Air Pollution Control
District
Attn: Cherie Clark
1990 E. Gettysburg Avenue
Fresno, CA 93726

Re: Comment Letter Regarding Proposed Amendments to SJVAPCD Rule 9510

Dear Ms. Clark:

We represent The Wonderful Company (Wonderful) in connection with the Wonderful Industrial Park (Wonderful Project) in the City of Shafter (City). This letter provides Wonderful's comments on the San Joaquin Valley Air Pollution Control District's (the District) proposed amendment to Rule 9510 (Proposed ISR Amendment), which governs indirect source review in the San Joaquin Valley. This letter supplements the comment letter dated September 14, 2016 submitted by John Condas and the two comment letters dated May 23, 2016 and August 30, 2016 previously submitted by The Roll Law Group on behalf of Wonderful, which are hereby incorporated by reference. We request that this letter be included in the administrative record for consideration of the Proposed ISR Amendment.

Wonderful's concerns raised in its prior comment letters have not been addressed by the new language added to Section 2.2 of the Proposed ISR Amendment nor in the District's responses to comments set forth in Appendix A of the Draft Staff Report, Rule 9510 Indirect Source Review, January 17, 2017 (Staff Report). In addition, the Socioeconomic Analysis for Rule 9510 (Appendix B to the Staff Report) is inadequate because it fails to identify the projects that will be subject to Rule 9510 as a result of the Proposed ISR Amendment and therefore necessarily precludes full analysis of its cost effectiveness and the socioeconomic impacts likely to result from its adoption.

We respectfully request that the District defer consideration of the Proposed ISR Amendment until its full scope and impacts on the San Joaquin Valley can be determined, based in part upon preparing an adequate effectiveness and socioeconomic impact analysis, as required by law.

Very truly yours,

Courtney Davis on behalf of

John Condas

JCC:cad

cc: John Guinn, The Wonderful Company
Jason Gremillion, The Wonderful Company
Melissa Poole, The Wonderful Company

APPENDIX F

PUBLIC COMMENT PERIOD (AUGUST 16, 2016 - SEPTEMBER 15, 2016)

COMMENTS RECEIVED AND DISTRICT RESPONSES

COMMENT LETTERS RECEIVED

PUBLIC COMMENT PERIOD (AUGUST 16, 2016 - SEPTEMBER 15, 2016)

COMMENTS RECEIVED AND DISTRICT RESPONSES

COMMENT LETTERS RECEIVED

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

EPA REGION IX COMMENTS:

No comments were received from EPA Region IX.

ARB COMMENTS:

No comments were received from ARB.

PUBLIC COMMENTS:

Comments were received from the following:

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

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

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

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

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

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

   Regarding the need to analyze the costs of the rule, since we have clarified that projects that have received their final discretionary approval prior to March 1, 2006 will remain exempt from the ISR rule, the concerns brought by the

commenter are alleviated. However, as an aside, see Appendix B for the District's socioeconomic impact analysis of the proposed amendments.

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

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

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

DISTRICT RESPONSE: As the District has previously stated, all those projects that received a final discretionary approval prior to the rule implementation date of

March 1, 2006, will not be affected by the amendments. However, if final discretionary decision was received after March 1, 2006, the requested change would have the result of improperly exempting that project from requirements that were applicable at the time of the discretionary decision. However, the District has made minor changes (double underlined below) to remove any ambiguity regarding the District's intent that development projects that received final discretionary approval prior to March 1, 2006, remain exempt from the rule.

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

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

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

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

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

DISTRICT RESPONSE: CEQA Guidelines section 15378(c) provides that "[t]he term 'project' refers to the activity which is being approved and … does not mean

each separate governmental approval." Accordingly, the "final discretionary approval" date is the date the agency first formally approves the project and not the date of any subsequent approvals. Similarly, section 15352 defines "approval" of the project as occurring when a decision "commits the agency to a definite course of action in regard to a project intended to be carried out by any person." These sections place the "approval" of a project at the earliest date on which a public agency first authorizes the underlying activity.

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

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

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

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

2.2 Effective on and after (rule amendment date), ~~unless~~ to the extent this rule does not apply ~~applies~~ pursuant to section 2.1, this rule shall apply to any applicant that seeks to obtain ~~gain ministerial or otherwise non~~

~~discretionary approval~~ from a public agency for a large development project any approval that is subject to review pursuant to CEQA~~,~~. This rule shall not apply to any approvals to which CEQA does not apply pursuant to Public Resources Code section 21080(b), which includes any approval that is deemed to be ministerial (as defined in CEQA Guidelines section 15369) under the ordinances, rules, and regulations of the public agency from which the approval is sought. A large development project is any project which upon full build-out will include any one of the following:…

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

(Melissa Poole, The Wonderful Company)

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

Cherie Clark

From: King, Bill <KingB@cityofmerced.org>
Sent: Thursday, August 18, 2016 3:53 PM
To: Cherie Clark
Subject: Rule 9510 amendment

A few questions:

Currently, local jurisdictions will send notices to the District for "discretionary projects," because "discretionary projects" trigger CEQA and its noticing requirements. There is no such requirement for non-discretionary projects.

How is the District going to know what "large development projects" have been submitted to local governments for non-discretionary review?

Similarly, how are applicants of "large development projects" to know they need to file an ISR application with the District prior to submittal of plans for approval (this includes a building permit) to a local jurisdiction?

Bill King
Principal Planner
City of Merced
Development Services
678 W. 18th Street
Merced, CA 95340
kingb@cityofmerced.org
209-385-4768

RLG
Roll Law Group

CRAIG B. COOPER
craig.cooper@wonderful.com

August 30, 2016

Mr. Brian Clements, Program Manager
San Joaquin Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno, CA 93726

RE: SJVAPCD Rule 9510 Indirect Source Review Rule – Proposed Amendments: September Daft

Dear Mr. Clements:

Roll Law Group PC ("RLG"), on behalf of The Wonderful Company, appreciates the San Joaquin Valley Air Pollution Control District ("District") providing stakeholders with the opportunity to offer comment on the most recent draft of proposed amendments to the District Rule 9510 – Indirect Source Review ("Proposed Amendments").

The Wonderful Company, and its related farming entities, farm and market pistachios, almonds, pomegranates, grapevines, and various citrus varietals throughout California. With a majority of our farming operations located within the San Joaquin Valley, we are acutely aware of the air quality challenges this region faces. We understand that the Proposed Amendments to Rule 9510 are intended to prevent new development projects from further degrading air quality in the region; however, we maintain our position that the Proposed Amendments are unlawful and unfair by subjecting already entitled projects to new requirements.

The District has not shown any evidence that it intended to include previously exempt projects in the original 9510 Rule. Typically, complex and expensive development projects with long lead times are granted the ability to finish their projects under the same rules by which they risked their capital in obtaining entitlements. New development rules typically only apply to new projects, and it is only in extreme cases where new rules are applied retroactively. This has particularly been the case with respect to projects where there is high risk and expense to obtain all development rights necessary to meet the requirements of existing law. This has always been our understanding of why the exemption for previously entitled projects was included in Rule 9510. The original language of Rule 9510 is exceptionally clear that the rule only applies to projects or portions of projects seeking to gain final discretionary approval. It would have been very easy to have originally written the rule such that there would be no distinction between fully entitled projects and those that were not finished when the rule was written. But the District did not craft Rule 9510 in that way; rather projects entitled as of the enactment of the Rule were exempted from its application. To try to change that with the Proposed Amendments a full 10 years later is illegal and unfair.

The Wonderful Company appreciates the District responding to, and providing feedback on the public comments submitted on the April 2016 draft of the Proposed Amendments; however we remain disappointed that the District failed to adequately address the most critical aspects of the Proposed Amendments. As such, we urge the District to consider the following comments before finalizing the amendments to Rule 9510.

1. **Ministerial Projects that Received Discretionary Approval Prior to the Establishment of Rule 9510 Should Remain Exempt**

The District argues that the Proposed Amendments are necessary in order to close an unintended loophole created by the 2005 version of Rule 9510, to help bring air quality in the San Joaquin Valley in line with Federal standards, and to ensure uniform application across development projects. We disagree with the District's arguments on all three accounts and urge the District to reconsider the applicability (as described in Sections 2.1, 2.2, and 2.3) of the Proposed Amendments prior to adoption.

- The Proposed Amendments are Not Necessary to Close an Unintended Loophole – The District highlights *Coalition for Clean Air v. City of Visalia (2012)* ("*Visalia*") as the impetus for the Proposed Amendments, specifically the provisions pertaining to rule applicability of previously exempt projects. The District tries to explain its justification for doing so by arguing that the provision in the original 9510 Rule that provides an exemption for non-discretionary projects was never intended to be used as a means to circumvent rule applicability to large developments (District Response to Comment 14 in the *Final Draft Staff Report for Proposed Amendments to Rule* 9510). The *Visalia Case* and the current situation differ in a number of key ways:

    - The project in Visalia was subject to the City's site plan review process, which the local agency determined was ministerial, but was in fact, discretionary.

    - The city filed a notice of exemption which would not have been required of a truly ministerial project.

    This is not the case with previously exempt projects that have received previous entitlements and that have been approved through a discretionary review process prior to Rule 9510 becoming effective. The "loophole" the District referred to in *Visalia* is not relevant to situations where there is a prior discretionary entitlement, which is what is being considered for inclusion in Rule 9510 by the Proposed Amendments. Rather, *Visalia* deals with a completely different situation where a lead agency classifies a project as ministerial and yet still carries out a discretionary review process. *Visalia* should not be used as the basis for applicability of Rule 9510 to previously entitled projects.

- Amendments are Not Required in Order to Meet Federal Standards – The District stated in their response to public comments that the Proposed Amendments are necessary in order to further improve the air quality of the San Joaquin Valley and bring the District closer in line with Federal air quality standards. We do not believe this to be the case.

The fact is, there are relatively few industrial projects that would now be subject to Rule 9510 with adoption of the Proposed Amendments (although classified as "large development projects") and these projects would not substantially alter the status of air quality in the District. Additionally, the majority of the large development projects that would become subject to Rule 9510 under the Proposed Amendments, have already undergone discretionary approval by the responsible public agencies, including assessments on air quality, further evidencing that subjecting those projects to Rule 9510 would not significantly improve air quality in the District. In addition, as discussed below, the District has not made a case that the Proposed Amendments are in fact necessary because they have not conducted any analysis of the impacts of the change, nor have they provided evidence that these newly impacted projects were included in the District's original rule analysis completed over 10 years ago.

- Non-Uniform Application and Constitutional Concerns – The Proposed Amendments single out a small number of industrial development projects, which will cause an unfair burden to be placed on these handpicked projects that have already received discretionary approvals. To this end, we believe that by making these previously exempt projects subject to Rule 9510, the District is applying this rule in a non-uniform matter by unfairly burdening projects that have complied with applicable land-use regulations in the years prior to the enactment of Rule 9510. In addition to the non-uniform application of the rule, we also believe that the District's new interpretation of Rule 9510 is illegal for the following reasons:

    - **Equal Protection Clause** – The fact that the District has proposed to include previously entitled projects not subject to discretionary approval constitutes a violation of the equal protection clause. The District, by intentionally singling out a small number of entities, the Wonderful Company being one, that would be required to submit to regulatory burdens that other developers in the State would not be subject to, would cause these entities to be treated differently than similarly situated entities with no rational basis for doing so. None of the most populated air districts in Southern or Northern California have similar rules.

    - **Uncompensated "Taking" of Private Property** – The Proposed Amendments would also constitute an uncompensated taking of private property because the District has proposed to include those projects which were previously exempt (*i.e.*, projects that received all necessary prior discretionary approval from the appropriate oversight agency), and the Proposed Amendments would constitute an exorbitant increase in regulatory fees for projects with existing development rights.

    - **Violation of Due Process** - Furthermore, the Proposed Amendments would essentially result in a de facto denial of non-discretionary approval of certain development projects, which violates due process rights.

Wonderful raised all of these concerns in our previous comments to the District (submitted May 23, 2016) and they were not adequately addressed in the District's response to comments.

2. **The District Must Provide Adequate Cost Benefit and Economic Impact Analyses of the Proposed Amendments**

The District's response to comments seeking additional cost benefit and socioeconomic analyses for the Proposed Amendments is inadequate. The District postulates that Rule 9510 intended to include the previously exempt development projects in question, and therefore the original economic and financial analyses already included the full scope of these development projects, but there is no evidence to support that claim. The District must provide an analysis on the environmental and financial impacts imposed by the Proposed Amendments, and it has failed to do so. Again, this amendment involves a smaller fixed set of fully entitled properties that can easily be identified and analyzed. When considering the impacted industrial properties the most responsible approach would be to determine the anticipated NOx, PM10 and CO2 from those projects and compare the benefits to the District associated with such projects, including jobs, tax base, public safety, schools and other community benefits. The Districts has not done so. For all of these reasons, we respectfully request that the District prepare updated cost benefit and economic impact analyses prior to considering the Proposed Amendments for adoption.

We appreciate the opportunity to provide additional comments on the Proposed Amendments to Rule 9510, and are available to discuss should the District require additional information.

Sincerely,

Craig Cooper

Craig B. Cooper
Roll Law Group PC

Cc: John Guinn
Melissa Poole
Ron Hunter

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
1900 Main Street, 5th Floor | Irvine, CA 92614-7321
Telephone: 949.553.1313 | Facsimile: 949.553.8354
www.allenmatkins.com

John Condas
E-mail: jcondas@allenmatkins.com
Direct Dial: 949.851.5551 File Number: 373522-00001/SF1016119.04

Via Electronic Mail

September 14, 2016

Governing Board, San Joaquin Valley Air
Pollution Control District
1990 E. Gettysburg Avenue
Fresno, CA 93726

Re: Proposed Amendment to Rule 9510 (Indirect Source Review)

Ladies and Gentlemen:

We represent The Wonderful Company in connection with the Wonderful Industrial Park (Wonderful Project) in the City of Shafter ("City"). We appreciate the opportunity to comment on the San Joaquin Valley Air Pollution Control District's (SJVAPCD) proposed amendment to SJVAPCD Rule 9510 (Proposed Amendment), which governs indirect source review in the Central Valley.

To remedy the shortcomings identified below, we respectfully request that SJVAPCD defer consideration of the Proposed Amendment until these flaws have been corrected and proper cost benefit and socioeconomic analyses are completed. These analyses should include an inventory of how many fully-entitled and pending projects would be affected by the Proposed Amendment. However, if this Board elects to proceed with adoption of the Proposed Amendment, The Wonderful Company requests certain revisions described below to more narrowly tailor the Proposed Amendment to exclude from Rule 9510 projects with valid final entitlements issued prior to the effective date of the Proposed Amendment as the result of a discretionary approval process but which still require ministerial approvals in order to commence construction.

We further request that this letter be included in the administrative record for consideration of the Proposed Amendment. As you know, The Roll Law Group has previously submitted two comment letters on behalf of the Wonderful Company dated May 23, 2016 and August 30, 2016, which are attached to this letter as Exhibits A and B, respectively, and the arguments set forth therein are hereby incorporated by reference into this letter.

I. Introduction.

The Wonderful Company questions the need for the Proposed Amendment. The Proposed Amendment would expose all fully-entitled projects which would be subject to the Proposed Amendment to costly redesign, additional mitigation measures and/or the payment of substantial off-site mitigation fees, which have not been accounted for in project plans. Also, there would be substantial delay for projects to go through the Proposed Amendment process, and the Proposed Amendment would inject massive uncertainty into projects which, at this point, have little to no entitlement risk. These projects, which already have all discretionary entitlements in place, are, in essence, "shovel ready" but with the Proposed Amendment, no longer would these projects be considered shovel ready.

Additionally, the Proposed Amendment will lead to a decrease in development, job creation and local government tax revenue reducing the ability to diversify the local economic base and further hindering local government's ability to provide public safety and other badly needed services.

To date, SJVAPCD has not provided any detail as to how many projects presently are not subject to Rule 9510 but would be if the Proposed Amendment is enacted. If there are only a few projects which would become subject to Rule 9510 if the Proposed Amendment is adopted, then The Wonderful Company questions the need for the Proposed Amendment. Due to the small number of affected projects, there would likely be little positive impact due to a small decrease in pollutants, and the aforementioned costs associated with complying with the Proposed Amendment would be devastating to these projects. The devastating costs of complying with the Proposed Amendment could render these developments economically infeasible.

On the other hand, if there are numerous projects which would only be subject to Rule 9510 with the Proposed Amendment, then The Wonderful Company is concerned that full public and private economic impacts have not been adequately analyzed. But because no analysis has been provided it is impossible to know the extent to which the Proposed Amendment will impact development and improve air quality, if at all.

As we previously commented, SJVAPCD improperly failed to prepare the cost-effectiveness and socioeconomic analyses for the Proposed Amendment as required by the California Health & Safety Code.

The Proposed Amendment would also usurp local decision making authority and impose significant administrative burdens on cities and other local public agencies. Moreover, these cities would be faced with a Hobson's choice regarding enforcement or non-enforcement of the Proposed Amendment. For example, in Shafter, as is the case in most California jurisdictions, the issuance of building permits is ministerial. (See Shafter Municipal Code, Title 15; California Building Code, §§ 104.1, 104.2, 105.3.) As a ministerial permit, the Building Official is required to issue the building

permit if the permit application complies with the provisions of the California Building Code and the Shafter Municipal Code. (California Building Code, § 105.3.1.) Thus, the Building Official would have no authority to refuse to issue a building permit if the permit application complied with all relevant provisions of the Shafter Municipal Code and the California Building Code provisions adopted by the City. Virtually all other cities in the Central Valley have a similar building permit issuance framework.

Because issuance of building permits is ministerial, if a local government chose to enforce the Proposed Amendment, it would face the prospect of being sued by developers for refusing to issue ministerial permits (such as grading and building permits), although all municipal and building code requirements have been satisfied. On the other hand, if the local government chose to follow its own municipal and building code requirements and did not enforce the Proposed Amendment, the local government could be subject to various enforcement actions of SJVAPCD.

II. The Wonderful Project has all discretionary entitlements.

The Wonderful Project's final discretionary approval was issued by the Shafter City Council on March 21, 2006 after a public review process and compliance with the California Environmental Quality Act (CEQA). In connection with these entitlements, the City certified an EIR. Through this thorough entitlement process, the City established a comprehensive regulatory framework governing development of the Wonderful Project. Based upon this extensive regulatory framework, to undertake construction of the Wonderful Project, only ministerial approvals, such as grading and building permits, need to be issued by the City.

III. The failure to prepare cost-effectiveness and socioeconomic impact analyses contravenes applicable Health and Safety Code requirements.

Health and Safety Code sections 40920.6(a) and 40728.5 require preparation of cost-effectiveness and socioeconomic impact analyses prior to adopting rules or regulations that are intended to attain air quality standards or that will significantly affect air quality or emissions limitations. The Staff Report claims that since the Proposed Amendment does not change the original intent of Rule 9510, as set forth 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. (*Id.*, pp. 16-17.) This is not correct. As Rule 9510 was originally drafted, it did not apply to the subset of projects deemed to be ministerial projects; under the Proposed Amendments such projects will now be subject to Rule 9510. The number of such projects that will be affected by the Proposed Amendment is not identified in the Staff Report. Nonetheless, there will be some quantifiable change in air emissions under the original Rule 9510 and the Proposed Amendment associated with this unidentified set of projects. Likewise, the ministerial projects that would fall within the Proposed Amendments will be required to incur costs either through costly project redesign measures or through payment of substantial off-site impact fees, or both.

Accordingly, these analyses should be prepared to inform both the public and this Board of the expected air quality gains anticipated from extending Rule 9510 to ministerial projects and the financial and socioeconomic costs associated with implementation. Failure to do so both contravenes the express text of Sections 40920.6(a) and 40728.5 and deprives both the public and this SJVAPCD Board from the benefit of understanding the impacts of adopting the Proposed Amendment. The District must prepare and disclose socio-economic and cost-benefit analyses prior to moving forward with adoption of the Proposed Amendment. Because the District has failed to prepare the required analysis, if the Proposed Amendment is adopted, the adoption would be invalidated pursuant to a writ of mandate. (*See, e.g., City of Dinuba v County of Tulare* (2007) 41 Cal.4th 859, 868 (county may be compelled to correctly allocate and distribute tax revenues).)

IV. The scope of the Proposed Amendment is broader than its stated goal and unduly burdens projects with existing entitlements issued after March 1, 2006 for which grading and/or building permits have not yet been sought.

The Staff Report indicates that the goal of the Proposed Amendment is to ensure Rule 9510 applies "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." (*Id.*, p. 5.) However, the Proposed Amendment's language for the new Section 2.2 is broader in scope than this stated goal as it would subject to Rule 9510 projects that have already received all discretionary approvals, but still require non-discretionary approvals (e.g., grading and building permits), despite that fact that those projects have already undergone a discretionary review process and complied with CEQA. Under the Proposed Amendment, these projects will either be required to make design modifications to accommodate on-site emission reduction measures, or if incorporation of these measures is not feasible, to pay off-site mitigation fees.

The Wonderful Company believes that SJVAPCD should defer consideration of the Proposed Amendment until its full scope and impacts on the San Joaquin Valley can be determined. However, if this Board elects to proceed with adoption of the Proposed Amendment, The Wonderful Company suggests that in order to reflect the Staff Report's stated goal of the Proposed Amendment, the Proposed Amendment should be more narrowly tailored to exclude from Rule 9510 projects with valid final entitlements issued prior to the effective date of the Proposed Amendment as the result of a discretionary approval process but which still require ministerial approvals in order to commence construction.

V. The Proposed Amendment strips local decision makers of discretion.

The Proposed Amendment would strip local decision makers of their discretion by effectively transforming what a local public agency deems a ministerial project into a discretionary project by mandating compliance with Rule 9510, which could involve implementation of mitigation and/or modifications to project design to accommodate on-site emission reduction

measures. Issuance of building permits, demolition permits, and grading permits are considered to be ministerial if no decision making involving subjective judgment is involved. (CEQA Guidelines § 15268; *see Adams Point Preservation Society v. City of Oakland* (1987) 192 Cal.App.3d 203; *Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85; *Environmental Law Fund, Inc. v City of Watsonville* (1981) 124 Cal.App.3d 711.)

CEQA Guidelines § 15268 specifically provides that the issuance of a building permit is presumed to be ministerial if the local ordinance does not require application of discretionary standards. The CEQA Guidelines acknowledge that the determination of what is ministerial is most appropriately made by the public agency acting as lead agency based upon its analysis of its own laws. (CEQA Guidelines, § 15268(a); see also *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 178.)

As discussed above, because the issuance of building permits is a ministerial approval in virtually all Central Valley cities and counties, the Proposed Amendment contravenes CEQA by usurping local public agencies' power to make that determination and substituting SVACPD's judgment for that of the public agency.

VI. The Proposed Amendment imposes administrative burdens on local public agencies and exposes them to litigation risk.

As described below (and discussed in the Staff Report), the Proposed Amendment imposes an administrative burden on local public agencies by requiring tracking and sharing of information with SJVAPCD on issuance of ministerial permits, which do not generally involve a public process or notice. Significant staff time will be required to keep track of whether projects applying for grading and building permits have received discretionary entitlements and if not, to ensure that SJVAPCD is notified when a ministerial permit is issued.

In addition to the administrative burden faced by public agencies, as discussed above, public agencies are likely to face significant litigation risks associated with enforcement or non-enforcement of the Proposed Amendment. The risks and burdens which would be placed upon local governments warrant a deferral of adoption of the Proposed Amendment, in order to create a workable solution.

VII. The Proposed Amendment (Option 3) suffers from the same flaws the Staff Report identifies for Options 1 and 2.

The Staff Report identifies several bases on which Options 1 and 2 were rejected in lieu of Option 3 for the Proposed Amendment, but fails to recognize that Option 3 suffers from these same flaws. In discussing Option 1 the Staff Report notes that applying Rule 9510 at the building permit stage is generally too late in the process for a project proponent to consider and incorporate project design elements that would contribute to reducing emissions from the development project. (*Id.*, p.

4.) However, the Staff Report fails to acknowledge that for those projects that have received final discretionary approvals but have not yet sought grading or building permits, including the Wonderful Project, the practical effect of the Proposed Amendment is to apply Rule 9510 at the building permit stage. In the words of the staff, this is "too late in the process for a project proponent to consider and incorporate project design elements that would contribute to reducing emissions from the development project," leaving project proponents faced with the prospect of potentially paying significant off-site mitigation fees or spending more time and money re-designing the Project to comply with a rule from which it was previously exempt. By the time ministerial approvals are being sought (e.g., grading and building permits), those projects have been fully designed and have completed the CEQA process. If application of Rule 9510 effectively dictates that the project be re-designed, this potentially forces the project proponents to go back to the public agency for a discretionary approval and possible CEQA compliance, even though no modifications to the project as entitled are contemplated by the developer. In cases where project re-design is not feasible and payment of impacts fees is required, this will cause delays in development since these fees will not have been accounted for in project budgeting.

In discussing Option 2, the Staff Report explains that because SJVAPCD does not currently receive information regarding all approvals from the public agency, requiring local agencies to report on non-discretionary approvals would create a significant and costly burden on public agencies and SJVAPCD to ensure that all approvals (discretionary and non-discretionary) are communicated to the SJVAPCD for evaluation. The Staff Report overlooks that issuance of ministerial permits, including grading and building permits, is generally not a public process for which public notice is given; thus the Proposed Amendment also would require local public agencies to expend significant time and money to develop and administer a process to notify SJVAPCD of every ministerial approval and permit issued by the agency.

As demonstrated above, the Proposed Amendment (Option 3) suffers from the same shortcomings and complications cited as reasons for rejecting Options 1 and 2. In light of this, the Staff Report's conclusion that Option 3 is the most workable solution is unsupported.

VIII. The scope of the Proposed Amendment's exemption should be expanded to include certain projects with existing final entitlements.

Although The Wonderful Company believes presently that adoption of the Proposed Amendment is not warranted, The Wonderful Company suggests the following revision be considered by SJVAPCD in conjunction with its future processing of the Proposed Amendment, including preparation of a proper cost benefit and socioeconomic analysis. In order to avoid unduly burdening projects that have obtained all final entitlements but have not yet sought the ministerial approvals required to commence construction, we urge SJVAPCD to revise Section 2.2 or Section 4.5 to extend the exemption from Rule 9510 for projects that prior to the Proposed Amendment's effective date received all final entitlements as the result of discretionary approvals by any local

public agency's decision making body (e.g., Planning Commission, City Council or Board of Supervisors), regardless of whether or not the developer has submitted a grading or building permit application.

IX. Before the Proposed Amendment can be adopted the Board must adequately comply with CEQA, which it has not done.

SJVAPCD has properly concluded that before it can adopt the Proposed Amendment, it must comply with CEQA. (Staff Report, p. 6.) In order to comply with CEQA, Staff recommends that the Board determine that adoption of the Proposed Amendment is exempt from CEQA ". . . . 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))." (*Id.*) This exemption is known as "the common sense exemption". *See Muzzy Ranch Co. v Solano County Airport Land Use Comm'n* (2007) 41 Cal.4th 372.

In making the required determination that there is no possibility that the activity in question may have a significant effect on the environment, the lead agency, here, SJVAPCD, must make a factual review of the record to determine whether the exemption applies. As the California Supreme Court stated in *Muzzy Ranch*, "whether a particular activity qualifies for the common sense exemption presents an issue of fact, and the agency invoking the exemption has the burden of demonstrating that it applies." (41 Cal.4th at 386.)

Although arguably the Proposed Amendment may have some beneficial environmental impacts through some marginal reduction in air pollution, projects designed to protect or improve the environment can have collateral effects on the environment that preclude application of the exemption. Thus, the District cannot simply assume that measures intended to protect the environment are entirely benign.

For example, the court in *Dunn-Edwards Corp. v Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644 overturned amendments to air district regulations designed to reduce the amount of volatile organic carbons (VOCs) in paint and other architectural coatings for failure to comply with CEQA. Because there was evidence that the new regulations would require lower quality products that would result in a net increase in VOC emissions, an exemption under the common sense exemption was held to be improper. *See also Wildlife Alive v Chickering* (1976) 18 Cal.3d 190 (Fish and Game Commission action setting fishing and hunting seasons has potential for both beneficial and adverse effects on survival of certain species); *Building Code Action v Energy Resources Conserv. & Dev. Comm'n* (1980) 102 CA3d 577 (adoption of energy conservation regulations establishing double-glazing standards for new residential construction could have significant impact on air quality as result of increased glass production).

There is absolutely no support in the Staff Report for the exemption determination. The Staff Report states: ". . . . 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." (*Id.*) This cursory statement is inadequate support for an exemption determination.

Although the District has failed to list, or take an inventory, of the number, size and type of projects which would be affected by the Proposed Amendment, as discussed above, requiring these projects to be subject to Rule 9510 could kill these projects, or increase the development and costs substantially. These added regulatory costs could lead to a lack of development, and possible urban decay, an impact that needs to be analyzed under CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184.) Also, such projects, if not built, may delay much-needed public improvements, which were to be funded through execution of the development of these projects. A lack of needed public improvements could lead to increased traffic congestion, worse hydrological conditions, and other negative environmental impacts.

As commented by Tulare County, the Proposed Amendment's revised definitions of "transportation project" and "transit project" would require such beneficial public projects to be subject to Rule 9510 (although the District claims that these definitions merely clarifies the District's interpretation of Rule 9510). (Staff Report, pp. A-16, A-17.) If Tulare County's interpretation is correct, beneficial transportation and transit projects would be delayed or possibly not built due to the need to comply with Rule 9510. If this were to happen, there would be less transportation improvements and less vehicles removed from the road which otherwise would be displaced by these projects. This could result in increased traffic congestion, increased air pollution and increased greenhouse gas production.

As the California Supreme Court has held, a lead agency, here SJVAPCD, has the burden to demonstrate that adoption of the Proposed Amendment will not have any significant environmental impacts. At this stage, the SJVAPCD has failed to meet this burden.

X. Conclusion

In light of the above, we respectfully request that SJVAPCD defer consideration of the Proposed Amendment until its full scope and impacts on the San Joaquin Valley can be determined, based in part upon preparing the required effectiveness and socioeconomic analyses. However, if this Board elects to proceed with adoption of the Proposed Amendment, The Wonderful Company suggests that it be revised as described above to ensure that those projects that received all final entitlements before the Proposed Amendment's effective date are exempt.

Very truly yours,

John Condas

JCC:cad

cc: John Guinn, The Wonderful Company
Melissa Poole, The Wonderful Company
Jason Gremillion, The Wonderful Company

Exhibit A

RLG
Roll Law Group

CRAIG B. COOPER
craig.cooper@wonderful.com

May 23, 2016

Mr. Brian Clements, Program Manager
San Joaquin Valley Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno, CA 93726

Re: SJVAPCD Rule 9510 Indirect Source Review Rule - Proposed Amendments

Dear Mr. Clements,

Roll Law Group PC, on behalf of the Wonderful Company ("TWC"), has reviewed the San Joaquin Valley Air Pollution Control District's ("District") proposed amendments to District Rule 9510 – Indirect Source Review, and we appreciate the opportunity to provide comments regarding these proposed amendments.

The Wonderful Company and its related entities farm and market pistachios, almonds, pomegranates, and various citrus varietals across California's Central Valley. As a diverse agricultural operation, we can appreciate the challenges that the District faces in improving the air quality throughout the San Joaquin Valley. Further, we understand the reasons why the District promulgated Rule 9510 in 2006. In the decade that has followed, developers and operations, such as TWC, have acquired land that complied with applicable land-use regulations for various planning and development agencies throughout the Valley. Many of these acquisitions were predicated on those certain entitlements that came with the land and which increased the cost of those acquisitions significantly. Consequently, we believe the District's proposed amendments present potentially significant impacts to planned growth and business expansion opportunities throughout the San Joaquin Valley. As such, we believe the District must consider these impacts and the various implications that the proposed amendments portend for the regulated community, residents, and business environment. With this in mind, the Wonderful Company provides the following comments:

- **Amended Section 2.2 Contradicts Section 4.5**
  Section 2.2 – Applicability – The amended section states *"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:..."* While Section 4.5 – Exemptions, seems to contradict this by stating, *"A development project that was granted a final discretionary approval prior to March 1, 2006 shall be exempt from the requirements of this rule."*

  It is unclear whether or not development projects that were exempt from the rule prior to this proposed amendment would remain exempt. The District should clarify the discrepancy noted

between these two sections. Is a large development project that only needs ministerial approval exempt from ISR or not? We believe such projects should remain exempt for a number of reasons, explained further below.

- **Uncompensated "Taking" of Private Property**
  First, if intended to not exempt previously entitled projects, the proposed amendment would constitute an uncompensated taking of private property which is prohibited by the Takings Clause in the U.S. and California constitutions whose purpose is to "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 80 S. Ct. 1563, 1569 (1960). The imposition of mitigation fees that are not directly connected to the impact caused by the potentially affected development projects is functionally equivalent to a land use exaction. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014). The proposed amendment to Rule 9510, would on its face, constitute an extortionate demand amounting to an uncompensated taking. Further, if the proposed changes were made to Rule 9510, it would, in effect result in the de facto denial of non-discretionary approval of development projects which violates due process rights. See, *Galland v. City of Clovis*, 24 Cal. 4th 1003, 1035, as modified (Mar. 21, 2001).

- **The Amendment Violates the Equal Protection Clause**
  Further, if intended to cover already entitled projects not subject to discretionary approvals, the amendment violates the equal protection clause by singling out a small number of entities, including the Wonderful Company, to submit to regulatory and financial burdens which are not imposed on other developers within the State. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co.*, 43 S.Ct. 190, 191 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S.Ct. 495 (1918)). The equal protection guarantee protects the disparate treatment of not only groups but also individuals who would constitute a "class of one." *Vill. of Willowbrook v. Olech*, 120 S.Ct. 1073, (2000); *SeaRiver Maritime Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir.2002). A successful equal protection claim can be brought by a "class of one" where, as here, an individual has been intentionally treated differently from others similarly situated and there is no rational basis for the difference. *Id.* The proposed amendment to the rule would result in this type of disparate treatment based on an arbitrary and irrational assessment of mitigation fees.

- **District Has Not Provided a Cost/Benefit Analysis or Disclosed Financial Impacts Posed by These Amendments**
  The District's April 26, 2016 Staff Report on the proposed amendment fails to disclose the financial impacts to the District and to the regulated community posed by the amendment. The

District is required to provide the socio-economic impacts, including the cost of compliance, of proposed amendments to existing rules prior to enactment. See *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2711 (2015).

- <u>District Has Not Disclosed Impacts to the Environment Posed by These Amendments</u>
  The District's April 26, 2016 Staff Report on the proposed amendment fails to disclose the impacts to the environment, and specifically the San Joaquin Valley Air Basin, posed by the amendment. Nor has the District disclosed why, from an air quality perspective, these amendments are necessary. Are these amendments required for the District to attain goals established in the Clean Air Act or the most current State Implementation Plan (SIP)? Is there a need from a scientific perspective why these amendments are needed at this time? None of these issues have been addressed.

We appreciate the opportunity to provide additional feedback on these proposed amendments, and are available to discuss our thoughts, comments, and questions should the District require additional information.

Sincerely,

Craig Cooper

Craig B. Cooper
Roll Law Group PC

Cc: John Guinn
Lisa Stilson
Melissa Poole

Exhibit B

RLG
Roll Law Group

CRAIG B. COOPER
craig.cooper@wonderful.com

August 30, 2016

Mr. Brian Clements, Program Manager
San Joaquin Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno, CA 93726

RE: SJVAPCD Rule 9510 Indirect Source Review Rule – Proposed Amendments: September Daft

Dear Mr. Clements:

Roll Law Group PC ("RLG"), on behalf of The Wonderful Company, appreciates the San Joaquin Valley Air Pollution Control District ("District") providing stakeholders with the opportunity to offer comment on the most recent draft of proposed amendments to the District Rule 9510 – Indirect Source Review ("Proposed Amendments").

The Wonderful Company, and its related farming entities, farm and market pistachios, almonds, pomegranates, grapevines, and various citrus varietals throughout California. With a majority of our farming operations located within the San Joaquin Valley, we are acutely aware of the air quality challenges this region faces. We understand that the Proposed Amendments to Rule 9510 are intended to prevent new development projects from further degrading air quality in the region; however, we maintain our position that the Proposed Amendments are unlawful and unfair by subjecting already entitled projects to new requirements.

The District has not shown any evidence that it intended to include previously exempt projects in the original 9510 Rule. Typically, complex and expensive development projects with long lead times are granted the ability to finish their projects under the same rules by which they risked their capital in obtaining entitlements. New development rules typically only apply to new projects, and it is only in extreme cases where new rules are applied retroactively. This has particularly been the case with respect to projects where there is high risk and expense to obtain all development rights necessary to meet the requirements of existing law. This has always been our understanding of why the exemption for previously entitled projects was included in Rule 9510. The original language of Rule 9510 is exceptionally clear that the rule only applies to projects or portions of projects seeking to gain final discretionary approval. It would have been very easy to have originally written the rule such that there would be no distinction between fully entitled projects and those that were not finished when the rule was written. But the District did not craft Rule 9510 in that way; rather projects entitled as of the enactment of the Rule were exempted from its application. To try to change that with the Proposed Amendments a full 10 years later is illegal and unfair.

The Wonderful Company appreciates the District responding to, and providing feedback on the public comments submitted on the April 2016 draft of the Proposed Amendments; however we remain disappointed that the District failed to adequately address the most critical aspects of the Proposed Amendments. As such, we urge the District to consider the following comments before finalizing the amendments to Rule 9510.

1. **Ministerial Projects that Received Discretionary Approval Prior to the Establishment of Rule 9510 Should Remain Exempt**

The District argues that the Proposed Amendments are necessary in order to close an unintended loophole created by the 2005 version of Rule 9510, to help bring air quality in the San Joaquin Valley in line with Federal standards, and to ensure uniform application across development projects. We disagree with the District's arguments on all three accounts and urge the District to reconsider the applicability (as described in Sections 2.1, 2.2, and 2.3) of the Proposed Amendments prior to adoption.

- The Proposed Amendments are Not Necessary to Close an Unintended Loophole – The District highlights *Coalition for Clean Air v. City of Visalia (2012)* ("*Visalia*") as the impetus for the Proposed Amendments, specifically the provisions pertaining to rule applicability of previously exempt projects. The District tries to explain its justification for doing so by arguing that the provision in the original 9510 Rule that provides an exemption for non-discretionary projects was never intended to be used as a means to circumvent rule applicability to large developments (District Response to Comment 14 in the *Final Draft Staff Report for Proposed Amendments to Rule* 9510). The *Visalia Case* and the current situation differ in a number of key ways:

    - The project in Visalia was subject to the City's site plan review process, which the local agency determined was ministerial, but was in fact, discretionary.

    - The city filed a notice of exemption which would not have been required of a truly ministerial project.

    This is not the case with previously exempt projects that have received previous entitlements and that have been approved through a discretionary review process prior to Rule 9510 becoming effective. The "loophole" the District referred to in *Visalia* is not relevant to situations where there is a prior discretionary entitlement, which is what is being considered for inclusion in Rule 9510 by the Proposed Amendments. Rather, *Visalia* deals with a completely different situation where a lead agency classifies a project as ministerial and yet still carries out a discretionary review process. *Visalia* should not be used as the basis for applicability of Rule 9510 to previously entitled projects.

- Amendments are Not Required in Order to Meet Federal Standards – The District stated in their response to public comments that the Proposed Amendments are necessary in order to further improve the air quality of the San Joaquin Valley and bring the District closer in line with Federal air quality standards. We do not believe this to be the case.

The fact is, there are relatively few industrial projects that would now be subject to Rule 9510 with adoption of the Proposed Amendments (although classified as "large development projects") and these projects would not substantially alter the status of air quality in the District. Additionally, the majority of the large development projects that would become subject to Rule 9510 under the Proposed Amendments, have already undergone discretionary approval by the responsible public agencies, including assessments on air quality, further evidencing that subjecting those projects to Rule 9510 would not significantly improve air quality in the District. In addition, as discussed below, the District has not made a case that the Proposed Amendments are in fact necessary because they have not conducted any analysis of the impacts of the change, nor have they provided evidence that these newly impacted projects were included in the District's original rule analysis completed over 10 years ago.

- Non-Uniform Application and Constitutional Concerns – The Proposed Amendments single out a small number of industrial development projects, which will cause an unfair burden to be placed on these handpicked projects that have already received discretionary approvals. To this end, we believe that by making these previously exempt projects subject to Rule 9510, the District is applying this rule in a non-uniform matter by unfairly burdening projects that have complied with applicable land-use regulations in the years prior to the enactment of Rule 9510. In addition to the non-uniform application of the rule, we also believe that the District's new interpretation of Rule 9510 is illegal for the following reasons:

    - **Equal Protection Clause** – The fact that the District has proposed to include previously entitled projects not subject to discretionary approval constitutes a violation of the equal protection clause. The District, by intentionally singling out a small number of entities, the Wonderful Company being one, that would be required to submit to regulatory burdens that other developers in the State would not be subject to, would cause these entities to be treated differently than similarly situated entities with no rational basis for doing so. None of the most populated air districts in Southern or Northern California have similar rules.

    - **Uncompensated "Taking" of Private Property** – The Proposed Amendments would also constitute an uncompensated taking of private property because the District has proposed to include those projects which were previously exempt (*i.e.*, projects that received all necessary prior discretionary approval from the appropriate oversight agency), and the Proposed Amendments would constitute an exorbitant increase in regulatory fees for projects with existing development rights.

    - **Violation of Due Process** - Furthermore, the Proposed Amendments would essentially result in a de facto denial of non-discretionary approval of certain development projects, which violates due process rights.

Wonderful raised all of these concerns in our previous comments to the District (submitted May 23, 2016) and they were not adequately addressed in the District's response to comments.

2. **The District Must Provide Adequate Cost Benefit and Economic Impact Analyses of the Proposed Amendments**

The District's response to comments seeking additional cost benefit and socioeconomic analyses for the Proposed Amendments is inadequate. The District postulates that Rule 9510 intended to include the previously exempt development projects in question, and therefore the original economic and financial analyses already included the full scope of these development projects, but there is no evidence to support that claim. The District must provide an analysis on the environmental and financial impacts imposed by the Proposed Amendments, and it has failed to do so. Again, this amendment involves a smaller fixed set of fully entitled properties that can easily be identified and analyzed. When considering the impacted industrial properties the most responsible approach would be to determine the anticipated NOx, PM10 and CO2 from those projects and compare the benefits to the District associated with such projects, including jobs, tax base, public safety, schools and other community benefits. The Districts has not done so. For all of these reasons, we respectfully request that the District prepare updated cost benefit and economic impact analyses prior to considering the Proposed Amendments for adoption.

We appreciate the opportunity to provide additional comments on the Proposed Amendments to Rule 9510, and are available to discuss should the District require additional information.

Sincerely,

Craig B. Cooper
Roll Law Group PC

Cc: John Guinn
Melissa Poole
Ron Hunter

APPENDIX G

PUBLIC WORKSHOP – APRIL 26, 2016

COMMENTS RECEIVED AND DISTRICT RESPONSES

COMMENT LETTERS RECEIVED

PUBLIC WORKSHOP – APRIL 26, 2016

COMMENTS RECEIVED AND DISTRICT RESPONSES

COMMENT LETTERS RECEIVED

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 comments received during and subsequent to the public workshop are addressed below. A copy of the comment letters received are attached at the end of this appendix.

EPA REGION IX COMMENTS:

No comments were received from EPA Region IX.

ARB COMMENTS:

No comments were received from ARB.

PUBLIC COMMENTS:

Comments were received from the following:

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

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)

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)

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

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

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

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

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

timing from having "received" a building permit prior to the adoption of the rule 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<u>, or other final construction authorization,</u> prior to (rule amendment date) shall be exempt from the requirements of this rule. This exemption shall not apply to development projects that failed to comply with applicable requirements of the prior version of this rule.*

COST/SOCIO ANALYSIS

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

(Randy Wasnick, 4Creeks)

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

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

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

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

DISTRICT RESPONSE: Pursuant to CH&SC Section 40920.6(a), the District is required to analyze the cost effectiveness of new rules or rule amendments.

Additionally, state law (CH&SC § 40728.5(a)) requires that "whenever a District intends to propose the adoption, amendment, or repeal of a rule or regulation that will significantly affect air quality or emissions limitations, that agency shall, to the extent data is available, perform an assessment of the socioeconomic impacts of the adoption, amendment, or repeal of the rule or regulation. The provision in the District's ISR Rule providing for exemption of non-discretionary projects was never intended to be used as a means to circumvent rule applicability to large development projects. The proposed rule amendment is designed to remove the unintended circumvention of the rule's original applicability to large projects

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

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

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

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

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

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

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

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

LARGE PROJECTS AND SPAL

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

DISTRICT RESPONSE: The Rule 9510 applicability thresholds are based on average emissions per project type, and the same thresholds apply throughout the Valley. The thresholds are not intended to sync with the city of Bakersfield's project size definitions, or with those of any of the other 60-plus land use agencies in the Valley. These varying square footage thresholds are intended to result in equivalent emissions, on average, for the different project types. A primary reason the commercial square footage results in more emissions per square foot is due to the nature of the business related to mobile source emissions. On average, there are more vehicle miles traveled related to commercial space compared to the other categories.

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

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

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

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

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

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

The proposed amendments provide for uniform application of the Rule throughout the Valley and as was illustrated in the above referenced case in the City of Visalia will actually bring the needed certainty for development projects that can otherwise be delayed or stopped with unnecessary litigation. Although the settlement that addressed the CEQA lawsuit included extensive additional air quality impact mitigation, subjecting the project to Rule 9510 would have substantially avoided both the need for the lawsuit in the first place and the related business uncertainty. There have been other similar industrial projects that could raise similar concerns in other jurisdictions in the Valley. In addition to being subject to potential lawsuits and delays, large projects that escape complying with Rule 9510 due to a public agency's use of a ministerial approval process potentially create increased health risks to the public by not mitigating project related emissions. The District's responsibility of ensuring public health through cleaner air requires that we address this inconsistent application of the rule.

DISCRETIONARY APPROVAL VS MINISTERIAL

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

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

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

16. COMMENT: Projects that have zoning that precedes March 1, 2006, should be exempt from the rule and payment of any fees as their development right and property value is vested before adoption of the rule. Also, under Applicability Section 2.2, which applies the rule to any applicant that seeks to gain ministerial or otherwise non-discretionary approval from a public agency for a large development project seems to contradict Section 4.5 (Exemptions) which exempts projects that received a final discretionary approval prior to March 1, 2006. This makes it unclear whether or not a large development project that only needs ministerial approval is exempt or not. Our group believes they should be exempt because if not, the proposed amendment would constitute an uncompensated taking of private property. It also would violate the equal protection clause by singling out a small number of entities including our group, to regulatory and financial burdens not imposed on other developers.
(Craig B. Cooper, Roll Law Group for Wonderful Company; Anonymous)

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

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

2.2 Effective on and after (rule amendment date), unless this rule applies pursuant to section 2.1,this rule shall apply…

2.3 Effective on and after March 1, 2006, ~~T~~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 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)

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 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)

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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.

4CREEKS

April 26, 2016

San Joaquin Valley Air Pollution Control District
Attn: Cherie Clark, Air Quality Specialist
1990 E. Gettysburg Avenue
Fresno, CA 93726
(559)230-600

RECEIVED
MAY 02 2016
SJVUAPCD

RE: DRAFT Staff Report Rule 9510 Indirect Source Review Public Hearing
April 29, 2016

Ms. Clark,

First, we commend the Air Board on their continued effort to improve the quality of air in the Central Valley. As residents of this Valley we appreciate the efforts and measures which has been put in place to ensure our children grow up in this Valley with clean and safe air.

As an engineering firm we have encountered Rule 9510 on a development standpoint in representing clients through all steps of land acquisition, planning, development and construction. While we agree and see the necessity for Rule 9510 be do believe some improvements can be made and we look forward to working with the Air Board in reviewing this document.

Thank you for the opportunity to review the Draft Staff Report regarding Rule 9510 Indirect Source Review Amendment. In addition to reviewing the Draft Staff Report our firm is also attending the Public Hearing Webinar on Tuesday, April 26, 2016 and has accumulated the following comments for your consideration.

- Suggested that Air Impact Applications (AIA) to be submitted to the Air District within 60 days of final discretionary approval instead of by discretionary approval date. The applicant is never 100% sure that the project will be approved by the City/County and therefore submitting an AIA before actual discretionary approval date could add costs to the applicant that are not required. The 60 days allows for the applicant to be certain the project is approved before submitting the application to the Air District.

- I would recommend that a "preliminary" AIA be submitted before discretionary approval or within 60 days of discretionary approval. This would only establish the potential "future" fees. I would have the final AIA be done before approval of a DCP, which would be before a building permit or land development permit is approved. At that point, the

Visalia Office
324 S. Santa Fe St. Ste. A
Visalia, California 93292
P: (559) 802.3052
F: (559) 802.3215

Porterville Office
881 W. Morton Ave., Suite D
Porterville, California 93257
P: (559) 781. 0102
F: (559) 781.6840

www.4-creeks.com

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developer/owner would establish the fee payment/deferral. This would allow for the actual person that will build/own the finished project to be involved and provide the necessary mitigation.

- Recommend a cost analysis of potential savings for incorporating mitigation measures. Provide a cost per square foot of each use and how each mitigation measure can provide cost savings.

- Agreed on removing $50,000 minimum fee deferral qualifier and down payment for projects to request a fee deferral schedule. We have processed many applications that are often sold to other developers and a pay as you develop each phase would work more efficiently for applicants.

- Allow the project applicant to use the actual dollars that the project would be subject to pay to the Air District to incorporate additional emission reduction measures in their project. (ex. Project develops 200 unit subdivision and is subject to pay $140,000 to Air District. Instead, this money could be made available to the applicant to incorporate additional emission reduction measures in the project.)

- Suggested for a timeline provided by the Air district to detail approval date of the AIA from time of submittal.

- Request review of Final Draft Rule 9510 Amendment before public hearing.

Thank you again for the opportunity to review and provide comments on the proposed changes. 4Creeks remains available for Air District representative to reach out and discuss any options over the comment period.

Sincerely,

Randy Wasnick, President

Visalia Office
324 S. Santa Fe St. Ste. A
Visalia, California 93292
P: (559) 802.3052
F: (559) 802.3215

Porterville Office
881 W. Morton Ave., Suite D
Porterville, California 93257
P: (559) 781. 0102
F: (559) 781.6840

www.4-creeks.com

Cc: Matthew Ainley, Vice President
David Duda, Planning Manager

City of Visalia
220 N. Santa Fe St., Visalia, CA 93292
City Manager's Office
Tel: (559) 713-4332; Email: mike.olmos@visalia.city

May 18, 2016

Oliver L. Baines III, Chair
San Joaquin Valley Air Pollution Control District
1990 E. Gettysburg Ave.
Fresno, CA 93726

RE: Opposition to Proposed Amendment to Indirect Source Rule 9510

Mr. Baines:

The City of Visalia appreciates the opportunity to comment on the San Joaquin Valley Air Pollution Control District's (District) proposed amendments to Indirect Source Rule 9510. The majority of the District's proposed amendments are logical and consistent with the original intent of Indirect Source Rule 9510. However, the City strongly opposes the proposal to expand the applicability of Rule 9510 to projects previously considered exempt.

Rule 9510 currently applies to a development project when such project is subject to a discretionary approval from a public agency. Projects are exempt when discretionary approvals occurred prior to March 1, 2006. One proposed revision would maintain this exemption, but impose a new definition of "large development project" and revoke the previous discretionary approval exemption if the proposed project exceeds the "large development" square footage threshold. The City's opposition to this proposed amendment is multi-faceted:

1. Revising Rule 9510's applicability would directly conflict with the commitment made by the District when the Rule was originally created. The Rule was heavily opposed when first proposed by District staff. A major reason for local jurisdictions to remove their opposition was the District's commitment to apply the rule only to new development, defined as projects that received their discretionary approvals prior to March 1, 2006 were specifically exempted.
2. The City of Visalia, like multiple other jurisdictions in the Valley, has a new General Plan and Climate Action Plan. The Climate Action Plan establishes a strategy for achieving its reduction target of 30% below 2005 baseline year level by 2030 and all indications are that the City will successfully achieve this target. The strategy does not include a drastic expansion of projects applicable to Rule 9510.
3. The size thresholds for applicability that would be triggered by non-discretionary approval of large development projects that are not otherwise subject to the Rule under Section 2.1 appear to be arbitrary. The methodology to determine the size thresholds appears to have been to simply multiply the estimated projection of two tons of NOX or PM10 project related emissions by five, and to call them

"large development projects" and therefore no longer exempt. Justification for this methodology is absent from the draft staff report.

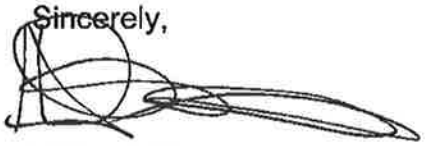
4. The District's June 2012 Small Project Analysis Level guidance on determining CEQA applicability, significance of impacts, and potential mitigation of significant impacts (attached) identifies substantially larger square footages for all land use categories. Thus, the proposed Amendment would create internal inconsistencies among District policies.

Aside from the points described above, the proposed Rule 9510 expansion would have a potentially significant negative impact on the City of Visalia's economic development efforts. This will directly lead to the loss of the City's ability to attract jobs; which is of particular concern given our location in a region that already has some of the highest unemployment levels in the nation.

Given this concern, the City is troubled by the District's conclusion that this Rule 9510 expansion is not subject to the California Environmental Quality Act. 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 that the proposed Rule expansion was indeed analyzed, the original EIR is at least 10 years old and conditions have changed dramatically in the last decade.

Please consider removing the expansion of Rule 9510 applicability to "large development projects" as defined in the District's draft staff report. I am available to discuss this issue with you at your convenience.

Sincerely,



Michael Olmos
City Manager

CC: Members, Visalia City Council
Ken Richardson, Visalia City Attorney
Seyed Sadredin, Executive Director, SJVAPCD
Senator Jean Fuller, CA Senate District 16
Assemblymember Devon Mathis, 26th Assembly District
Supervisor Phil Cox, Tulare County District 3
Supervisor Steve Worthley, Tulare County District 4
Supervisor Allen Ishida, Tulare County District 1
Mike Spata, CAO, Tulare County
Nancy Lockwood, Executive Director, Visalia EDC
Paul Saldana, CEO, Sequoia Valley EDC
Gail Zurek, CEO, Visalia Chamber of Commerce
Brett Taylor, Executive Director, Tulare County Association of Realtors

ECONOMIC DEVELOPMENT CORPORATION

serving Tulare County

May 21, 2016

Oliver L. Baines III, Chair
San Joaquin Valley Air Pollution Control District
1990 E. Gettysburg Ave.
Fresno, CA 93726

RE: Opposition to Proposed Amendment to Indirect Source Rule 9510

Mr. Baines:

The Economic Development Corporation serving Tulare County strongly opposes the proposed amendment to Indirect Source Rule 9510. This proposed amendment will effectively reduce the economic competitiveness of the San Joaquin Valley and result in increased unemployment and poverty.

Rule 9510 currently applies to a development project when such project is subject to a discretionary approval from a public agency. One proposed revision would maintain this exemption, but impose a new definition of "large development project" and revoke the previous discretionary approval exemption if the proposed project exceeds the "large development" square footage threshold. The EDC is opposed to this proposed amendment for the following reasons:

- The rule reverses the commitment made by the District when Rule 9510 was initially adopted.
- Local jurisdictions via Climate Action Plans achieve reduction of emissions within their communities.
- The size thresholds that are proposed are indiscriminate and are without justification and as such without merit.
- The proposed amendment conflicts with the District's Small Project Analysis Level guidance on CEQA applicability and therefore cannot be adopted as proposed.

The proposed rule expansion would have a potentially significant negative impact on the economic development efforts throughout the San Joaquin Valley. This will directly lead to the loss of the local communities' ability to attract jobs; which is of particular concern given our location in a region that already has some of the highest unemployment levels in the nation.

Please consider removing the expansion of Rule 9510 applicability to "large development projects" as defined in the District's draft staff report. We appreciate the opportunity to comment on the proposed rule.

Very truly yours,

Paul M. Saldana
President & CEO

506 N. Kaweah Avenue, Suite A • Exeter, CA 93221• (559) 592-1349 • paul@edctulare.com

Cherie Clark

From: Jim Sanders <JSanders@paynterrealty.com>
Sent: Tuesday, April 26, 2016 3:42 PM
To: WebCast
Subject: Questions To Webcast on ISR Changes

Questions:

1) 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?
2) How is 10,000 square feet of commercial space considered a large project wherein every other project type is 45,000 square feet or larger?

Sincerely,
James S. Sanders
Paynter Realty & Investments, Inc.
17671 Irvine Blvd, Ste. 204
Tustin, CA 92780
PH: (714) 731-8892
FX: (714) 731-8993
EM: jsanders@paynterrealty.com

Cherie Clark

From: Molly Saso <msaso@insenv.com>
Sent: Tuesday, April 26, 2016 2:29 PM
To: WebCast
Subject: Proposed Amendments to ISR Rule 9510

Good afternoon,

Below are several questions that I would like addressed during today's webcast on the proposed amendments to District Rule 9510 (Indirect Source Review):

1) Option 3 lists new applicability thresholds (page 6) for projects anticipated to exceed CEQA significance thresholds, e.g. 10 tons per year for NOx. However, several of these "applicability thresholds for large development projects" are significantly smaller than the SPAL thresholds. For example, the District's guidance document on Small Project Analysis Level (SPAL), in Table 5-3(d) states that a general light industry project below 510,000 ft^2 would be not exceed the CEQA thresholds of significance for criteria pollutants. This determination was made based on District pre-quantified emissions. Option 3 of the Draft Staff Report: Rule 9510 lists light industrial projects above 125,000 ft^2 as projects expected to exceed CEQA significance thresholds. Can you please provide calculations or assumptions used to determine that light industrial projects less than half the size of a SPAL light industrial project would exceed CEQA significance thresholds.
    a. Similarly, the SPAL limit for heavy industrial projects is 920,000 ft^2 while the proposed Option 3 threshold in the Draft Staff Report for heavy industrial projects is 500,000 ft^2. Please explain.
2) The Draft Staff Report states in section VI. Page 15, that "As this rule amendment primarily addresses large projects that have avoided so-called discretionary decision processes, but which have always been expected to be subject to the rule, the draft amendments will have neither effect, and is therefore not subject to the cost effectiveness nor socioeconomic analysis requirements." Please clarify whether this is intended to state that if Option 3 is adopted, projects exceeding the proposed applicability thresholds for large development projects will be unable to provide cost effectiveness calculations proving that ISR fees are not cost effective and in fact detrimental to their business. If not, please clarify this sentence the meaning is unclear. Projects are not required to submit cost effectiveness or socioeconomic analyses...
3) 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. Please respond.

Thank you in advance for spending the time and effort required to respond to the above questions,

Molly S. Saso, M.S., LEED Green Associate | Consultant
Insight Environmental Consultants, Inc. | 5500 Ming Avenue, Suite 140 | Bakersfield, CA 93309
661-282-2200 (Office) | 661-282-2204 (Fax) | 661-204-0568 (C) | email: msaso@insenv.com
www.insenv.com Insight is a Trinity Consultants Company www.trinityconsultants.com

Science • Strategy • Solutions

Cherie Clark

From: Devon Jones <Devon.Jones@visalia.city>
Sent: Tuesday, April 26, 2016 3:49 PM
To: WebCast
Subject: Questions for ISR workshop

1. It sounds as if staff is aware of certain cities that this change may apply to, could you tell us which cities those are?

2. Can you tell us more about what specifically triggered this proposed change now?

Devon Jones
City of Visalia

Sent from my iPad

Cherie Clark

From: Morrow, Colby L. <CLMorrow@semprautilities.com>
Sent: Tuesday, April 26, 2016 4:27 PM
To: WebCast
Subject: Response to gentleman in Bakersfield who asked for model to be listed in the rule

Dear SJVAPCD staff – great job on the workshop.

A suggestion that would satisfy the gentleman in Bakersfield who asked for model to be listed in the rule and said just amend the rule again when the approved model changes: would be to list the most recently approved model on the District's website. Maybe include a web link such that anyone who would like to run the model for their projects can download it and do so. I don't think the gentleman realizes how much staff time and resources goes into every rule amendment.

Colby L. Morrow
Environmental Affairs Program Manager – NW Region
Energy and Environmental Affairs
SoCalGas and SDG&E
CLMorrow@semprautilities.com
Mobile: 559.999.3450

Cherie Clark

Subject: FW: Contact Information and Thanks!

From: Ron Hunter [mailto:rhunter@insenv.com]
Sent: Thursday, April 28, 2016 6:39 PM
To: Brian Clements
Subject: Contact Information and Thanks!

Brian,

It was a pleasure speaking with you today regarding the proposed changes to District Rule 9510. As we discussed, I'll see if I can come up with some language that could be incorporated into the District's preferred Option 3 – although Option 1 actually covers the precise issue we discussed.

Ideally, what I would like to see is perhaps an "application period" which would commence with the developer's initial application to the lead agency and extend until 30 days before the building permit is pulled. This period would give the developer time to explore mitigation options while realizing the financial impacts each measure can bring to the project in terms of design features and (most importantly) financial savings from District emissions fees. This would remove the ambiguity of when the ISR application has to be filed and would allow time for developers to resolve other vital issues, such as financing, in determining if they have a viable project. The case we discussed today (NOVs issued to Corporation for Better Housing – for filing the ISR application after the application filing date for final discretionary approval) would have been resolved without an NOV and with full compliance with ISR, had the project been approved to be financed and built by the federal government (HUD).

I'll try to come up with some language that can address this issue – and thanks again for taking the time to speak with our staff and I on the phone today – this issue is very important to many of our clients and, therefore, to us as well. My contact information is below – please feel free to call or write anytime we can be of assistance.

Regards,
Ron

RONALD W. HUNTER | Managing Principal Consultant
Insight Environmental – Trinity Consultants, Inc. | 5500 Ming Avenue, Suite 140 | Bakersfield, CA 93309
661-282-2200 (Office) | 661-282-2204 (Fax) | 661-303-1234 (C) | email: rhunter@insenv.com
www.insenv.com Insight is a **Trinity Consultants Company** www.trinityconsultants.com

California State Senate

SENATOR
JEAN FULLER
SENATE REPUBLICAN LEADER
SIXTEENTH SENATE DISTRICT

March 24, 2016

Mr. Oliver L. Baines III., Chairman
San Joaquin Valley Air Pollution Control District
1990 East Gettysburg Avenue
Fresno, California 93726

Dear Chairman Baines,

I am writing to express my opposition to the proposed amendment to Indirect Source Rule (ISR) 9510, which would expand the applicability of ISR 9510 to projects previously considered exempt, create a new definition for a "large development project" and revoke the previous discretionary approval exemption if the proposed project exceeds the "large development" square footage threshold.

This proposed amendment, if implemented, would threaten many economic development projects within various jurisdictions within the Central Valley, including many communities within my Senate District. The concerns that I share with many of the communities that I represent are as follows:

- Revising ISR 9510's applicability would directly conflict with the commitment made by the District when the Rule was originally created.
- The City of Visalia, like multiple other jurisdictions in the Central Valley, for example, has a new General Plan and Climate Action Plan that does not include a drastic expansion of projects applicable to Rule 9510.
- The size thresholds for applicability that would be triggered by non-discretionary approval of large development projects that are not otherwise subject to the Rule under Section 2.1 appear to be arbitrary.
- The District's June 2012 Small Project Analysis Level guidance on determining CEQA applicability, significance of impacts, and potential mitigation of significant impacts (attached) identifies substantially larger square footages for all land use categories. Thus, the proposed Amendment would create internal inconsistencies among District policies.

In addition to the points described above, the proposed ISR 9510 amendment would significantly impact the City of Visalia's and other community's 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.

I hope that you will kindly take into consideration my concerns and those outlined by local area communities that would be potentially affected by this proposed amendment. Thank you in advance for your attention, and I encourage to you contact me directly at (661) 323-0443 should you like to discuss this letter or require additional information.

Sincerely,

Jean Fuller

JEAN FULLER
Senate Republican Leader, 16th State Senate District

RESOURCE MANAGEMENT AGENCY

5961 SOUTH MOONEY BLVD
VISALIA, CA 93277
PHONE (559) 624-7000
FAX (559) 730-2653

Michael Washam — Economic Development and Planning
Benjamin Ruiz, Jr. — Public Works
Roger Hunt — Administration

BENJAMIN RUIZ, JR., INTERIM DIRECTOR

June 3, 2016

Cherie Clark
SJVUAPCD
1990 E. Gettysburg Avenue
Fresno, CA 93726

RE: Comments to Proposed Amendments to Rule 9510 (Indirect Source Review)

Dear Ms. Clark,

The County of Tulare Resource Management Agency, Economic Development and Planning Branch (RMA) thank you for the opportunity to comment on the Proposed Amendments to Rule 9510 (Indirect Source Review) and supporting staff report. In addition to our comments on the staff Report, we have attached our comments to the draft proposed Rule.

The following represent our comments, questions, and recommendations following our comprehensive review of Rule 9510:

Page 3, 3rd full paragraph:

The determination of whether a project should be ministerial or discretionary should remain with the land use agency. Land use agencies differ on their determination based on their specific needs, goals, objectives, etc. Circumstances are not uniform within the San Joaquin Valley, and as such, such determinations should remain within the purview of each land use agency.

Page 7. Regarding the 30-day transition period:

Is the 30-day period reflective of calendar or working days? If the 30th day falls on a holiday or weekend, the next working day should be the transition deadline.

Page 7. Also regarding the 30-day transition period. 15.

The County's Project Review Committee (PRC) meets as needed. As such, 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 PRC 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 consider revising this transitional timing exemption such that all projects that have submitted their applications to the agency prior to the adoption of the rule, but not yet received building permits, be exempt from the amended rule. Such an exemption would eliminate the need for a transition period. The County suggests that exemption 4.6 be revised as follows:

> Any large development project that has ~~received~~ submitted an application for a building permit to the land use agency 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 version of this rule adopted December 15, 2005.

Pages 7-8 Regarding Clarifying "Development Project" definition:

Many projects over the past 10 years have been exempted from Rule 9510 because they have been determined to not meet the definition of a development project because they do not increase capacity or activity. This amendment would result in previously exempted public benefit projects being subject to Rule 9510. Such public benefit projects include: installation of new sewage pipes for compliance with current regulation or reducing risk of rupture and surface exposure; flood control retention basins, flood berms; installation of sidewalks and bike lanes for pedestrian safety; and road widening (without new lanes) to comply with current state/federal requirements for road safety.

Often, these public benefit projects are partially or fully funded by state/federal monies and may not developed if grant monies are not available. If public benefit projects that are reliant upon grant funding become subject to Rule 9510, agencies would have to submit an AIA application prior to completion of the grant application or any agency approval in order to account for and include the cost of ISR fees in the funding request. If grant deadlines are not met or grants are not awarded, agencies would end up paying an ISR fee for projects that may never occur. As such, without an exemption for public benefit projects that do not increase capacity, activity, or use (that is, increasing operational emissions) the amendment would place an unnecessary and potentially significant financial burden on agencies.

Therefore, the County requests that the District add an exemption to Rule 9510 for public benefit projects that are intended to comply with current safety regulations, meet current standards, replace obsolete (but equivalent) facilities or equipment, result in repair of vital facilities or equipment, or provide other public benefits (as agreed to by the District) to ensure the general safety and welfare of the public.

Page 11-12, regarding Clarifying "Transit and Transportation Project" definition:

The County disagrees that the proposed redefinition of "transportation project" and "transit project" are merely "clarifications". The redefinition changes the status of these definitions to de facto applicability The County strongly opposes redefining "transportation project" and "transit

project" that are undertaken for public benefit to be considered as development projects subject to Rule 9510. For example, construction of a compressed natural gas or electric charging stations are necessary to fuel alternative transit vehicles (and other County maintenance vehicles). The facilities are vital to providing the fuels necessary to operate transit vehicles for persons (usually low income persons) without access to transportation (such as private vehicles). Not only are the construction activity-related emissions short-term and temporary, the vehicles' fueled at alternative fueling stations reduce and remove substantial amounts of emissions from gasoline and diesel powered motors.

Also, the County's requests the documentation demonstrating that redefining transportation and transit projects as development projects, which are clearly public benefit projects, emit such amounts of criteria pollutants that it is necessary to redefine transportation and transit projects thereby removing their exemption from Rule 9510. What are the anticipated emission reductions? What is the cost-effectiveness of this proposed amendment? (Also, see comments at Section VI, Cost Effectiveness)

As previously noted, there are many types of public benefit projects in addition to seismic safety projects that are intended to provide public safety and do not result in increased operational emissions or VMT. Such projects include flood control basins, flood berms, sewer system upgrades, and widening of existing roads (no new lanes) to meet current safety regulations (for example, shoulder widths, turn radii, sidewalks, space to accommodate guardrails, etc.). These types of projects are similar to seismic retrofits/rebuilds in that they are intended to provide public safety, the only new emissions are from the project are associated with short-term, temporary construction-related activities, and their development often are funded wholly or in large part by state or federal monies. As such, the County requests that the District consider including an exemption for Public Benefit projects as suggested earlier.

Page 9. Regarding Requirement to Report a Change in Ownership of a Project:

The County is aware of four circumstances in which a Change of Developer is required: (1) sale prior to start of construction-related activities with no changes in the project; (2) sale after the start of construction-related activities with no changes in the project; (3) sale prior to start of construction-related activities with changes in the project; and (4) sale after start of construction-related activities with changes in the project. The County is also aware that there has been an instance when an owner/developer does not submit the Change of Developer, leaving the burden of obtaining the form on the successor (new) owner/developer or the District. While Section 9.1.3 has been added to include the requirement for owners to submit the Change of Developer form, Rule 9510 does not include the AIA application submittal process for the new owner/developer (buyer) and violation procedures in the event that the previous owner/developer (seller) fails to submit the Change of Developer form. Specifically, the amendment should address the following.

- Under what circumstances is the buyer required to submit a new AIA application?

- When should this new AIA application be submitted?

- What is the process for the buyer in the event that the project was sold without notification of applicability to Rule 9510 and/or existing AIA application on file with the District and the seller cannot be located or refuses to sign the Change of Developer form?

- As the seller is responsible for the project until the Change of Developer process is complete, will the buyer incur any violations/penalties in the event that the seller does not comply?

Page 15, VI COST EFFECTIVENESS AND SOCIOECONOMIC IMPACT ANALYSIS:

We do not agree with the District's determination that a cost effectiveness and socioeconomic impact analysis is not necessary. Our reasons are as follows:

The District points out the fact that state law requires an analysis for any rule that strengthens an emission limitation. While this Rule 9510 does not limit emissions, it does require projects exceeding certain limits to mitigate those emission. The amendments to Rule 9510 requires more projects to mitigate emissions than what was evaluated under current Rule 9510. However, the thresholds are based on emissions and as emissions are based on sources, an amendment with wider applicability will require formerly exempt sources to comply with the Rule. Hence, a cost-effectiveness and socio-economic impact analysis should be conducted for the newly regulated sources.

The District states that the rule amendment addresses "... large projects that have avoided so-called discretionary decision processes, but which have always been expected to be subject to the rule..." We are concerned by the District's use of the phrase "so-called" as it has the appearance that the District is undermining a land use agency's authority to determine which projects are ministerial and which are not. Furthermore, the District appears to be contradicting itself by stating that these ministerial large development projects "have always been expected to be subject" to Rule 9510. If that was the case, the original rule should not have been specific to only discretionary development projects. Unless it was memorialized in the original rule-making effort, the District's argument is hearsay. The District also neglected to include changes in definitions that affect Rule 9510 applicability (e.g., definition of transportation project and transit project).

Page 16, ENVIRONMENTAL ASSESSMENT:

It is the County's position that the proposed amendment should undergo, at a minimum, a more robust environmental evaluation such as a Negative or Mitigated Negative Declaration via the CEQA process. It is our contention that since the original rule included only discretionary projects, amending the rule by adding requirements for ministerial projects and changing some definitions would result in real, physical changes in the environment, whether directly or indirectly.

Thank you for the opportunity to participate and comment in the Rule 9510 amendment process. Please contact Mr. Hector Guerra, Chief, Environmental Planning Division, at 624-7121 or via email at hguerra@co.tulare.ca.us if you have any questions or would like to discuss these comments.

Sincerely,

Michael Washam
Assistant Director
Economic Development and Planning Branch
Tulare County Resource Management Agency

RULE 9510 INDIRECT SOURCE REVIEW (ISR) (Adopted December 15, 2005, Amended [*Date of Adoption*])

1.0 Purpose

The purposes of this rule are to:

1.1 Fulfill the District's emission reduction commitments in the PM10 and Ozone Attainment Plans.

1.2 Achieve emission reductions from the construction and use of development projects through design features and on-site measures.

1.3 Provide a mechanism for reducing emissions from the construction of and use of development projects through off-site measures.

2.0 Applicability

2.1 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:

2.1.1 50 residential units;

2.1.2 2,000 square feet of commercial space;

2.1.3 25,000 square feet of light industrial space;

2.1.4 100,000 square feet of heavy industrial space;

2.1.5 20,000 square feet of medical office space;

2.1.6 39,000 square feet of general office space;

2.1.7 9,000 square feet of educational space;

2.1.8 10,000 square feet of government space;

2.1.9 20,000 square feet of recreational space; or

2.1.10 9,000 square feet of space not identified above.

2.2 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;

2.2.5 100,000 square feet of medical office space;

2.2.6 195,000 square feet of general office space;

2.2.7 45,000 square feet of educational space;

2.2.8 50,000 square feet of government space;

2.2.9 100,000 square feet of recreational space; or

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

2.~~2~~3 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.

1. ***County Comments/Questions for District:*** ***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 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.***

The County requests that the District provide clarification of this perceived contradiction between the District's written direction and its practices in action.

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 should include adopted and draft policies, as well as any internal processing and procedural memos, FYIs, etc. 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.

2.~~3~~4 Projects on Contiguous or Adjacent Property

2.~~3~~4.1 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 are subject to this rule.

2.~~3~~4.2 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 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.

3.0 Definitions

3.1 APCO: as defined in Rule 1020 (Definitions).

3.2 APCO-Approved Model: any computer model that estimates construction, area source and/or 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 has been approved by the APCO and EPA.

3.3 Air Impact Assessment (AIA): the calculation of emissions generated by the project and the emission reductions required by the provisions set forth in this rule. The AIA must be based solely on the information provided to the APCO in the AIA application, and must include all information listed in Section 5.6, et seq.

3.4 Air Impact Assessment (AIA) Application: the aggregate of documentation supporting the development of an AIA. This includes, but is not limited to, the information listed in Section 5.0, et seq.

3.5 Air Resources Board (ARB or CARB): as defined in Rule 1020 (Definitions).

3.6 Applicant: any person or entity that undertakes a development project.

3.7 Area Source: any multiple non-mobile emissions sources such as water heaters, gas furnaces, fireplaces, wood stoves, landscape equipment, architectural coatings, consumer product, etc., that are individually small but can be significant when combined in large numbers.

3.8 Baseline Emissions: the unmitigated NOx or PM10 emissions as calculated by the APCO-approved model.

3.9 Construction: any excavation, grading, demolition, vehicle travel on paved or unpaved surfaces, or vehicle exhaust that occurs for the sole purpose of building a development project.

3.10 Construction Baseline: the sum of baseline NOx or exhaust PM10 for the duration of construction activities for a project, or any phase thereof, in total tons.

3.11 Construction Emissions: any NOx or exhaust PM10 emissions resulting from the use of internal combustion engines related to construction activity, which is under the control of the applicant through ~~either~~ ownership, rental, lease agreements, or contract.

3.12 Contiguous or Adjacent Property: a property consisting of two or more parcels of land with a common point or boundary, or separated solely by a public roadway or other public right-of-way.

3.13 Development Project: any project, or portion thereof, that, is subject to an ~~discretionary~~ approval by a public agency, and will ultimately result in:

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

3.14 Discretionary Approval: a decision by a public agency that requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove 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.

3.15 District: the San Joaquin Valley Unified Air Pollution Control District as defined in Rule 1020 (Definitions).

3.16 Emission Reduction Measure: an activity taken or conditions incorporated in a project to avoid, minimize, reduce, eliminate, or compensate emissions estimated to occur from new development projects.

3.16.1 On-Site Emission Reduction Measure: any feature activity, device, or control technology of a project, which is incorporated into the design of that project or through other means, which will avoid, minimize, reduce or eliminate the project's emissions. All on-site emission reductions achieved

beyond District or state requirements shall count towards the mitigated baseline. City, County and other public agency requirements may also be credited towards emission reductions.

3.16.2 Off-Site Emission Reduction Measure: any feature, activity, or emission reduction project used, undertaken, or funded to compensate for a project's emission that is not part of the development project.

3.17 Indirect Source: any facility, building, structure, or installation, or combination thereof, which attracts or generates mobile source activity that results in emissions of any pollutant, or precursor thereof, for which there is a state ambient standard, as specified in Section 1.1.

3.18 Land Use: any facility, building, structure, installation, activity, or combination thereof, and the purpose, for which it is arranged, designed, intended, constructed, erected, moved, altered or enlarged on, or for which it is or may be occupied or maintained. Land use can be identified in the following categories:

3.18.1 Commercial: any facility, building, structure, installation, activity or combination thereof, that offers goods and services for sale. This can include but is not limited to wholesale and retail stores, food establishments, hotels or motels, and movie theatres.

3.18.2 Educational: any facility, building, structure, installation, activity or combination thereof, whose purpose is to develop knowledge, skill, and character. This can include but is not limited to: schools, day care centers, libraries, and churches.

3.18.3 General Office: any facility, building, structure, installation, activity or combination thereof, where the affairs of a non-medical business are conducted.

3.18.4 Governmental: any facility, building, structure, installation, activity or combination thereof, where the affairs of an entity that exercises authority over a country, or any subdivision thereof, are carried on.

3.18.5 Industrial: any facility, building, structure, installation, activity or combination thereof that creates, collects, extracts, packages, modifies, and/or distributes goods.

3.18.5.1 Light Industrial: ~~U~~usually employs fewer than 500 persons, with an emphasis on activities other than manufacturing and typically have minimal office space. Typical light industrial activities include: print plants, material testing labs, and assemblers of data processing equipment. Light Industrial tends to be free-standing.

3.18.5.2 Heavy Industrial: ~~A~~also categorized as manufacturing facilities.

Heavy Industrial usually has a high number of employees per industrial plant.

3.18.6 Medical Office: any facility, building, structure, installation, activity or combination thereof, where the affairs of a business related to the science and art of diagnosing, treating, and preventing diseases are carried on.

3.18.7 Recreational: any facility, building, structure, installation, activity or combination thereof, where individuals may relax or refresh the body or the mind. This can include but is not limited to: parks, fitness clubs, and golf courses.

3.18.8 Residential: any facility, building, structure, installation, activity or combination thereof, which provides a living space for an individual or group of individuals.

3.19 Mitigation: synonym of on-site emission reduction measure. For the purposes of this rule, mitigation is all on-site emission reductions achieved beyond District or state requirements. City, County and other public agency requirements may be counted as mitigation, and credited towards emission reductions for the mitigated baseline.

3.20 Mitigated Baseline: the NOx or PM10 emission generated by a project after on-site emission reduction measures have been applied.

3.21 Mobile Emissions: the NOx or PM10 emissions generated by motorized vehicles.

3.22 Monitoring and Reporting Schedule (MRS): a form listing on-site emission reduction measures committed to by the applicant that are not enforced by another public agency along with the implementation schedule and enforcement mechanism for each measure. The Construction Equipment Schedule constitutes a MRS for the construction phase of a development project. The format of the MRS shall be provided by the District. ~~The format of the MRS shall be provided by the District.~~

3.23 NOx: any oxides of nitrogen.

3.24 Off-Site Emission Reduction Fee (Off-Site Fee): a fee to be paid by the applicant to the District for any emission reductions required by the rule that are not achieved through on-site emission reduction measures. Off-Site Fees shall only apply to off-site emission reductions required, and shall only be used for funding off-site emission reduction projects.

3.25 Off-Site Emission Reduction Fee Deferral Schedule (FDS): a payment schedule requested by the applicant and approved by the District for Off-Site Emission Reduction Fees that ensures contemporaneous off-site emission reductions for the development project. Fee payment shall be made prior to the issuance of a building permit. The District shall provide the FDS format.

3.26 On-Site Emission Reduction Checklist (On-Site Checklist): the list provided by the District that identifies potential on-site emission reduction measures. Project applicants must identify those measures that will be implemented and those that will not. There is no minimum required to be selected for implementation.

3.27 Operational Baseline: the baseline NOx or PM10 emissions, including area source and mobile emissions, calculated by the APCO-approved model, for the first year of buildout for that project, or any phase thereof, in tons per year.

3.28 Operational Emissions: for the purposes of this rule, the combination of area and mobile emissions associated with an indirect source.

3.29 Phase: a defined portion ~~on a map,~~ or stage of a development project.

3.30 PM10 (or PM-10): as defined in Rule 1020 (Definitions).

3.31 Public Agency: any federal, state, local, or special agency that exercises discretionary powers on development activities within the San Joaquin Valley Air Basin.

3.32 San Joaquin Valley Air Basin (SJVAB): as defined in Rule 1020 (Definitions).

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~~transportation 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.

~~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.~~

3.365 Vehicle Trip: a trip by a single vehicle regardless of the number of persons in the vehicle, which is one way starting at one point and ending at another. A

'round trip' is counted as two separate trips.

4.0 Exemptions

4.1 Transportation development projects shall be exempt from the requirements in Sections 6.2 and 7.1.2.

4.2 Transit development projects shall be exempt from the requirements in Sections 6.2 and 7.1.2.

4.3 Development projects that have a mitigated baseline below two (2.0) tons per year of NOx and two (2.0) tons per year of PM10 shall be exempt from the requirements in Sections 6.0 and 7.0.

4.4 The following shall be exempt from the requirements of this rule:

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.

2. County Comment/Questions for District: The County requests that the District add an exemption for all public benefit projects that do not increase operational emissions or VMT and are intended to comply with current safety regulations, or provide public benefits or safety features for users; examples include but are not limited to flood control basins, flood berms, sewer system upgrades, and widening of existing roads (no new lanes) to meet current safety regulations (for example, shoulder widths, turn radii, sidewalks, space to accommodate guardrails, etc.).

4.4.2 Transportation development ~~P~~projects that consist solely of:

4.4.2.1 A modification of existing roads subject to District Rule 8061 that is not intended to increase single occupancy vehicle capacity, or,

4.4.2.2 Transportation control measures included in a District air quality attainment plan.

3. County Comment/Question for District: Section 4.4.2.2 exempts TCMs 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.

4.4.3 A development project on a facility whose primary functions are subject to Rule 2201 (New and Modified Stationary Source Review Rule) or Rule 2010 (Permits Required), including but not limited to the following industries:

4.4.3.1 Aggregate Mining or Processing;

4.4.3.2 Almond Hulling, Canning Operations, Food Manufacturing, Grain Processing and Storage, Vegetable Oil Manufacturing, and Wineries;

4.4.3.3 Animal Food Manufacturing;

4.4.3.4 Confined Animal Facilities;

4.4.3.5 Coatings and Graphic Arts;

4.4.3.6 Cotton Ginning Facilities;

4.4.3.7 Energy Production Plants;

4.4.3.8 Ethanol Manufacturing;

4.4.3.9 Gas Processing and Production, Oil Exploration, Production, Processing, and Refining;

4.4.3.10 Glass Plants;

4.4.3.11 Solid Waste Landfills;

4.4.3.12 Petroleum Product Transportation and Marketing Facilities.

4.5 A development project that was granted a final discretionary approval prior to March 1, 2006 shall be exempt from the requirements of this rule.

4.6 Any large development project that has received a building permit 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.

4. County Comments/Questions for District (Also see page 3 of RMA comment letter to Air District): The County requests that Exemption 4.6 be revised such that large development projects that have submitted application to the land use agency prior to the adoption of the amendment shall be exempt from the requirements of the rule.

Also, throughout the proposed amendment 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?

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.

Any 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, approval from a public agency for the project. An applicant for a large development project which has not received a building permit y the date of rule adoption shall submit an AIA application within 30 days after the rule adoption date.

5. County Comment/Question to District: See previous comments/questions (Question 4).

The AIA application shall be submitted on a form provided by the District and shall contain the following information:

5.1 Applicant name and address;

5.2 Detailed project description including, but not limited to:

5.2.1 Site Size;

5.2.2 Site Plans;

5.2.3 Proposed Project Schedule;

5.2.4 Associated Project;

5.2.5 If residential, the number and type of dwelling units;

5.2.6 If commercial, the type, square footage and loading facilities;

5.2.7 If industrial, the type, estimated employment per shift, and loading facilities;

5.2.8 Amount of off-street parking provided for non-residential projects;

5.3 On-site Emission Reduction Checklist (On-Site Checklist): The District shall provide an On-Site Checklist that includes quantifiable on-site measures that reduce operational NOx and/or PM10 emissions.

5.3.1 The applicant shall identify measures voluntarily selected and how those measures will be enforced. On-Site measures must be fully enforceable through

permit conditions, development agreements, or other legally binding instrument entered into by the applicant and the public agency; or, if the measure is not a requirement by another public agency, by a MRS contract with the District. Enforcement mechanisms can include:

5.3.1.1 Applicable local ordinance or section of a regulation that requires the measure, if any

5.3.1.2 A District approved MRS, as identified in Section 5.4 below.,

5.3.2 The applicant shall also include justification for those measures not selected.

6. <u>County Comments/Questions for District</u>: 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.

5.3.3 All selected on-site measures, regardless of enforcement mechanism, shall count towards on-site emission reductions.

5.4 Monitoring and Reporting Schedule (MRS): The District shall provide a standardized MRS format. The applicant shall include in the AIA application a completed proposed MRS for on-site emission reduction measures selected that are not subject to other public agency enforcement, and the timeline for submittal of the construction equipment schedule. A proposed MRS shall outline how the measures will be implemented and enforced, and will include, at minimum, the following:

5.4.1 A list of on-site emission reduction measures included;

5.4.2 Standards for determining compliance, such as funding, record keeping, reporting, installation, and/or contracting;

5.4.3 A reporting schedule;

5.4.4 A monitoring schedule;

5.4.5 Identification of the responsible entity for implementation;

5.4.6 Provisions for failure to comply;

7. <u>County Comments/Questions for County</u>: 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.

5.4.7 Applicants proposing on-site emission reduction measures that require

ongoing funding, shall provide evidence in the proposed MRS of continued funding, including, but not limited to:

5.4.7.1 Bonds; or

5.4.7.2 Community Service Districts; or

5.4.7.3 Contracts.

8. County Comments/Question for District: 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.

5.4.8 The schedule for submitting a construction equipment schedule.

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:

5.5.1 Identification of the person or entity responsible for payment;

5.5.2 Billing address;

5.5.3 Total required off-site operational emissions for the development project and any phase thereof;

5.5.4 Total required off-site construction emissions for the development project and any phase thereof;

5.5.5 Year of build-out, and any phase thereof;

5.5.6 Any applicable milestones;

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

5.5.7~~8~~ Payment schedule not to exceed or go beyond the issuance of a building permit. For development projects with multiple phases, the payment schedule shall connect fee deadlines for off-site emission reductions required by each phase prior to the issuance of building permits for those phases.

5.5.8~~9~~ The cost of reductions corresponding to the payment schedule;

5.5.9~~10~~ Applicable project termination and delay clauses; and

5.5.10~~11~~ Provisions for failure to comply.

5.6 Air Impact Assessment (AIA): An AIA shall be produced for the project from the project specific information identified in the AIA application. An AIA may be produced by or for the applicant. If an AIA is not provided by the applicant, the District shall perform the AIA during the AIA application review period. The AIA shall meet the following requirements:

5.6.1 The analysis of the proposed project shall be conducted according to the information provided in the application;

5.6.2 The analysis shall employ an APCO-approved model or calculator and include detailed documentation and reasons for all changes to the default input values;

5.6.3 If the AIA is conducted by or for the applicant, a hard copy and an electronic copy of all model runs conducted for the project and each phase thereof, shall be submitted;

5.6.4 The applicant shall include any other information and documentation that supports the calculation of emissions and emissions reductions;

5.6.5 The AIA shall quantify construction and operational NOx and PM10 emissions associated with the project. This shall include the estimated construction and operational baseline emissions, and the mitigated emissions for each applicable pollutant for the development project, or each phase thereof;

5.6.6 The AIA shall quantify the Off-Site Fee, if applicable.

6.0 General Mitigation Requirements

6.1 Construction Equipment Emissions

6.1.1 The exhaust emissions for construction equipment greater than fifty (50) horsepower used or associated with the development project shall be reduced by the following amounts from the statewide average as estimated by the ARB:

6.1.1.1 20% of the total NOx emissions, and

6.1.1.2 45% of the total PM10 exhausts emissions.

6.1.2 An applicant may reduce construction emissions on-site by using less-polluting construction equipment, which can be achieved by utilizing add-

on controls, cleaner fuels, or newer lower emitting equipment.

6.2 Operational Emissions

6.2.1 NOx Emissions

Applicants shall reduce 33.3%, of the project's operational baseline NOx emissions over a period of ten years as quantified in the approved AIA as specified in Section 5.6.

6.2.2 PM10 Emissions

Applicants shall reduce of 50% of the project's operational baseline PM10 emissions over a period of ten years as quantified in the approved AIA as specified in Section 5.6.

6.3 The requirements listed in Sections 6.1 and 6.2 above can be met through any combination of on-site emission reduction measures or off-site fees.

7.0 Off-site Emission Reduction Fee (Off-Site Fee) Calculations and Fee Schedules

7.1 Off-site Fee Calculations

7.1.1 Construction Activities

7.1.1.1 NOx Emissions

The applicant shall pay to the District a monetary sum necessary to offset the required construction NOx emissions not reduced on-site. The off-site fee shall be calculated as follows:

$$CN\ OF = \sum_{i=1}^{n} \left[NACE_i - (0.8 \times NSEE_i)\right] \times CNR_i$$

Where,

CN OF = Construction NOx Off-Site Fee, in dollars

i = each phase

n = last phase

NACE = Actual Estimated Equipment NOx Emissions, as documented in the APCO approved Air Impact Assessment application, in total tons

NSEE = Statewide Average Equipment NOx Emissions, as calculated by the APCO, in total tons

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.

7.1.1.2 PM10 Emissions

The applicant shall pay a monetary sum necessary to offset the required construction PM10 exhaust emissions not reduced on-site. The off-site fee shall be calculated as follows:

$$CPM\ OF = \sum_{i=1}^{n} \left[PMACE_i - (0.55 \times PSEE_i)\right] \times CPR_i$$

Where,

CPM OF = Construction PM10 Off-Site Fee, in dollars

i = each phase

n = last phase

PMACE = Actual Estimated Equipment PM10 Emissions, as documented in the APCO approved AIA application, in total tons

PSEE = Statewide average Equipment PM10 Emissions, as calculated by the APCO, in total tons

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.

7.1.2 Operational and Area Source Activities

7.1.2.1 NOx Emissions

The applicant shall pay a monetary sum necessary to offset the excess NOx emissions not reduced on-site. The off-site fee shall be calculated as follows:

$$NOxOF = \sum_{i=1}^{\left\lfloor \left(\frac{NEB_i \times 7.5}{3} \right) - (NEB \times 7.5 \times NAPOR_i) \right\rfloor} \times CNR_i$$

Where,

NOx OF = Operational NOx Off-Site Fee, in dollars

i = each phase

n = last phase

NEB = Estimated Baseline Emissions, of Operational NOx, as documented in the APCO approved AIA application, in tons per year

NAPOR = NOx Actual Percent of On-Site Reductions, as documented in the APCO approved air impact assessment application, as a fraction of one, calculated as (NEB-NOx Mitigated Baseline)/NEB

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

The applicant shall pay a monetary sum necessary to offset the excess PM10 emissions not reduced on-site for a period of ten years. The off-site fee shall be calculated as follows:

$$PM10OF = \sum_{i=1}^{n} [(PMMB - 0.5PEB_i)(10)] \times CPR_i$$

Where,

PM10 OF = Operational PM Off-Site Fee, in

dollars i = each phase

n = last phase

PEB = Estimated Baseline Emissions, of Operational PM10, as documented in the APCO approved AIA application, in tons per year

PMMB = Mitigated Baseline Emissions, as documented in the APCO approved AIA application, in tons per year

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

7.2 Fee Schedules

7.2.1 The costs of NOx reductions are as follows:

Year	Cost of NOx~~X~~ Reductions ($/ton)
2006	$4,650.00
2007	$7,100.00
2008 and beyond	$9,350.00

7.2.2 The costs of PM10 reductions are as follows:

Year	Cost of PM10 Reductions ($/ton)
2006	$2,907.00
2007	$5,594.00
2008 and beyond	$9,011.00

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~~.

7.4 The applicant shall receive credit for any off-site emission reduction measures that have been completed and/or paid for, prior to the adoption of this rule, if the following conditions have been met:

7.4.1 The prior off-site emission reduction measures were part of an air quality mitigation agreement with the APCO; or

7.4.2 The applicant demonstrates to the satisfaction of the APCO that the off-site emission reduction measures result in real, enforceable, and surplus reductions in emissions.

7.5 Refund: If a project is terminated or is cancelled, the building permit or use permit expires, is cancelled, or is voided, no construction has taken place, and the use has never occupied the site, the applicant is entitled to a refund of the unexpended Off-Site fees paid less any administrative costs incurred by the APCO. The applicant must provide a written request for the refund, with proof of the project termination, within thirty (30) calendar days of the termination. Proof of project termination can include a confirmation from a local agency of permit cancellation.

9. County Comments/Questions for District: 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.?

7.6 The APCO may adjust the cost of reductions according to the following process:

7.6.1 An Analysis shall be performed that details:

7.6.1.1 The cost effectiveness of projects funded to date;

7.6.1.2 The rule effectiveness of achieving the required emission reductions to date;

7.6.1.3 The availability of off-site emission reduction projects;

7.6.1.4 The cost effectiveness of those projects.

7.6.2 The APCO shall provide a draft revised cost effectiveness based on the analysis.

7.6.3 The process shall include at least one public workshop.

8.0 Administrative Process

8.1 Completeness of the AIA application: The APCO shall determine whether the application is complete and contains the necessary information no later than ten (10) calendar days after receipt of the application, or after such longer time as agreed to by both the applicant and the APCO.

8.1.1 Should the application be deemed incomplete, the APCO shall notify the applicant in writing of the decision and shall specify the additional information required. Resubmittal of any portion of the application begins a new ten (10) day calendar period for the determination of completeness by the APCO.

8.1.2 Completeness of an application or resubmitted application shall be evaluated on the basis of the information requirements set forth in the District Rules and Regulations as they exist on the date on which the application or resubmitted application is received.

8.1.3 The APCO shall notify the applicant in writing that the application is deemed complete.

8.2 Public Agency Review of the proposed project: The APCO shall forward a copy of the AIA application, including the MRS (if applicable) to the relevant public agencies for review. The public agencies may review and comment at any time on the provisions of the MRS. Comments received by the APCO shall be forwarded to the applicant. The proposed MRS may be modified, if necessary, based on the input from the public agency. If any changes result from their comments, the APCO shall make the appropriate changes and provide the applicant a revised Off-Site Fee, if applicable. No section or provision within this rule requires action on the part of the public agency.

8.3 APCO Evaluation of the AIA Application: The AIA application shall be evaluated for content.

8.3.1 If the applicant submits an AIA, the APCO will evaluate the modeling inputs and calculations.

8.3.2 If the applicant does not submit an AIA, the APCO will complete an AIA from the information contained in the AIA application.

8.3.3 The APCO may, during the evaluation of the application, request clarification, amplification, and any correction as needed, or otherwise supplement the information submitted in the application. Any request for such information shall not count towards the time the APCO has to provide notice of approval or disapproval. The clock shall resume once the APCO has received the requested information.

8.4 AIA Approval: The APCO shall notify the applicant in writing of its decision

regarding the AIA application and its contents within thirty (30) calendar days after determination of an application as complete and provide the following in writing to the applicant, the public agency, all interested parties as identified by the developer, and make available to the public.

8.4.1 APCO approval determination of the AIA application;

8.4.2 The required emission reductions;

8.4.3 The amount of on-site emission reduction achieved;

8.4.4 The amount of off-site emission reduction required, if applicable;

8.4.5 The required Off-Site Fee if applicable;

8.4.6 A statement of tentative rule compliance;

8.4.7 A copy of the final MRS, if applicable; and

8.4.8 An approved FDS, if applicable.

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.

8.6 Fee Deferral Schedule: In the event that the applicant had not previously submitted FDS in the AIA application, but desires one, the applicant shall ensure that the proposed FDS is submitted to the APCO no later than fifteen (15) calendar days after receipt of the AIA Approval. The District shall have fifteen (15) calendar days to approve the FDS request.

8.7 MRS Compliance: After the APCO approves the AIA application and its contents; the APCO shall enact the MRS contract, if applicable. The applicant is responsible for implementation and/or maintenance of those measures identified within the MRS. Upon completion of Monitoring and Reporting, the District shall provide to the applicant, the public agency, and make available to the public, an MRS Compliance letter.

8.7.1 Operational On-Site Measures: On-site emission reduction measures that are active operational measures, such as providing a service, must be implemented for 10 years after buildout of the project, if applicable.

8.7.2 Construction Equipment Schedule: The construction equipment schedule shall be submitted to the District if identified in the MRS prior to the start of construction, but not to exceed the issuance of a grading permit, if applicable.

8.8 In the event the applicant significantly changes the AIA application or any portion thereof during the Administrative Process, the APCO shall re-start the evaluation process pursuant to Section 8.3.

9.0 Changes to the Project

9.1 Changes Proposed By The Applicant

9.1.1 The applicant may substitute equivalent or more effective on-site emission reduction measures upon written approval from the APCO.

9.1.2 Changes in the project or to the build-out schedule that increase the emissions associated with the project shall require submission of a new AIA application. A new AIA shall be conducted and the off-site fees shall be recalculated in accordance with the applicable provisions of this rule. The APCO shall notify the applicant of the new off-site fees, the difference of which shall be payable by the due date specified on the billing invoice.

9.1.3 I

f 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.

9.2 Changes Required By The Public Agency or Any Court Of Law

Project changes that result in an increase in the emissions shall require submission of a new AIA application within 60 days of said changes, or prior to the start of project construction, whichever is less. A new AIA shall be conducted and the off-site fees shall be recalculated in accordance with the applicable provisions of this rule.

10.0 APCO Administration of the Off-Site Fee Funds

10.1 The District shall establish and maintain separate accounts for NOx and for PM10 for funds collected under this rule. Any off-site fees collected by the District shall be deposited into these accounts.

10.2 The District shall utilize monies from the accounts to fund quantifiable and enforceable Off-Site projects that reduce surplus emissions of NOx and PM10 in an expeditious manner.

10.2.1 The District shall set forth funding criteria for each category of off-site projects that may be funded by this rule.

10.2.2 The District shall ensure that the emission reductions calculations for the off-site projects are accurate.

10.2.3 If the off-site project involves the replacement of existing equipment, the District shall inspect the existing equipment.

10.2.4 The District shall enter into a binding contract with the applicant of the off-site project, which will, at minimum, require an annual report from the applicant that includes information necessary to ensure that emissions reductions are actually occurring.

10.2.5 The District shall conduct inspections on the off-site project to verify that the project is installed or implemented and operating for the life of the contract.

10.2.6 The District may substitute NOx reductions for PM10 in a 1.5 to 1 ratio.

10.3 Any interest that accrues in the off-site account(s) shall remain in the account, to be used in accordance with Section 10.2 above.

10.4 The District shall prepare an annual report that will be available to the public regarding the expenditure of those funds, and shall include the following:

10.4.1 Total amount of Off-Site Fees received;

10.4.2 Total monies spent;

10.4.3 Total monies remaining;

10.4.4 Any refunds distributed;

10.4.5 A list of all projects funded;

10.4.6 Total emissions reductions realized; and

10.4.7 The overall cost-effectiveness factor for the projects funded.

~~11.0 Effective date of this rule~~

~~The provisions of this rule shall become effective on March 1, 2006.~~

PO Box 2722
Visalia, CA 93279
559/733-3737
559/733-8156 fax
www.visaliaedc.com
nlockwood@
thelockwoodagency.net

May 20, 2016

Oliver L. Baines III, Chair
San Joaquin Valley Air Pollution Control District
1990 E. Gettysburg Ave.
Fresno, CA 93726

RE: Opposition to Proposed Amendment to Indirect Source Rule 9510

Mr. Baines:

As a non-profit committed to recruiting and retaining employers who can put our residents to work, we strongly oppose the proposal to expand Rule 9510 to include projects previously considered exempt.

The Rule was originally created to apply only to new development – projects that received discretionary approval prior to March 1, 2006. Expanding this rule to exempt projects will impede our ability to compete for new employers and serve as a major setback to the progress Visalia and other Valley cities have made in reducing our region's chronically high unemployment rate.

We also must point out that the City of Visalia is on its way toward meeting its reduction target of 30 percent below 2005 baseline year level by 2030. The city's strategy does not include a drastic expansion of projects applicable to Rule 9510.

Broadening the scope of the Rule is not likely to help clean our air – and it is highly likely to harm efforts to create jobs and opportunities for people from throughout Tulare and Kings counties.

We respectfully ask that you consider the potential impacts of the expansion and remove the expansion of the rule's applicability to "large development projects."

Sincerely,

Nancy Lockwood, Executive Director
Visalia Economic Development Corporation

RLG
Roll Law Group

CRAIG B. COOPER
craig.cooper@wonderful.com

May 23, 2016

Mr. Brian Clements, Program Manager
San Joaquin Valley Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno, CA 93726

Re: SJVAPCD Rule 9510 Indirect Source Review Rule - Proposed Amendments

Dear Mr. Clements,

Roll Law Group PC, on behalf of the Wonderful Company ("TWC"), has reviewed the San Joaquin Valley Air Pollution Control District's ("District") proposed amendments to District Rule 9510 – Indirect Source Review, and we appreciate the opportunity to provide comments regarding these proposed amendments.

The Wonderful Company and its related entities farm and market pistachios, almonds, pomegranates, and various citrus varietals across California's Central Valley. As a diverse agricultural operation, we can appreciate the challenges that the District faces in improving the air quality throughout the San Joaquin Valley. Further, we understand the reasons why the District promulgated Rule 9510 in 2006. In the decade that has followed, developers and operations, such as TWC, have acquired land that complied with applicable land-use regulations for various planning and development agencies throughout the Valley. Many of these acquisitions were predicated on those certain entitlements that came with the land and which increased the cost of those acquisitions significantly. Consequently, we believe the District's proposed amendments present potentially significant impacts to planned growth and business expansion opportunities throughout the San Joaquin Valley. As such, we believe the District must consider these impacts and the various implications that the proposed amendments portend for the regulated community, residents, and business environment. With this in mind, the Wonderful Company provides the following comments:

- **Amended Section 2.2 Contradicts Section 4.5**
  Section 2.2 – Applicability – The amended section states *"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:..."* While Section 4.5 – Exemptions, seems to contradict this by stating, *"A development project that was granted a final discretionary approval prior to March 1, 2006 shall be exempt from the requirements of this rule."*

  It is unclear whether or not development projects that were exempt from the rule prior to this proposed amendment would remain exempt. The District should clarify the discrepancy noted

between these two sections. Is a large development project that only needs ministerial approval exempt from ISR or not? We believe such projects should remain exempt for a number of reasons, explained further below.

- **Uncompensated "Taking" of Private Property**
  First, if intended to not exempt previously entitled projects, the proposed amendment would constitute an uncompensated taking of private property which is prohibited by the Takings Clause in the U.S. and California constitutions whose purpose is to "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 80 S. Ct. 1563, 1569 (1960). The imposition of mitigation fees that are not directly connected to the impact caused by the potentially affected development projects is functionally equivalent to a land use exaction. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014). The proposed amendment to Rule 9510, would on its face, constitute an extortionate demand amounting to an uncompensated taking. Further, if the proposed changes were made to Rule 9510, it would, in effect result in the de facto denial of non-discretionary approval of development projects which violates due process rights. See, *Galland v. City of Clovis*, 24 Cal. 4th 1003, 1035, as modified (Mar. 21, 2001).

- **The Amendment Violates the Equal Protection Clause**
  Further, if intended to cover already entitled projects not subject to discretionary approvals, the amendment violates the equal protection clause by singling out a small number of entities, including the Wonderful Company, to submit to regulatory and financial burdens which are not imposed on other developers within the State. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co.*, 43 S.Ct. 190, 191 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S.Ct. 495 (1918)). The equal protection guarantee protects the disparate treatment of not only groups but also individuals who would constitute a "class of one." *Vill. of Willowbrook v. Olech*, 120 S.Ct. 1073, (2000); *SeaRiver Maritime Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir.2002). A successful equal protection claim can be brought by a "class of one" where, as here, an individual has been intentionally treated differently from others similarly situated and there is no rational basis for the difference. *Id.* The proposed amendment to the rule would result in this type of disparate treatment based on an arbitrary and irrational assessment of mitigation fees.

- **District Has Not Provided a Cost/Benefit Analysis or Disclosed Financial Impacts Posed by These Amendments**
  The District's April 26, 2016 Staff Report on the proposed amendment fails to disclose the financial impacts to the District and to the regulated community posed by the amendment. The

District is required to provide the socio-economic impacts, including the cost of compliance, of proposed amendments to existing rules prior to enactment. See *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2711 (2015).

- <u>District Has Not Disclosed Impacts to the Environment Posed by These Amendments</u>
  The District's April 26, 2016 Staff Report on the proposed amendment fails to disclose the impacts to the environment, and specifically the San Joaquin Valley Air Basin, posed by the amendment. Nor has the District disclosed why, from an air quality perspective, these amendments are necessary. Are these amendments required for the District to attain goals established in the Clean Air Act or the most current State Implementation Plan (SIP)? Is there a need from a scientific perspective why these amendments are needed at this time? None of these issues have been addressed.

We appreciate the opportunity to provide additional feedback on these proposed amendments, and are available to discuss our thoughts, comments, and questions should the District require additional information.

Sincerely,

Craig Cooper

Craig B. Cooper
Roll Law Group PC

Cc: John Guinn
Lisa Stilson
Melissa Poole