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Air That Kills

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"The residents of the San Joaquin Valley breath 'an air that kills'" due to the existing dangerous levels of particulate matter and ozone pollution in the Valley. Attempting to combat the poor air quality, the San Joaquin Valley Unified Air Pollution Control District promulgated Rule 9510, which regulates emissions from

development projects.

The rule applies to various types of development projects, including those that involve: 50 or more residential units, 2,000 square feet of commercial space, 25,000 square feet of light industrial space or 9,000 square feet of educational space. All development projects covered by Rule 9510 are required to undergo an air impact assessment, which uses computer modeling to estimate the construction and operation air emissions of the proposed development if no mitigation measures are applied. This creates a baseline emissions level from which proposed developments must show between a 20 percent and 50 percent reduction in operational emissions and from construction equipment with greater than 50 horsepower through either the application of add-on controls, cleaner fuels, or more advanced equipment. Alternatively, a developer may pay fees for each ton of emissions that is not mitigated. The district charges approximately \$9,000 per ton of unmitigated emissions. These fees are used by the district to fund emissions reductions elsewhere.

In *National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District* 2010 U.S. App. LEXIS 24892 (9th Cir. Cal. Dec. 7, 2010), the National Association of Home Builders (NAHB) challenged Rule 9510's regulation of construction equipment emissions as being pre-empted by the Federal Clean Air Act, but lost at the trial court level. On appeal, the 9th U.S. Circuit Court of Appeals held in a 2 to 1 decision that the Clean Air Act did not pre-empt Rule 9510, and that the district was free to regulate the air emissions from new development projects as indirect sources.

The Clean Air Act prevents a state or local municipality from enforcing air quality regulations against off-road mobile sources, such as construction equipment, without

prior approval by the Environmental Protection Agency. Section 110(a)(5) of the Clean Air Act does, however, authorize states and local municipalities to adopt "indirect source review programs." An indirect source review program is one that provides a facility-by-facility review of indirect sources of air pollution, and includes measures necessary to assure, or assist in assuring, that a new or modified indirect source (buildings, parking lots, or real property, etc.) will not attract mobile sources of air pollution. However, "direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources..."

The NAHB argued that Rule 9510 was not a proper indirect source review program, but rather, an impermissible attempt to regulate emissions from direct off-road sources such as construction equipment. NAHB argued that two provisions in the Clean Air Act pre-empted Rule 9510. The first provision, Section 209(e)(2), expressly prohibits states from "adopt[ing] or attempt[ing] to enforce any standard or other requirement relating to the control of emissions [from] new engines" smaller than 175 horsepower, "which are used in construction equipment or vehicles." The court held that this section did not pre-empt Rule 9510 because it only applied to "new" equipment, which was defined as "showroom new," not to the regulation of already-purchased construction equipment being used in the field.

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The second provision, Section 209(e)(2), "impliedly preempts 'standards and other requirements relating to the control of emissions' from any non-road vehicles or engines." The court held that Rule 9510 was not pre-empted by Section 209(e)(2) because it evaluated the emissions from indirect sources, specifically new development sites, rather than from direct sources such as construction equipment. The court noted that Rule 9510 required emission reductions from construction equipment associated with a new development, but that fact did not prevent the regulation of indirect sources such as development sites. Rather, the court justified its decision on the grounds that the "regulation of emissions from an indirect source necessarily regulates emissions from direct sources." As the court stated, "[i]f an indirect source review program could not attribute the emissions from mobile sources, while they are stationed at an indirect source, to the indirect source as a whole, states could not adopt any indirect source review program."

The court also distinguished the *Engine Manufacturers Ass'n v. South Coast Air Quality Management District* (2004) 541 U.S. 246 and *Pacific Merchant Shipping Ass'n v. Goldstene* (9th Cir 2008) 517 F.3d 1108 opinions from the instant decision. The *South Coast* case dealt with the question of whether a local air district rule was pre-empted where it required that local fleets of vehicles - street sweeps, airport taxicabs, and solid waste collection vehicles, etc. - to purchase or lease certain low-emissions vehicles when adding or replacing vehicles in their fleets. In *Pacific Merchant*, the question was whether a California rule requiring emission limitations on oceangoing

diesel engines were pre-empted. In both *South Coast* and *Pacific Merchant* the courts' had found the rules in question to be pre-empted. The court distinguished these cases by noting that in the *South Coast* and *Pacific Merchant* decisions, vehicles were being directly regulated, while in the instant case only indirect sources were being regulated with some effect on direct emission sources.

Judge N. Randy Smith dissented from the majority on the issue of preemption by Section 209(e)(2). Judge Smith argued that while Rule 9510 starts with a baseline analysis of the emissions of an entire development, it only required emission reductions from construction equipment. As such, it should be pre-empted under federal law. Judge Smith noted that if Rule 9510 had simply provided for the regulation of the emissions from the development project rather than from construction equipment, then he would not have found the regulation to be pre-empted.

The court's decision in *NAHB v. San Joaquin Valley Unified Air Pollution Control District* upholds state regulation of indirect sources of air contaminants, even where such regulation affects mobile sources normally regulated exclusively by the EPA. While the court's decision only directly pertains to San Joaquin's Rule 9510, the decision will likely have far reaching consequences throughout the country as it will serve to support aggressive and targeted indirect source regulations in other California air district's, as well as in other states. With the expansion of indirect source review programs, developers can expect to face significant increases in emission reduction targets as well as emission fees.

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