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LOCAL AIR DISTRICT RULE REQUIRING DEVELOPMENT SITES TO REDUCE AMOUNT OF POLLUTANTS EMITTED NOT PREEMPTED BY THE CLEAN AIR ACT

National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District, No. 08-17309, (9th Cir., December 7, 2010)

By *Kyndra Joy Casper*

In *NAHB v. San Joaquin Valley UAPCD*, the United States Court of Appeal for the Ninth Circuit held that Rule 9510, the San Joaquin Valley Unified Air Pollution Control District's (the "District") rule requiring development sites to reduce the amount of air pollutants they emit, was not preempted by the Clean Air Act (the "CAA"). The Court found that Rule 9510 was a proper "indirect source review program" and thus, was not preempted.

Generally speaking, the CAA gives the states the job of regulating stationary sources of pollution, but the Environmental Protection Agency (the "EPA"), and with the EPA's permission California, are responsible for regulating emissions from motor vehicles and other mobile sources.

In response to levels of ozone, PM10 and PM2.5 that violated national air quality standards, the District adopted Rule 9510, which requires development sites to reduce the amount of pollutants they emit. Rule 9510 applies to various types of development projects, including, but not limited to those that involve: (1) 50 or more residential units, (2) 2,000 or more square feet of commercial space, or (3) 25,00 square feet of light industrial 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% and 45% reduction in emissions through either the application of add-on controls, cleaner fuels, or more advanced equipment. Alternatively, a developer may pay fees to the District that are then used to fund emissions reductions elsewhere.

The District adopted Rule 9510 under section 110(a)(5) of the Act, a provision addressing "indirect sources," which do not fit neatly into the categories of stationary source and mobile source. Section 110(a)(5) authorizes the states to adopt "any indirect source review program." 42 U.S.C. § 7410(a)(5)(A)(i). An indirect source review program means "the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution" that would contribute to exceeding the national air quality standards or would prevent the maintenance of those standards. *Id.* § 7410(a)(5)(D).

On June 6, 2007, NAHB filed a complaint in federal court asserting, among other claims, that the CAA preempts the provisions of Rule 9510 that address emissions from construction equipment. The district court allowed the Environmental Defense Fund and the Sierra Club ("Intervenors") to intervene to defend Rule 9510 along with the District. On cross-motions for summary

judgment, the district court granted summary judgment to the District and Intervenors and denied it to NAHB. NAHB appealed.

NAHB argued that Rule 9510 regulates emissions from non-road vehicles, a task that the CAA prevents California from attempting without first securing the EPA's approval. NAHB asserted that section 209(e)(1) of the CAA expressly preempts, and section 209(e)(2) of the CAA impliedly preempts, Rule 9510's regulation of construction equipment.

The first provision, section 209(e)(1), 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 preempt Rule 9510 because it only applied to "new" equipment, which was defined as "showroom new," and none of the construction equipment regulated could possibly be "showroom new."

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 preempted by section 209(e)(2) because it evaluated the emissions from indirect sources pursuant to section 110(a)(5), specifically new development sites, rather than from direct sources such as construction equipment. The court explained that that emissions from any indirect source come from the direct sources located there. Accordingly "[i]f an indirect source review program were not allowed in some circumstances to impute direct sources of emissions to an indirect source as a whole, there could be no regulation of the emissions from indirect sources and no indirect source review program could exist."

The court further reasoned that Rule 9510 does not target direct sources apart from its regulation of the indirect source as a whole. Accordingly the plain language of section 110(a)(5) affirmatively authorized Rule 9510. A development site qualifies as "real property," or a "facility," "structure," or "installation," all indirect sources per the CAA. By measuring emission and requiring reduction based on development sites as a whole, Rule 9510 qualified as a "facility-by- facility" review of indirect sources.

Judge Smith dissented from the majority on the issue of preemption by section 209(e)(2). Judge Smith argued that Rule 9510 was preempted because it did not qualify as an "indirect source review program," since it directly regulates construction equipment (which are direct emissions sources) and it creates an emissions control "standard" for construction equipment that has not been approved by the EPA.

The court's decision in *NAHB v. San Joaquin Valley UAPCD* upholds state regulation of indirect sources of air pollutants by regulating mobile sources that are normally regulated exclusively by the EPA. The court's decision is likely have far reaching effects as it may serve to support similar targeted indirect source regulations in other states.

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