

# *National Association of Home Builders v. San Joaquin Valley Air Pollution Control District: Ninth Circuit Directly Authorizes Regulation of Indirect Emissions Sources*

## INTRODUCTION

In *National Ass'n of Home Builders v. San Joaquin Valley Air Pollution Control District (NAHB)* the Ninth Circuit determined that the Clean Air Act (CAA) did not preempt a local rule capping exhaust emissions from mobile “non-road” construction equipment at development sites in the San Joaquin Valley.<sup>1</sup> Historically, the Environmental Protection Agency (EPA) had exclusive authority to regulate emissions from mobile sources.<sup>2</sup> However, the court found that, because the local rule does not set emissions limits on individual vehicles or engines and instead curbs emissions on a “facility-by-facility” basis,<sup>3</sup> the CAA in fact authorizes the local rule through the indirect source review program.<sup>4</sup>

In upholding the validity of the rule, the court resolved an apparent inconsistency between two sections of the CAA: the indirect source review program allows states to limit pollution from indirect sources,<sup>5</sup> which include non-road mobile sources like construction equipment, while the CAA’s mobile source provisions expressly preempt state regulation of emissions from non-road mobile sources.<sup>6</sup> The decision expanded the power of local governments

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1. *Nat'l Ass'n of Home Builders v. San Joaquin Valley Air Pollution Control Dist. (NAHB)*, 627 F.3d 730, 734–35 (9th Cir. 2010), cert. denied, 132 S. Ct. 369 (2011).

2. See *Engine Mfrs. Ass'n v. EPA (EMA)*, 88 F.3d 1075, 1079 (D.C. Cir. 1996).

3. *NAHB*, 627 F.3d at 740.

4. 42 U.S.C. § 7410(a)(5)(D) (2006).

5. The CAA defines an “indirect source” as a “facility, building, structure, installation, real property, road, or highway, which attracts, or may attract, mobile sources of pollution.” *Id.* § 7410(a)(5)(C).

6. Title II of the CAA governs the regulation of mobile sources. 42 U.S.C. §§ 7521–7590 (2006). The Act divides mobile sources into three categories: on-highway motor vehicles (for example, cars, trucks, and buses), aircraft, and non-road vehicles, which is a catch-all category for self-propelled equipment not used on the highways. Some examples include cranes, forklifts, tractors, lawnmowers, chainsaws, motorboats, locomotives, and airport ground service equipment. Michael J. Horowitz,

and agencies to control air pollution consistent with one of the main objectives of the CAA, which is to give states primary responsibility over pollution control.<sup>7</sup> However, because the court's approval of the rule depended largely on the nature of the indirect source being regulated, mobile non-road construction equipment, indirect sources are not categorically permissible after *NAHB*. The court's reasoning requires that administrative agencies and courts continue to evaluate subsequent indirect source rules on a case-by-case basis to determine whether they indirectly impose standards on vehicles.<sup>8</sup>

## I. BACKGROUND

### A. *Air Pollution Control in the San Joaquin Valley*

In 2005, the San Joaquin Valley Air Pollution Control District (District) promulgated Rule 9510 as part of its continuing efforts to meet and maintain the National Ambient Air Quality Standards (NAAQS) set by the EPA.<sup>9</sup> For years, the Valley<sup>10</sup> has had trouble<sup>11</sup> reducing levels of particulate matter (PM<sub>10</sub>) and nitrogen oxide (NO<sub>x</sub>), which is a precursor to ozone.<sup>12</sup> As a result, the area has some of the nation's worst air pollution.<sup>13</sup> Growth in population and corresponding construction projects continue to increase air pollution, which will make it harder to achieve NO<sub>x</sub> standards and maintain PM<sub>10</sub> standards in the coming years.<sup>14</sup> Rule 9510 caps emissions from construction projects to help the District fulfill its emission reduction commitments for NO<sub>x</sub>

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*Regulation of Mobile Sources: Motor Vehicles, Nonroad Engines, and Aircraft*, in THE CLEAN AIR ACT HANDBOOK 351 (Julie R. Domike & Alec C. Zaccaroli, eds., 3d ed. 2011).

7. 42 U.S.C. § 7401(a)(3).

8. *Id.* § 7410(a)(5)(D).

9. Local air districts, like the San Joaquin Valley Air Pollution Control District, implement and enforce rules to maintain compliance with the NAAQS. The districts may also formulate rules to achieve compliance, which are compiled by the State and sent to EPA for approval and integration into the State Implementation Plan (SIP), which then becomes part of federal law. *Nat'l Ass'n of Home Builders v. San Joaquin Valley Air Pollution Control Dist.*, No. CV F 07-0820 LJO DLB, 2008 WL 4330449, at \*3 (E.D. Cal. Sept. 19, 2008), *aff'd*, 627 F.3d 730 (9th Cir. 2010).

10. The term "Valley" refers to the geographic area under the control of the San Joaquin Valley Air Pollution Control District, namely, the counties of San Joaquin, Stanislaus, Merced, Madera, Fresno, Kings, Tulare, and a portion of Kern. Press Release, San Joaquin Valley Air Pollution Control District, District's Developer Rule Stands (Oct. 3, 2011), *available at* [http://www.valleyair.org/recent\\_news/recent\\_district\\_news.htm](http://www.valleyair.org/recent_news/recent_district_news.htm).

11. In 2001, the Valley missed a deadline for achieving the federal PM<sub>10</sub> standard. *Nat'l Ass'n of Home Builders*, 2008 WL 4330449 at \*3-4. Although the Valley finally attained this standard in 2006, it has not yet achieved the NAAQS for ozone. U.S. Env'tl. Prot. Agency, *8-Hour Ozone Nonattainment State/Area/County Report*, THE GREEN BOOK (Mar. 30, 2012), <http://www.epa.gov/oaqps001/greenbk/gncs.html#CALIFORNIA>.

12. Brief for Respondent at 16, *NAHB*, 627 F.3d 730 (9th Cir. 2010) (No. 08-17309) (cataloguing statistics for incidence of respiratory disease among Valley residents).

13. *Id.* at 18.

14. Brief for Respondent, *supra* note 12, at 19-20.

and PM<sub>10</sub>.<sup>15</sup> The rule requires individuals seeking approval for development permits to calculate, using an approved computer model, the site's construction emissions.<sup>16</sup> If the model estimates indicate that the project will emit NO<sub>x</sub> and PM<sub>10</sub> in excess of an approved level the builder must develop and implement on-site emission reduction measures.<sup>17</sup> Alternatively, the developer may pay an off-site emissions reduction fee<sup>18</sup> that the District may then use to obtain an equivalent reduction in emissions elsewhere.<sup>19</sup>

### B. Mobile Source Preemption Under the Clean Air Act

The CAA identifies sources of pollution, defines and sets limits on pollutants, and divides enforcement responsibility between states and the federal government.<sup>20</sup> Although the division of pollution control responsibility has generally elicited tension between different levels of government, nowhere is this more pronounced than in the regulation of emissions from mobile sources, given the ability for such sources to cross state boundaries and thus be subject to the regulations of multiple states.<sup>21</sup> At the time Congress drafted the CAA, the automobile industry was concerned that a failure to expressly preempt state automobile-emissions standards would subject manufacturers to fifty different, state-specific standards.<sup>22</sup> On the other hand, California wanted to set its own standards because it feared that the federal government would not adequately address its unique and severe air quality problems.<sup>23</sup> Congress balanced both concerns when it prevented states or political subdivisions from adopting or enforcing any standard "relating to the control of emissions from new motor vehicles or new motor vehicle engines," but allowed California to set standards at least as stringent as federal air pollution limits, subject to EPA approval.<sup>24</sup>

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15. Indirect Source Review, Rule 9510 (Dec. 15, 2005), available at <http://www.valleyair.org/rules/1ruleslist.htm>.

16. *Id.* § 5.6.

17. If a developer's project uses a combination of engines and vehicles greater than fifty horsepower in such a manner and for such a time that the construction project is calculated to produce less than 20 percent of the NO<sub>x</sub> and 45 percent of the PM<sub>10</sub> emissions from a "baseline" level calculated by the model, no further action is necessary. *NAHB*, 627 F.3d 730, 732 (9th Cir. 2010). Emission reduction measures include plans to use less-polluting equipment by utilizing add-on controls, cleaner fuels, or newer models of construction equipment. Indirect Source Review, Rule 9510 § 6.1.2.

18. *Id.* at § 7.0.

19. *Nat'l Ass'n of Home Builders v. San Joaquin Valley Air Pollution Control Dist.*, No. CV F 07-0820 LJO DLB, 2008 WL 4330449, at \*7 (E.D. Cal. Sept. 19, 2008).

20. See Horowitz, *supra* note 6, at 351.

21. The term "mobile source" refers not only to automobiles, trucks, and buses, but also to motorcycles, airplanes, ships, locomotives, and non-road engines and vehicles like tractors, bulldozers, lawnmowers, forklifts, and rototillers. ROY S. BELDEN, *CLEAN AIR ACT* 155 (2d ed. 2011).

22. See Horowitz, *supra* note 6, at 352.

23. See *id.*

24. For the portion of the CAA that governs mobile source emissions, see 42 U.S.C. § 7543(a)-(b) (2006) (Clean Air Act §§ 209(a)-(b)).

Congress used a similar two-pronged approach to regulate non-road mobile sources.<sup>25</sup> CAA section 209(e)(1)(A) prohibits states from adopting or attempting to enforce “any standard or other requirement relating to the control of emissions from new non-road mobile sources smaller than 175 horsepower”; however, section 209(e)(2)(A) allows California to adopt standards more stringent than federal standards regulating non-road mobile sources, subject to EPA approval.<sup>26</sup>

## II. THE NINTH CIRCUIT RULING

### A. *Rule 9510 did not Violate the CAA’s Express Prohibition on State Regulation of Emissions from new Mobile Sources*

The National Association of Homebuilders (NAHB) argued that CAA section 209(e)(1)(A) preempted Rule 9510 because the rule, which limited emissions from engines and vehicles larger than fifty horsepower, operated as a regulation of new mobile sources smaller than 175 horsepower.<sup>27</sup> The Ninth Circuit found that, although section 209(e)(1)(A) absolutely preempts state regulation of new vehicles smaller than 175 horsepower, the provision only applies to “showroom new” vehicles.<sup>28</sup> The court determined that, because Rule 9510 would only affect vehicles used at development sites, the CAA’s express preemption provision specific to new vehicles was not applicable to this case.<sup>29</sup>

### B. *Rule 9510 did not Violate the CAA’s Requirement that EPA Approve California’s Regulation of Motor Vehicle Emissions*

NAHB also argued that by regulating indirect sources generally, Rule 9510 is invalid under CAA section 209(e)(2), which allows more stringent mobile emissions standards in California subject to EPA approval, because EPA did not approve the standard.<sup>30</sup> The court found that a cap on emissions from non-road equipment did not constitute a “standard” as defined by section 209(e)(2).<sup>31</sup> The court did not directly articulate whether a cap alone qualifies as a standard, but found that Rule 9510 did not impose a standard “relating to the control of emissions from [non-road] vehicles or engines” that would violate the CAA.<sup>32</sup> The court found that relevant cases referred only to regulations that limited emissions from individual vehicles and thus were

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25. The 1990 amendments to the Act introduced provisions regulating emissions from non-road engines. Horowitz, *supra* note 6, at 355.

26. 42 U.S.C. § 7543(e)(1)(A), (2)(A).

27. *See id.* § 7543(e)(1); Brief for Petitioner at 47, NAHB, 627 F.3d 730 (9th Cir. 2010) (No. 08-17309).

28. NAHB, 627 F.3d at 735.

29. NAHB, 627 F.3d at 735.

30. Brief for Petitioner, *supra* note 27, at 3.

31. NAHB, 627 F.3d at 738.

32. *Id.* (quoting 42 U.S.C. § 7543(a)).

inapposite; the court did not find any cases with rules that limited emissions from particular geographic areas like Rule 9510 does.<sup>33</sup>

Although the court conceded that a cap on emissions that applies to an entire fleet would constitute a “standard” preempted by the CAA, it determined the CAA did not preempt Rule 9510 because it did not regulate a fleet, but instead regulated an indirect source in which a variety of vehicles could be used.<sup>34</sup> The fact that Rule 9510 would reach many types of equipment operating at a construction site was determinative to the court because the rule would not regulate only one vehicle model.<sup>35</sup>

*C. Rule 9510 is Valid Because the CAA Expressly Allows States to Regulate Indirect Sources*

The court further determined that CAA section 110(a)(5) affirmatively authorized Rule 9510.<sup>36</sup> The court concluded that since the CAA expressly allows states to regulate indirect sources, it “necessarily contemplates” imputing mobile, non-road pollution sources to an indirect source as a whole.<sup>37</sup> The court acknowledged that if the proviso were read to prohibit regulation of mobile sources while they are at indirect sources, there could be no indirect source review program.<sup>38</sup>

### III. DISCUSSION

*A. Rule 9510 Will Allow Localities to Control Vehicle Emissions, but is Consistent with the CAA’s Focus on State-Based Pollution Control.*

Rule 9510 aimed to regulate all emissions over the lifetime of a development project, including those from the “construction” phase and those from the “operational” phase.<sup>39</sup> In his dissent, Judge Smith objected to the majority’s conclusion that Rule 9510 regulates emissions from a single indirect source by noting that the language specifically requires that developers reduce emissions from construction equipment greater than fifty horsepower.<sup>40</sup> Judge

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33. *Id.* at 739 (citing *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (holding that Clean Air Act preempted rule prohibiting purchase of vehicles that did not meet emissions standards); *Pac. Merch. Shipping Ass’n v. Goldstene*, 517 F.3d 1108 (9th Cir. 2008) (holding that rule prohibiting emissions from ships in excess of a rate that would result from the use of particular fuels, which could be precisely quantified, was a standard)).

34. *NAHB*, 627 F.3d at 740.

35. *Id.*

36. *Id.* at 737.

37. *Id.* at 739.

38. *Id.* at 736. The court’s decision that the mobile source provision did not preempt the indirect source provision was influenced heavily by the legislative history of the CAA. It found persuasive the fact that EPA’s initial attempt to regulate indirect sources was met with “heavy criticism” because it represented a “significant federal intrusion into the traditionally local domain of land use control” and was later abandoned in favor of provisions allowing states to regulate indirect sources. *Id.* at 737–38.

39. Indirect Source Review, Rule 9510 § 3.10, .27 (Dec. 15, 2005).

40. *NAHB*, 627 F.3d at 741 (Smith, J., dissenting).

Smith reasoned that in contrast to the portions of Rule 9510 being litigated, section 6.2 of Rule 9510 requires lifetime emissions reductions from the project's operational baseline.<sup>41</sup> However, this argument is semantic; if the rule were amended to regulate pollution from the site as a whole, it would likely still have the same impact on construction equipment, since emissions at a construction site are generated solely from construction equipment.<sup>42</sup>

NAHB argued that Congress did not intend for the indirect source program to regulate mobile sources, pointing to text in section 110(a)(5) specifying that "direct emission sources . . . at, within, or associated with any indirect source shall not be deemed indirect sources for the purpose of [the indirect source review program]."<sup>43</sup> The dissent agreed, arguing that, "if the provision has any meaning at all," it mandates that a state or subdivision may not regulate direct emission sources apart from the source as a whole, and thus the CAA's indirect source provision did not in fact authorize Rule 9510.<sup>44</sup>

However, courts have interpreted "direct emission sources at indirect sources" to mean stationary sources at indirect sites, not mobile equipment being temporarily operated at such sites.<sup>45</sup> EPA's comments on a proposed rule revising the Texas State Implementation Plan by limiting emissions from ground support equipment at an airport bolstered this interpretation.<sup>46</sup> There, the agency determined that a mandate to reduce emissions by 90 percent was not an "emissions standard" and thus constituted permissible regulation of mobile equipment through an indirect source.<sup>47</sup> EPA also found that engines brought to a construction site for less than one year are generally non-road mobile sources.<sup>48</sup> The District was thus justified in arguing that Congress authorized states to do indirectly what it could not do directly, which is regulate mobile sources through section 110(a)(5).<sup>49</sup> The court's interpretation of the

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41. Section 6.2 of Rule 9510 requires developers to incorporate features into the project that would reduce the "operational emissions" that would result from vehicles being attracted to the site after construction is completed, from a baseline calculated using an approved computer model. NAHB did not challenge this portion of Rule 9510 on appeal. *See id.* at 732 (majority opinion).

42. Telephone Interview with Catherine Redmond, Counsel for the San Joaquin Valley Air Pollution Control Dist. (Jan. 4, 2012).

43. Brief for Petitioner, *supra* note 27, at 72 (quoting 42 U.S.C. § 7410(a)(5) (2006)). A "direct source," on the other hand, is either a stationary source like a smokestack or a mobile source like construction equipment. *Id.* at 14.

44. *NAHB*, 627 F.3d at 742 (Smith, J., dissenting).

45. Brief for Respondent, *supra* note 12, at 48 (citing *Natural Res. Def. Council v. EPA*, 725 F.2d 761, 771–72 (D.C. Cir. 1984)).

46. Proposed Approval and Promulgation of Implementation Plans, 66 Fed. Reg. 16,432 (Mar. 26, 2001).

47. *Id.* at 16,433. The EPA stated that the fact that the level of required reductions was calculated based on the level of emissions generated by the ground support equipment in a prior year did not mean that the rule imposed an emissions standard on non-road equipment. Similarly, the EPA found that the compliance alternatives available to a fleet operator did not transform the obligation to achieve a certain quantity of reductions into an emissions standard. *Id.*

48. Standards of Performance for Stationary Compression Ignition and Spark Ignition Internal Combustion Engines, 75 Fed. Reg. 32,612, 32,616 (June 8, 2010) (explaining the difference between stationary sources and non-road mobile sources).

49. *See* Brief for Respondent, *supra* note 12, at 38.

CAA's indirect source provision opens the door for air quality districts to use more cap-and-trade programs to regulate pollution while preserving the EPA's exclusive power to set vehicle tailpipe emission limits. This strikes a balance between granting enforcement authority to the states as opposed to the federal government. This power does not frustrate the purpose of the CAA and, in fact, achieves one of the legislation's major objectives of giving states power to regulate pollution. The CAA preempts state standards in order to avoid an "anarchic patchwork" of federal and state regulatory programs, which would invariably result if different states set different standards for tailpipe emissions from vehicles.<sup>50</sup> Rule 9510 does not specify that any vehicle be designed, manufactured, or used in such a manner so as to limit emissions to a particular quantity.<sup>51</sup> Accordingly, it does not compel manufacturers to create a "second vehicle" that meets both federal requirements and new, "un-approved" California standards.<sup>52</sup> Rule 9510 is thus consistent with the CAA's goals of leaving tailpipe regulations to the federal government. The dissent's concern that Rule 9510 contravenes the purpose of the CAA is therefore unfounded.<sup>53</sup>

*B. NAHB Will Not Transform Certain Indirect Source Rules into de facto Standards*

The District also argued that compliance with Rule 9510 could be achieved "easily" by using a mix of newer and older equipment or using its construction fleet more efficiently.<sup>54</sup> This likely influenced the court's decision to uphold Rule 9510.<sup>55</sup> It remains to be shown whether the court's interpretation of section 110 of the CAA may create an implicit standard for certain vehicles that may be the exclusive source of mobile emissions at an indirect source. Indirect source rules must be evaluated based on how they

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50. See *EMA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996).

51. Nor does the rule set an implicit standard on the tailpipe emissions of a particular vehicle by referring to a quantity of emissions that would result from the use of certain fuels, which can be precisely quantified. See *Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108, 1114 (9th Cir. 2008). The rule also does not affect a particular fleet. See *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 248 (2004).

52. In response to comments about incorporating Rule 9510 into the California State Implementation Plan, EPA acknowledged that the "innovative" rule sets precedent for future rulemaking actions on similar indirect source rules submitted to the EPA, but does not, on its own, have a "nationwide scope or effect" on vehicles. Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District, 76 Fed. Reg. 26,609, 26,612 (May 9, 2011).

53. In a parallel proceeding about Rule 9510 in state court, the California Court of Appeal came to the same conclusion as the majority in this case. The court held that "the only logical way" to interpret the term "indirect source" was to acknowledge that its emissions came from vehicular sources. *Cal. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist.*, 100 Cal. Rptr. 3d 204, 218 (Ct. App. 2009).

54. Brief for Respondent, *supra* note 12, at 11–12, 24.

55. The court examined the actual types of vehicles that may be affected by indirect source rules. See *NAHB*, 627 F.3d 730, 739 (9th Cir. 2010). See also *Pac. Merch. Shipping*, 517 F.3d at 1114 (determining that rule imposed standard where emission limit was "susceptible to precise quantification").

affect particular facilities.<sup>56</sup> If, for example, the rule applied to limit emissions from particular types of farmland, on which only one type of non-road mobile source such as a tractor or harvester was customarily used, the court's decision may create a de facto rule regulating tailpipe emissions from that model. If a landowner cannot easily find an alternative vehicle, then the regulation of an indirect source may be transformed into a standard that essentially governs vehicle tailpipe emissions.<sup>57</sup> Rule 9510 does not directly address this scenario because it contains exceptions for facilities whose primary functions are subject to permits,<sup>58</sup> including those in the animal food manufacturing industry.<sup>59</sup> If such a scenario exists, an expansive reading of *NAHB* has the potential to transform other local rules into standards governing emissions.<sup>60</sup>

#### CONCLUSION

In upholding Rule 9510, the Ninth Circuit and later EPA, appropriately granted localities control over local air quality problems.<sup>61</sup> Although the parties did not address this issue, concomitant with that local control may be the burden of scrutinizing whether each local indirect source rule functionally regulates emissions from one particular vehicle model. Such a case-by-case evaluation may be difficult to conduct, as it may require specialized knowledge about the types of equipment used in various operations by different industries. However, since this type of decision making promotes local control of air quality, it achieves an important goal of the CAA—to enable states and localities to retain control of air quality despite participating in a centralized regulatory regime.

*Anuradha Sivaram*

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56. 42 U.S.C. § 7410(a)(5)(D) (2006).

57. The EPA addressed this hypothetical in its responses to comments on the proposed final rule approving Rule 9510. EPA acknowledged that an indirect source rule could be preempted if the rule in practice and as applied acts to compel a user of a non-road vehicle or engine to change the emission control design. However, the EPA determined that Rule 9510 would not bring about this result. Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District, 76 Fed. Reg. at 26,611.

58. Indirect Source Review, Rule 9510 § 4.4.3 (Dec. 15, 2005).

59. *Id.* § 4.0.

60. Despite this possibility, the EPA approved Rule 9510, thereby finalizing its incorporation into the California State Implementation Plan. Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District, 76 Fed. Reg. 26,609.

61. Rule 9510 was approved and is now codified at 40 C.F.R. § 52.220 (2011).

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