

**El Dorado County**  
**Air Quality Management District**

**Staff Report**

**Rule 611, Clean Air Act Nonattainment Fees**

**Proposed for Adoption January 23, 2023**

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## **Introduction**

The El Dorado County Air Quality Management District (District) is the agency with primary responsibility for achieving and maintaining clean air standards in El Dorado County (EDC). A portion of EDC is located within the Sacramento Federal Ozone Nonattainment Area (SFNA). The SFNA is currently designated as nonattainment for the 1979 1-hour and 1997, 2008, and 2015 8-hour ozone National Ambient Air Quality Standards (NAAQS).

The purpose of this staff report is to provide a summary and background information to the District Board of Directors. This staff report provides evidence to defend against any legal challenges that may arise regarding the approval or adoption of Rule 611.

## **Background**

Ground level ozone is a secondary pollutant formed from photochemical reactions of ozone precursors nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOC) in the presence of sunlight. Ozone NAAQS were developed in 1979 as a 1-hour standard, and in 1997, 2008, and 2015 as 8-hour standards. In the photochemical reaction, NO<sub>x</sub> is the limiting precursor. California Air Resources Board (CARB) Emissions inventory data for the SFNA indicates that mobile sources produce 88% of NO<sub>x</sub> emissions, while stationary sources contribute only 9%. Nevertheless, 42 U.S.C. 7511d (Federal Clean Air Act (CAA) section 185) requires the imposition of a penalty, on major sources, of \$11,922 (for 2023) per ton of ozone precursors in excess of the emissions produced in the attainment date year in areas classified as severe or extreme non-attainment for the ozone NAAQS that do not attain the NAAQS by the applicable deadlines. The penalty amount is adjusted annually for inflation. Major sources are those producing 25 tons per year of VOC or NO<sub>x</sub>. The fee will be applied to 20% of the amount of emissions in the attainment year. Major sources that reduce their ozone precursor emissions by at least twenty percent (20%) below the attainment year total will not be subject to the fee. The U.S. Environmental Protection Agency (EPA) has indicated that such penalty provisions must be adopted by areas classified as severe nonattainment for any of the ozone standards and imposed if the areas fail to meet an attainment date.

The SFNA comprises Sacramento and Yolo counties, the southern portion of Sutter County, the western portions of El Dorado and Placer counties, and the northeastern portion of Solano County. Only the western portion of the EDC is subject to the provisions of section 185. The eastern portion of EDC not located in the SFNA is not subject to section 185.

District is the agency responsible for maintaining the NAAQS in EDC. Western EDC is designated as severe nonattainment for the 1997 ozone NAAQS and the 2008 ozone NAAQS. The SFNA is currently classified as serious for the 2015 ozone NAAQS. However, air quality photochemical modeling conducted by the CARB forecasts that the SFNA will not attain the 2015 ozone NAAQS by the serious attainment date of August 2027. The SFNA air districts have requested to be reclassified to severe to extend the attainment date to August 2033. EPA is expected to reclassify the SFNA to severe in a final rule.

If adopted, proposed Rule 611, Clean Air Act Nonattainment Fees, will impose fees on any major stationary sources in the EDC portion of the SFNA, if the SFNA fails to attain an ozone NAAQS by the respective deadlines. Rule 611 will apply to the existing ozone NAAQS (1997, 2008, and 2015) and any future ozone NAAQS. As the SFNA is classified as severe nonattainment for the 2008 ozone standard, the SFNA districts were required to adopt Section 185 fee rules by July 20, 2022. Because only the Sacramento Air Quality District had adopted a Section 185 fee rule prior to July 20, 2022, and the other SFNA districts had not, the EPA issued a finding of failure to submit to the SFNA on January 17, 2023<sup>1</sup>, with an effective date of February 16, 2023<sup>2</sup>. That finding of failure to submit started a 24-

<sup>1</sup> "Finding of Failure to Submit State Implementation Plan Revisions Required Under Clean Air Act section 185; California; Sacramento Metro Area", Federal Register 88:10 (January 17, 2023) p. 2541.

<sup>2</sup> Under authority of CAA sections 110(k)(3), codified at 42 USC 7410(k)(3), and 40 CFR 52.31.

month sanctions clock. If all the SFNA air districts do not adopt section 185 fee rules prior to August 16, 2024, then two sanctions will be implemented on February 16, 2025. The EPA will also promulgate a Federal Implementation Plan.

The first sanction would be increased offset ratios imposed by the air districts New Source Review Rules. This would require new major sources and major sources wishing to modify their permitted equipment to purchase more emission reduction credits (2:1) than are currently required (1.3:1).

The second sanction would be a federal highway fund sanction. If the highway fund sanction were to take effect, the SFNA region would lose any federal transportation project funding for projects that have not already had funding obligated.

In addition to the sanctions, if the EPA determines that the SFNA has failed to comply with the Section 185 requirements, they will adopt a Federal Implementation Plan (FIP). The FIP will supersede the SIP and dictate the measures the SFNA air districts and the State must take to attain the NAAQS.

District staff have reviewed all current and pending permit applications and determined that there are no current nor anticipated applicable major sources of NO<sub>x</sub> and VOC located in the EDC portion of the SFNA. However, if a large major source facility is established in the EDC SFNA area, it would likely be subject 185 fees unless emission control technology was utilized to keep the ozone precursor emissions below the emissions produced during the attainment year.

District staff propose to stop the sanctions clock by adopting Rule 611. If the SFNA does achieve all ozone NAAQS by the attainment dates and EPA redesignates the SFNA to attainment for all ozone NAAQS, then Rule 611 would no longer apply.

### **Federal Mandates:**

Section 185 of the CAA requires that the SIPs for severe and extreme ozone nonattainment areas include the adoption of 185 fee rules. The 185 fee rules are to take effect if the area fails to attain the ozone NAAQS by the applicable attainment date. If the 185 rules are imposed, each major stationary source of VOCs or NO<sub>x</sub> located in the area will be required to pay a fee to the state (or in this case the air district) as a penalty for failure to attain. Section 185 also requires that if an area fails to administer 185 fee rule provisions, then EPA must collect the unpaid fees, any interest on back fees owed and a fifty percent penalty on sources that failed to pay<sup>3</sup>.

The SFNA is designated as a severe nonattainment area for the 1979 1-hour and 1997 federal 8-hour ozone NAAQS. Although both the 1979 and 1997 NAAQS have been revoked, EPA has determined that a Section 185 fee rule for these NAAQS is still required. The SFNA attainment demonstration plan developed for the 1997 ozone NAAQS set an attainment date of June 2019. The EPA has not yet determined whether the SFNA met the 1997 ozone NAAQS by the June 2019 attainment date.

The SFNA is designated as a severe nonattainment area for the 2008 federal ozone NAAQS. The SFNA attainment demonstration plan developed for the 2008 ozone NAAQS set an attainment date of July 2025<sup>4</sup>.

The SFNA is currently designated serious nonattainment for the 2015 federal 8-hour ozone NAAQS. However, during the attainment plan development process, it was determined that the area could not reach attainment by the August 2027 deadline for serious nonattainment areas. Consequently, the districts of the SFNA submitted a voluntary bump-up request to the EPA, asking to be reclassified to severe, giving the area additional time to attain. On October 26, 2023, CARB adopted and has submitted to the EPA the SFNA SIP to achieve the federal 2015 8-hour ozone standard based on a severe

<sup>3</sup> 42 U.S.C. sections 7604, 7511d(d), & 7661a(b)(3)(C)

<sup>4</sup> Sacramento Regional 2008 NAAQS 8-hour Ozone Attainment and Reasonable Further Progress Plan. District, Feather River Air Quality Management District, Placer County Air Pollution Control District, Sacramento Metro Air Quality Management District, Yolo Solano Air Quality Management District, July 24, 2017.

classification. The attainment date for the 2015 NAAQS SIP is August 2033<sup>5</sup>.

If the SFNA does not attain any of these standards by their respective deadlines, EPA will issue a finding of failure to attain. If EPA issues a finding of failure to attain, Section 185 fees may be triggered. Pursuant to section 181(a)(5) of the CAA, the EPA may approve a District's request for a one- or two-year extension to the attainment date. Attainment date extensions are contingent upon:

- a. Compliance with all requirements and commitments pertaining to the area in the applicable implementation plan, and
- b. No more than one occurrence of an exceedance of the ozone NAAQS having occurred in the year preceding the extension year.

### **Summary of Proposed Rule 611:**

District staff recommend adopting Rule 611. Rule 611 would apply to any major sources of NOx and VOCs in the SFNA portion of EDC if the SFNA fails to attain any ozone NAAQS for which the SFNA has been designated as a severe or extreme nonattainment. Rule 611 may be triggered by the failure to attain existing and any future ozone NAAQS, and EPA issues a finding of failure to attain. Major sources of NOx and VOC would be required to either pay a fee or reduce their emissions by 20% below baseline.

The fee payment is based on the difference between the amount of actual emissions in the post-attainment years and the actual emission in the Attainment Year. The CAA does not specify how the District must use the fees. The Board could determine the fees shall be used for grants to reduce emissions of NOx and VOCs.

The proposed Rule 611 has a mechanism for the cessation of penalty fees. Penalty fees may be terminated by 1) the EPA redesignating the SFNA to attainment for an ozone standard, or 2) the EPA terminating the anti-backsliding requirements associated with the section 185 penalty for a revoked standard.

The fee was established to be \$5,000 per ton of NOx and VOC in 1990 by the CAA. The fee is adjusted annually by consumer price index (CPI). For 2023 the fee was \$11,922 per ton of emissions. The EPA publishes the CPI adjusted fee<sup>6</sup> annually.

### **Socioeconomic Impact:**

California Health and Safety Code section 40728.5(d), Required Assessment, states "this section does not apply to any district with a population of less than 500,000 persons". As the population in EDC is less than 500,000 persons, a socioeconomic impact analysis is not required.

### **Cost-effectiveness:**

California Health and Safety Code section 40703 states that the District must consider, and make public, "the cost-effectiveness of a control measure". Draft Rule 611 is administrative in nature and is not a control measure. The purpose of Rule 611 is to collect a fee as a penalty for missing an ozone NAAQS attainment date.

Because Rule 611 does not include requirements for Best Available Retrofit Control Technology nor Best Available Control Technology, and feasible control measures are not involved, an incremental cost-effectiveness analysis under Health and Safety Code section 40920.6 is not required.

### **Control Requirements:**

<sup>5</sup> U.S. EPA. *Ozone NAAQS Timelines*. <https://www.epa.gov/ground-level-ozone-pollution/ozone-naaqs-timelines>

<sup>6</sup> Memorandum dated October 3, 2022, from Corey Sugerik, Operating Permits Group, AQPD, OAQPS to Operating Permits Contacts, Regions I-X.

The amended rule does not impose any control requirements.

**Public Comments:**

As of the time of submittal of this staff report to the County Recorder Clerk, District had received no comments on the proposed Rule.

**Environmental Review:**

California Public Resource Code section 21159 requires the District to perform an environmental analysis of the reasonably foreseeable methods of compliance. The analysis must include the following information for the proposed Rule 611:

1. An analysis of the reasonably foreseeable environmental impacts of the methods of compliance.
2. An analysis of the reasonably foreseeable mitigation measures.
3. An analysis of the reasonably foreseeable alternative means of compliance with the rule or regulation.

However, section 21159 also states, “In the preparation of this analysis, the agency may utilize numerical ranges or averages where specific data is unavailable; however, the agency shall not be required to engage in speculation or conjecture.” Further, “This section does not require the agency to conduct a project-level analysis.”

Since there are no current permitted facilities in EDC to which the new Rule 611 would apply, and District is unaware of any affected facilities considering locating in EDC, staff will not engage in speculation or conjecture. District staff cannot reasonably foresee any environmental impacts, mitigation measures or alternative means of compliance.

**Findings:**

The California Health and Safety Code, Division 26, Air Resources, requires local districts to comply with a rule adoption protocol as set forth in section 40727 of the Health and Safety Code. This section contains six findings that the District must make when developing, amending, or repealing a rule. These findings and their definitions are listed in the following table.

Finding	Finding Determination
<b>Authority:</b> The District must find that a provision of law or of a state or federal regulation permits or requires the District to adopt, amend, or repeal the rule. [Health and Safety Code section 40727(b)(2)].	Health and Safety Code sections 40000, 40001, 40702, 40716, 40919, 42300 and section 185 of the Clean Air Act Amendments are provisions of law that provide air districts with the authority to adopt the proposed regulation.
<b>Necessity:</b> The District must find that the rulemaking demonstrates a need exists for the rule, or for its amendment or repeal. [Health and Safety Code section 40727(b)(1).]	A section 185 fee rule is required by the 2008 and 2015 NAAQS Implementation Rules, which set 10-year deadlines to submit a 185 fee rule <sup>7,8</sup> . The proposed rule satisfies the federal mandates and corrects the SIP plan deficiency identified by the EPA in the failure to submit action. Proposed Rule 611 is necessary to meet Federal Clean Air Act section 185 planning requirements for severe nonattainment areas.
<b>Clarity:</b> The District must find that the rule is written or displayed so that its meaning can be easily understood by the persons directly affected by it. [Health and Safety Code section 40727(b)(3)].	Staff has reviewed the proposed rule and determined that it can be understood by the affected industry.

<sup>7</sup> “Implementation of the 2008 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements”, Federal Register 80:44 (March 6, 2015) p. 12317.

<sup>8</sup> “Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements”, Federal Register 83:234 (December 6, 2018) p. 63036.

<p><b>Consistency:</b> The rule is in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or state or federal regulations. [Health and Safety Code section 40727(b)(4)].</p>	<p>This rule is administrative in nature in that it provides the means for the District to implement and enforce federal law. Thus, implementing and enforcing federal law is consistent with applicable state and federal statutory requirements. In addition, other air districts in the SFNA and throughout California have and are in the process of adopting this same model rule.</p>
<p><b>Non-Duplication:</b> The rule does not impose the same requirements as an existing State or federal regulation, unless the District finds that the requirements are necessary and proper to execute the powers and duties granted to, and imposed upon, the District.</p>	<p>This rule does not impose requirements that are duplicative of existing laws or regulations.</p>
<p><b>Reference:</b> Any statute, court decision, or other provision of law that the district implements, interprets, or makes specific by adopting, amending, or repealing a regulation.</p>	<p>This rule implements the provisions of CAA Amendments section 185.</p>
<p><b>Additional Informational Requirements:</b> In complying with Health and Safety Code section 40727.2, the District must identify all federal requirements and District rules that apply to the same equipment or source type as the proposed rule or amendments. [Health and Safety Code section 40727.2].</p>	<p>Rule 611 is a fee rule and does not set or amend emissions standards, monitoring, reporting, or recordkeeping requirements. Therefore, a written analysis of federal regulations and other District rules is not required.</p>

**Staff Recommendation:**

Staff recommends that the Board conduct a public hearing, approve the resolution and adopt Rule 611, Clean Air Act Nonattainment Fees.



**References:**

“Finding of Failure to Submit State Implementation Plan Revisions Required Under Clean Air Act Section 185; California; Sacramento Metro Area”, Federal Register 88:10 (January 17, 2023) p. 2541.

“Implementation of the 2008 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements”, Federal Register 80:44 (March 6, 2015) p. 12264.

“Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements”, Federal Register 83:234 (December 6, 2018) p. 62998.

U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards. *Clean Air Act Section 185 Fee Rates Effective for Calendar Year 2021*. Research Triangle Park, NC. September 27, 2021. [https://www.epa.gov/system/files/documents/2021-12/memorandum\\_sec-185-penalty-fees-for-year-2021.pdf](https://www.epa.gov/system/files/documents/2021-12/memorandum_sec-185-penalty-fees-for-year-2021.pdf)

U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards. *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for 1-hour Ozone NAAQS*. Research Triangle Park, NC. January 5, 2010. [https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20100105\\_page\\_section\\_185\\_fee\\_programs.pdf](https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20100105_page_section_185_fee_programs.pdf)