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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2011-0571; FRL-9691-1]

Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action, EPA is finalizing approval of San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) Rule 3170, "Federally Mandated Ozone Nonattainment Fee," as a revision to SJVUAPCD's portion of the California State Implementation Plan (SIP). Rule 3170 is a local fee rule submitted to address section 185 of the Clean Air Act (CAA or Act) with respect to the 1-hour ozone standard for anti-backsliding purposes. EPA is also finalizing approval of SJVUAPCD's fee-equivalent program, which includes Rule 3170 and state law authorities that authorize SJVUAPCD to impose supplemental fees on motor vehicles, as an alternative to the program required by section 185 of the Act. EPA has determined that SJVUAPCD's alternative fee-equivalent program is not less stringent than the program required by section 185, and, therefore, is approvable as an equivalent alternative program, consistent with the principles of section 172(e) of the Act.

DATES: This rule is effective on [Insert date 30 days from the date of publication in the Federal Register].

ADDRESSES: EPA has established docket number EPA-R09-OAR-2011-0571 for this action. Generally, documents in the docket for this action are available electronically at http://www.regulations.gov or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at http://www.regulations.gov, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports), and some may not be available in either location (e.g., confidential business information (CBI)). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Lily Wong, EPA Region IX, (415) 947-4114, wong.lily@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

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I. Proposed Action and Interim Final Determination to Defer Sanctions

On July 28, 2011 (76 FR 45212), EPA proposed to approve the following rule into the California SIP.

Local Agency	Rule #	Rule Title	Adopted	Submitted
SJVUAPCD	3170	Federally Mandated Ozone Nonattainment Fee	05/19/11	06/14/11

EPA also proposed to approve SJVUAPCD's fee-equivalent program, which includes Rule 3170 and state law authorities that authorize SJVUAPCD to impose supplemental fees on motor vehicles, as an equivalent alternative to the program required by section 185 of the Act for the 1-hour ozone standard as an anti-backsliding measure.

In addition, on July 28, 2011 (76 FR 45199), EPA published an Interim Final Rule to defer the implementation of sanctions that would have resulted from EPA's final limited approval and limited disapproval of an earlier version of Rule 3170 (75 FR 1716, January 13, 2010).

II. Rationale for Approving Equivalent Alternative Programs

In proposing this action regarding the SJVUAPCD, EPA proposed to allow states to meet the section 185 obligation arising from the revoked 1-hour ozone NAAQS through a SIP revision containing either the fee program prescribed in section 185 of the Act, or an equivalent alternative program. 76 FR 45213 (July 28, 2011). Since our proposed action on SJVUAPCD's alternative section 185 program, EPA has also proposed to approve an alternative section 185 program submitted by the State of California on behalf of the South Coast Air Quality Management District as an equivalent alternative program. 77 FR 1895-01 (January 12, 2012). As further explained below, EPA is today approving through notice-and-comment rulemaking, SJVUAPCD Rule 3170 into the California SIP. We are also approving SJVUAPCD's alternative program as an equivalent alternative program consistent with the principles of section 172(e) of the CAA and not less stringent than a program prescribed by section 185.[1]

[1] EPA has previously set forth this reasoning in a memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Air Division Directors, "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS," January 5, 2010 ("Section 185 Guidance Memo"). On July 1, 2011, the D.C. Circuit Court of Appeals vacated this guidance, on the ground that it was final agency action for which notice-and-comment rulemaking procedures were required, and that the Agency's failure to use the required notice and comment procedures rendered the guidance invalid. *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. 2011). In today's action, EPA, having gone through notice-and-comment rulemaking, adopts the reasoning set forth in that memorandum as it applies to SJVUAPCD's equivalent alternative program as its basis for approving the SJVUAPCD SIP revision. In so doing, we have applied the court's directive to follow the rulemaking requirements set forth in the Administrative Procedures Act to inform consideration of section 185 and equivalent alternative programs.

Section 172(e) is an anti-backsliding provision of the CAA that requires EPA to develop regulations to ensure that controls in a nonattainment area are "not less stringent" than those that applied to the area before EPA revised a NAAQS to make it less stringent. In the Phase 1 Ozone Implementation Rule for the 1997 ozone NAAQS published on April 30, 2004 (69 FR 23951), EPA determined that although section 172(e) does not directly apply where EPA has strengthened the NAAQS, as it did in 1997, it was reasonable to apply to the transition from the 1-hour NAAQS to the more stringent 1997 8-hour NAAQS, the same anti-backsliding principle that would apply to the relaxation of a standard. Thus, as part of applying the principles in section 172(e) for purposes of the transition from the 1-hour standard to the 1997 8-hour standard, EPA can either require states to retain programs that applied for purposes of the 1-hour standard, or can allow states to adopt equivalent alternative programs, but only if such alternatives are determined through notice-and-comment rulemaking to be "not less stringent" than the mandated program. EPA has previously identified three types of alternative programs that could satisfy the section 185 requirement: (i) those that achieve the same emissions reductions; (ii) those that raise the same amount of revenue and establish a process where the funds would be used to pay for emission reductions that will further improve

ozone air quality; and (iii) those that would be equivalent through a combination of both emission reductions and revenues.[2] We are today determining through notice-and-comment rulemaking that states can demonstrate an alternative program's equivalency by comparing expected fees and/or emissions reductions directly attributable to application of section 185 to the expected fees, pollution control project funding, and/or emissions reductions from the proposed alternative program. Under an alternative program, EPA concludes that states may opt to proceed as here, shifting the fee burden from a specific set of major stationary sources to non-major sources, such as owners of mobile sources that also contribute to ozone formation. EPA also believes that alternative programs, if approved as "not less stringent" than the section 185 fee program, would encourage one-hour ozone NAAQS nonattainment areas to reach attainment as effectively and expeditiously as a section 185 fee program, if not more so, and therefore satisfy the CAA's goal of attainment and maintenance of the NAAQS.

While section 185 focuses most directly on assessing emissions fees, we believe it is useful to interpret anti-backsliding requirements for section 185 within the context of

[2] These types of programs were identified in our proposed rulemaking action concerning SJVUAPCD Rule 3170 and its alternative program 76 FR 45212 (July 28, 2011).

the CAA's ozone implementation provisions of subpart 2 (which includes section 185). The subpart 2 provisions are designed to promote reductions of ozone-forming pollutant emissions to levels that achieve attainment of the ozone NAAQS. In this context, to satisfy the anti-backsliding requirements for section 185 associated with the 1-hour NAAQS, we believe it is appropriate for states to implement equivalent alternative programs that maintain a focus on achieving further emission reductions, whether that occurs through the incentives created by fees levied on pollution sources or other funding of pollution control projects, or some combination of both. For any alternative program adopted by a state, the state's demonstration that the program is not less stringent should consist of comparing expected fees and/or emission reductions directly attributable to application of section 185 to the expected fees, pollution control project funding, and/or emissions reductions from the proposed alternative program. For a valid demonstration to ensure equivalency, the state's submissions should not underestimate the expected fees and/or emission reductions from the section 185 fee program, nor overestimate the expected fees, pollution control project funding, and/or emission reductions associated with the proposed alternative program.

We also note that the structure established in Subparts 1 and 2 of the CAA recognizes that successful achievement of clean air goals depends in great part on the development by states of clean air plans that that are specifically tailored to the nature of the air pollution sources in each state. The Act recognizes that states are best suited to design plans that will be most effective. Allowing states to put forward an equivalent program under the circumstances that pertain here, and under the authority of section 172(e), is consistent with this principle of the Act.

In sum, in order for EPA to approve an alternative program as satisfying the 1-hour ozone section 185 fee program SIP revision requirement, the state must demonstrate that the alternative program is not less stringent than the otherwise applicable section 185 fee program by collecting fees from owner/operators of pollution sources, providing funding for emissions reduction projects, and/or providing direct emissions reductions equal to or exceeding the expected results of the otherwise applicable section 185 fee program. We have previously accepted public comment on whether it is appropriate for EPA to consider equivalent alternative programs. We have concluded that it is appropriate to do so, and that SJVUAPCD's program is

approvable as an equivalent alternative program consistent with the principles of section 172(e) of the Act.

III. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received comments from several parties. The comments and our responses are summarized below.

A. Rule 3170 and Section 185:

1. Exemption for Clean Emission Units.

a. Comment: One commenter stated that Rule 3170, sections 4.1 and 4.2, exempt so-called "clean emission units," but section 185 does not allow for such an exemption. The Act provides no exemption for any major stationary source, regardless of the emission control technology employed. Congress assumed that areas subject to 185 will have adopted reasonably available control technologies ("RACT") for major stationary sources, that other sources will have gone through new source review and be subject to the lowest achievable emission rate ("LAER") requirement, and that SIPs may have targeted certain categories for more stringent controls than others. All of this is laid out in subparts 1 and 2 of Title I, Part D of the Act. Section 185 applies when, despite all of these controls, the area still fails to attain. Another commenter stated that Rule 3170 allows exemptions for "clean emissions units" and stated that the Act

provides no exemption for any major stationary source, regardless of the emission control technology employed.

Response: We agree that section 185 applies when an ozone nonattainment area designated Severe or Extreme fails to reach attainment by its attainment date and requires assessment of a fee for each source, with no exemption for clean emission units. Today's action, however, is to approve Rule 3170, in the context of the revoked 1-hour ozone NAAQS. We conclude that Rule 3170 is approvable into the California SIP and as part of the District's equivalent alternative program because we have determined that Rule 3170 will result in the collection of fees at least equal to the amount that would be collected under section 185, that the fees will be used to reduce ozone pollution, and that the program therefore satisfies the requirements of CAA section 185, consistent with the principles of section 172(e). We also note that the program will raise this amount by a combination of fees from sources that do not qualify as "clean units" as defined in Rule 3170 and from a fee on vehicles, which are responsible for approximately 80 percent of ozone formation in SJVUAPCD.[3] Our proposed action contains our analysis of how the District's equivalent alternative program meets the "not less stringent

[3] District comment letter dated August 24, 2011 and the California Air Resources Board's *California Emissions Projection Analysis Model (CEPAM): 2009 Almanac* found at: http://www.arb.ca.gov/app/emsinv/fcemssumcat2009.php

than" criterion of section 172(e), and we provide additional explanation below.

b. Comment: Congress' decision was to make each major stationary source pay a penalty based on their individual contribution to the continuing problem. Larger emitters pay a larger fee and small emitters pay a smaller fee. There is no suggestion that the best controlled sources are entitled to any other "reward" or exemption. Section 185 is not a program to penalize only the less-well regulated sources.

Response: We do not agree with the commenter's statement that section 185 does not provide a "reward" or exemption for well-controlled sources. In fact, we believe that section 185 clearly "rewards" well-controlled sources by exempting those that reduce emissions by 20 percent or more from the fee requirements. This "reward," however, is available only if the source acts to decrease its emissions after the attainment deadline has passed, which in San Joaquin's case was 2010. Rule 3170, on the other hand, provides an exemption from fees for "clean emission units," which are units that have air pollution controls that reduce pollution by at least 95 percent or units that installed Best Available Control Technology (BACT) anytime between 2006 and 2010. The "clean unit exemption" in Rule 3170 is thus not consistent with the timing envisioned by Congress; therefore, we

agree with the commenter that the exemption is not consistent with the express language in section 185. We note, however, that in the context of the revoked 1-hour ozone NAAQS, we are approving Rule 3170 into the California SIP and as part of the District's equivalent alternative program because we have determined that Rule 3170 will result in the collection of fees at least equal to the amount that would be collected under section 185, that the fees will be used to reduce ozone pollution, and that the program therefore satisfies the requirements of CAA section 185, consistent with the principles of section 172(e). Our proposed action contains our analysis of how the District's equivalent alternative program meets the "not less stringent than" criterion of section 172(e), and we provide additional explanation below.

We also do not agree with the comment that, "Congress' decision was to make each major stationary source pay a penalty based on their individual contribution to the continuing problem. Larger emitters pay a larger fee and small emitters pay a smaller fee." In fact, under section 185 large emitters can completely avoid penalties in any year that they emit 20 percent less than they emitted in the applicable attainment year (2010 for the District). As a result, a source in the District that emits 500 tons of NO_X in 2010 would not pay a section 185 fee in any

subsequent year in which its NO_X emissions are 400 tons or less. On the other hand, a source that emits 50 tons of NO_X in 2010 will still have to pay a section 185 fee in every subsequent year that it emits more than 40 tons. Thus, under these scenarios, after the attainment year of 2010, the source that emits 400 tons would pay no fee and the source that emits 41 tons would pay a fee (albeit a nominal one based on 1 ton of emissions above the reduction target). In this respect, then, section 185 does not distinguish between sources based on their relative contribution to ozone non-attainment.

c. Comment: That Congress understood that the level of control between sources could vary is expressly acknowledged in section 185(b)(2), which specifies that the baseline comes from the *lower* of actuals or allowables, and that the allowables baseline is to be based on the emissions allowed "under the permit" unless the source has no permit and is subject only to limits provided under the SIP. It would defeat this express language to exempt sources from paying a fee based on some arbitrary notion of being "clean enough."

Response: The commenter's characterization of Rule 3170's clean unit exemption as "arbitrary" or as based on "being clean enough" is inaccurate. In fact, Rule 3170, section 3.3 defines a "clean unit" as: an emission unit that (i) has emissions control

technology with a minimum control efficiency of at least 95 percent (or at least 85 percent for leanburn, internal combustion engines); or (ii) has emission control technology that meets or exceeds achieved-in-practice BACT as accepted by the Air Pollution Control Officer (APCO) during the period from 2006 - 2010." We believe Rule 3170 reflects the District's considered determination of what it views as "clean" sufficient to qualify for an exemption from fees as part of an equivalent alternative program for anti-backsliding purposes.

Nevertheless, we agree with the commenter that Congress did not differentiate between sources according to the "level of control." Thus, section 185 does not distinguish a source with a control efficiency of 1 percent from a source with a control efficiency of 99 percent. Under either scenario, sources are subject to section 185 fees if those reductions occurred prior to the attainment year. This aspect of section 185 does not affect our action to approve Rule 3170 into the California SIP and as part of SJVUAPCD's equivalent alternative program, as discussed further below.

2. Alternative Baseline.

a. Comment: Two commenters stated that Rule 3170 fails to meet the requirements of section 185 by allowing an alternative baseline period for major stationary sources. They claim there

is no statutory basis for section 3.2.2 of Rule 3170, which allows for the establishment of "[a]n alternative baseline period reflecting an average of at least two consecutive years within 2006 through 2010, if those years are determined by the APCO as more representative of normal source operation." They further claim that:

- Section 185 requires the baseline to be the lower of actual emissions or emissions allowed during the attainment year.
- Only sources with emissions that are irregular, cyclical, or otherwise vary significantly from year to year can extend the baseline period to account for that variation.
- The possibility of extending the baseline is not available at the option of the source or at the discretion of the APCO.
- Section 185 allows the option of extending the baseline only with respect to determining actual emissions; section 5.1 suggests that the APCO might be able to change the baseline period for determining allowable emissions, which is not allowed.

Response: Section 185(b)(2) authorizes EPA to issue guidance that allows the baseline to be the lower of average actuals or average allowables determined over more than one calendar year. Section 185(b)(2) further states that the

guidance may provide that the average calculation for a specific source may be used if the source's emissions are irregular, cyclical or otherwise vary significantly from year to year. Pursuant to these provisions, EPA developed and issued a memorandum to EPA Regional Air Division Directors, "Guidance on Establishing Emissions Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment Date," William T. Harnett, Director, Air Quality Division, March 21, 2008 (EPA's Baseline Guidance). EPA's Baseline Guidance suggests as an alternative baseline for sources whose annual emissions are "irregular, cyclical, or otherwise vary significantly from year to year," the baseline calculation in EPA's Prevention of Significant Deterioration (PSD) regulations at 40 CFR 52.21(b)(48). As explained in EPA's Baseline Guidance, the PSD regulations allow a baseline to be calculated using "any 24-consecutive month period within the past 10 years ('2-in-10' concept) to calculate an average actual annual emissions rate (tons per year)."

Rule 3170, section 3.2.2 allows for an alternative baseline based on the average of at least two consecutive years within 2006 through 2010, "if those years are determined by the APCO as more representative of normal source operation." Therefore, Rule

3170 differs from the PSD-based 2-in-10 concept described in EPA's Baseline Guidance because it allows for an alternative baseline based on 2006-2010, rather than the "2-in-10" concept.

In response, we note that EPA's Baseline Guidance stated that the 2-in-10 concept was "*an* acceptable alternative method that could be used for calculating the 'baseline amount,'" leaving open the possibility that other methods might also be appropriate. We also note that EPA's Baseline Guidance described the 2-in-10 concept as warranted because it allows for a determination of a baseline "that represents normal operation of the source" over a full business cycle; the similar terminology leads to a reasonable expectation that determinations under Rule 3170 will be similar to those contemplated by EPA's Baseline Guidance. In addition, we believe that Rule 3170's use of a 5 year "look back," rather than a 10 year "look back" actually limits the amount of flexibility allowed by Rule 3170's alternative baseline, rather than expanding it beyond the scope of EPA's Baseline Guidance.

We do not agree with the commenter's criticism that Rule 3170 section 5.1 "suggests that the APCO might be able to change the baseline period for determining allowable emissions" whereas section 185 allows for extending a baseline based only on actual emissions. Section 185 plainly states that EPA may issue

guidance authorizing a baseline reflecting an emissions period of more than one year based on the "lower of average actual or average allowables".

Furthermore, we note that the District's equivalent alternative program uses the attainment year, 2010, as the baseline period to determine the fees that would have been assessed under a direct implementation of section 185 and as the point of comparison for the equivalency demonstration. *See* Rule 3170, Section 7.2.1.3. In this way, we believe the District will be able to make a proper comparison between fees owed under section 185 and revenues resulting from the alternative fee program.

Finally, we note that in the context of the revoked 1-hour ozone NAAQS, we are approving Rule 3170 into the California SIP and as part of the District's equivalent alternative program because we have determined that Rule 3170 will result in the collection of fees at least equal to the amount that would be collected under section 185, that the fees will be used to reduce ozone pollution, and that the program therefore satisfies the requirements of CAA section 185, consistent with the principles of section 172(e). Our proposed action contains our analysis of how the District's equivalent alternative program meets the "not less stringent than" criterion of section 172(e).

3. Major Source Definition.

a. Comment: Cross-references are a bad practice because they create a potential for conflicts between the locally-applicable rule and the SIP-approved rule.

Response: EPA believes that cross-references to other district rules can be problematic and has commented to our state and local agencies to that effect. There are also cases where cross-referencing is an efficient and reasonable approach to local rule development. We do not find that Rule 3170's cross-reference to Rule 2201, New and Modified Stationary Source Review Rule, is an appropriate basis for disapproval, nor does the commenter seem to claim that we should disapprove the rule on that basis.

b. Comment: Rule 2201's definition of "major source" does not match the definition of 182(e) of the Act, which includes all emissions of VOC or NO_X, with no exemption for fugitive emissions, and looks at the larger of actual or potential emissions. Rule 2201 excludes fugitive emissions for certain sources.

Response: EPA does not agree that Rule 3170's reference to Rule 2201 is clearly inconsistent with the requirements of section 185. First, we note that section 182(e) is silent with respect to whether fugitive emissions should be included when

determining whether a source's actual or potential emissions exceed the 10 ton per year threshold. That is, section 182(e) neither expressly includes nor excludes fugitive emissions. Second, we note that Congress' definition of "major stationary source" at CAA 302(j) expressly delegates to EPA the authority to address the inclusion of fugitive emissions in major source determinations by rule. EPA has promulgated such definitions in the context of our rules for non-attainment major new source review, prevention of significant deterioration, state operating permit programs, and federal operating permit programs. See 40 CFR part 51, Appendix S, part 52, part 70 and part 71. Each of these regulations excludes a source's fugitive emissions from major source determinations unless the source belongs to one of 28 specifically listed categories. Third, we believe that the District's use of its permitting program's definition of major source to implement the section 185 fee program is reasonable and consistent with congressional intent because Congress itself recognized the relevancy of permit programs to section 185 fee programs when it provided that the baseline amount for calculating 185 fees should be "the lower of the amount of actual VOC emissions ('actuals') or VOC emissions allowed under the permit applicable to the source". Fourth, we note that CAA section 185 fee programs are new and that neither EPA nor the

states have a history of interpreting or implementing section 185 in a way that would suggest that states should include fugitive emissions when determining which sources are subject to the program or that failure to do so would provide a basis for disapproving Rule 3170.

The commenter's reference to section 182(e) "look[ing] at the larger of actual or potential emissions" is not entirely clear. To the extent that the commenter is saying that section 182(e) defines a major source as a source whose actual emissions exceed 10 tons per year or whose potential to emit exceeds 10 tons per year, we agree with the comment. Rule 2201, section 3.23 also defines major stationary source as one whose post-project emissions or post-project PTE exceeds 20,000 pounds (10 tpy).

c. Comment: Rule 2201 only includes potential emissions from units with valid permits.

Response: The comment is vague and unclear in its reference to Rule 2201. To the extent the commenter is complaining that a source's potential emissions are included only if the unit has a valid permit, EPA infers that the commenter is referencing Rule 2201, section 4.10, which provides that the calculation of post-project stationary source potential to emit shall include the potential to emit from all units with a valid Authority to

Construct (ATC). To the extent that the commenter is concerned that some sources will not be considered major sources subject to section 185 fees because the source includes unpermitted emission units, EPA believes this problem is not an inherent defect in either Rule 2201 or Rule 3170, but rather a problem that should be addressed through enforcement action, which presumably will result in the issuance of an ATC if appropriate, followed by a determination of major source status if warranted.

d. Comment: Rule 2201 credits limits in authorities to construct that may or may not reflect actual emissions.

Response: The commenter's complaint that Rule 2201 "credits limits in authorities to construct that may or may not reflect actual emissions" is also vague and unclear -- both in reference to the application of Rule 2201 itself and to how this aspect of Rule 2201, if it exists, affects determinations of major source status for the purposes of Rule 3170. To the extent the commenter is claiming that the application of Rule 2201 would not result in a calculation of major source status consistent with the CAA, we disagree. Rule 2201, section 3.23 clearly allows for major source determinations to be made based on a source's post-project actual emissions or its post-project PTE and applies the correct trigger for either NO_X or VOCs of 20,000 pounds or 10 tons per year. Furthermore, we note that Rule 3170, section 6.2,

requires sources to report actual emissions on an annual basis and that Rule 2201, sections 3.26 and 4.10 provide a clear means to determine a source's potential to emit. Thus, we do not agree with the commenter that Rule 3170 is flawed because of its reference to Rule 2201 as the basis for defining "major source."

4. Motor vehicle fees as a "cure" for Rule 3170's clean-unit exemption and alternative baseline provisions.

Comment: Motor vehicle fees do not qualify SJVUAPCD for either of the fee exemptions provided by the Act: (i) extension years under 7511(a)(5), and (ii) areas with population below 200,000 that can demonstrate transport.

Response: As explained in our proposed action, we are approving Rule 3170 into the California SIP and as part of the District's equivalent alternative program as an anti-backsliding measure for the revoked 1-hour ozone standard because we have determined that Rule 3170 will result in the collection of fees at least equal to the amount that would be collected under section 185, that the fees will be used to reduce ozone pollution, and that the program therefore satisfies the requirements of CAA section 185, consistent with the principles of section 172(e). Thus, it is irrelevant that Rule 3170 does not meet the precise requirements of section 185.

B. EPA's Authority to Approve Alternative Fee Programs that Differ from CAA Section 185

1. Authority under CAA and case law.

Comment: One commenter stated that nothing in the plain language of the Act, the "principles" behind that language, or *South Coast Air Quality Management District v. EPA,* 472 F.3d 882 (D.C. Cir. 2006) gives EPA the power to rewrite the terms of section 185. EPA's argument that it can invent alternatives that fail to comply with the plain language of section 185 has no statutory basis. Another commenter stated that section 185's plain language is unambiguous, that Congress has specified the parameters of the section 185 program and that to approve a fee alternative program that does not meet the minimal requirements explicitly set out in section 185 violates the plain language of the Act. This commenter also stated that the *South Coast* court upheld retention of section 185 nonattainment fees for regions that fail to meet the 1-hour ozone standard. Other commenters supported EPA's action as a reasonable interpretation of the Act and consistent with the *South Coast* decision.

Response: In a 2004 rulemaking governing implementation of the 1997 8-hour ozone standard, EPA revoked the 1-hour ozone standard effective June 15, 2005. 69 FR 23858 (April 30, 2004) and 69 FR 23951 (April 30, 2004) ("2004 Rule"); *see also,* 40 CFR

50.9(b). EPA's revocation of the 1-hour standard was upheld by the Court of Appeals for the District of Columbia Circuit. *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006) reh'g denied, 489 F.3d. 1245 (D.C. Cir.) 2007) (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review)("*South Coast*"). Thus, the 1-hour ozone standard that the District failed to attain by its attainment date no longer exists and a different standard now applies.

Section 172(e) provides that, in the event of a relaxation of a primary NAAQS, EPA must promulgate regulations to require "controls" that are "not less stringent" than the controls that applied to the area before the relaxation. EPA's 8-hour ozone standard is recognized as a strengthening of the NAAQS, rather than a relaxation; however, EPA is applying the "principles" of section 172(e) to prevent backsliding of air quality in the transition from regulation of ozone pollution using a 1-hour metric to an 8-hour metric. Our application of the principles of section 172(e) in this context was upheld by the D.C. Circuit in the *South Coast* decision: "EPA retains the authority to revoke the one-hour standard so long as adequate anti-backsliding provisions are introduced." *South Coast*, 472 F.3d at 899. Further, the court stated, that in light of the revocation,

"[t]he only remaining requirements as to the one-hour NAAQS are the anti-backsliding limitations." *Id.*

As stated above, section 172(e) requires State Implementation Plans to contain "controls" that are "not less stringent" than the controls that applied to the area before the NAAQS revision. EPA's 2004 Rule defined the term "controls" in section 172(e) to exclude section 185. *See* 2004 Rule, 69 FR at 24000. The D.C. Circuit ruled that EPA's exclusion of section 185 from the list of "controls" for Severe and Extreme non-attainment areas was improper and remanded that part of the rule back to EPA. *See South Coast*, 472 F.3d at 902-03. The court did not, however, address the specific issue of whether the principles of section 172(e) required section 185 itself or any other controls not less stringent, and section 172(e) clearly on its face allows such equivalent programs. Further, the court in *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. 2011), specifically noted with respect to equivalent alternative programs that "neither the statute nor our case law obviously precludes [the program alternative.]" 643 F.3d at 321. In this rulemaking approving SJVUAPCD Rule 3170, EPA is fully recognizing section 185 as a "control" that must be met through the application of the principles of section 172(e). As explained above, the D.C. Circuit stated that EPA must apply the principles of section

172(e) to non-attainment requirements such as section 185. Thus, we are following the D.C. Circuit's holding that the principles of section 172(e) apply in full to implement 185 obligations.

2. Applicability of Section 172(e).

Comment: CAA section 172(e) does not apply to this situation because EPA has adopted a more health protective ozone standard. EPA acknowledges that section 172(e) by its terms does not authorize EPA's action because the newer 8-hour ozone standard is not a relaxation of the prior 1-hour ozone standard. EPA claims that its authority to permit States to avoid the express requirements of section 185 derives from the "principles" of section 172(e). But there is no principle in the CAA that Congress intended to give EPA authority to rewrite the specific requirements of section 185 when EPA finds that the health impacts related to ozone exposure are even more dangerous than Congress believed when it adopted the detailed requirements in the 1990 Clean Air Act Amendments. The *South Coast* court upheld retention of section 185 nonattainment fees for regions that fail to meet the 1-hour ozone standard. Other commenters supported EPA's action as a reasonable application of section 172(e).

Response: The *South Coast* court agreed with the application of the principles of section 172(e) despite the fact that section 172(e) expressly refers to a "relaxation" of a NAAQS, whereas the

transition from 1-hour to 8-hour is generally understood as increasing the stringency of the NAAQS. As the court stated, "Congress contemplated…the possibility that scientific advances would require amending the NAAQS. Section 109(d)(1) establishes as much and section 172(e) regulates what EPA must do with revoked restrictions…. The only remaining requirements as to the one-hour NAAQS are the anti-backsliding limitations." *South Coast*, 472 F.3d at 899. (citation omitted).

3. Discretion in Title I, Part D, Subparts 1 and 2.

Comment: One commenter stated that the Supreme Court in *Whitman v. Am. Trucking Assns,* interpreted the CAA as showing Congressional intent to limit EPA's discretion. The D.C. Circuit in *SCAQMD* also held that EPA's statutory interpretation maximizing agency discretion was contrary to the clear intent of Congress in enacting the 1990 amendments. EPA's approach [with respect to 185] would allow EPA to immediately void the specific statutory scheme Congress intended to govern for decades. EPA cannot reasonably claim that Congress meant to give EPA the discretion to revise the carefully prescribed statutory requirements like section 185 that Congress adopted to address these exposures. EPA proposes to accept a program other than that provided by Congress in section 185. Given that Congress provided a specific program, EPA has no discretion to approve an

alternative. Another commenter also stated that given that Congress provided a specific program, EPA has no discretion to approve an alternative.

Response: While one holding in *Whitman v. Am. Trucking Assns,* 531 U.S. 457 (2001) stands for the general proposition that Congress intended to set forth prescriptive requirements for EPA and states, particularly the requirements contained in Subpart 2, the D.C. Circuit has noted that the Court did not consider the issue of how to implement Subpart 2 for the 1-hour standard after revocation. *See, South Coast*, 472 F.3d at 893 ("when the Supreme Court assessed the 1997 Rule, it thought that the one- and eight-hour standards were to coexist."). Thus, the Court did not consider how section 172(e)'s anti-backsliding requirements might be applied in the current context of a revoked NAAQS.

We also believe that the commenter's reliance on *South Coast* to argue that it precludes EPA's use of section 172(e) principles to implement section 185 is similarly misplaced. The holding cited by the commenter relates to an entirely different issue than EPA's discretion and authority under section 172(e) -- whether EPA had properly allowed certain 8-hour ozone non-attainment areas to comply with Subpart 1 in lieu of Subpart 2. In fact, the *South Coast* court not only upheld EPA's authority

under section 109(d) to revise the NAAQS, it recognized its discretion and authority to then implement section 172(e):

> Although Subpart 2 of the Act and its table 1 rely upon the then-existing NAAQS of 0.12 ppm, measured over a one-hour period, elsewhere the Act contemplates that EPA could change the NAAQS based upon its periodic review of 'the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health' that the pollutant may cause. CAA sections 108(a), 109(d), 42 U.S.C. sections 7408(a), 7409(d). The Act provides that EPA may relax a NAAQS but in so doing, EPA must 'provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.' CAA 172(e), 42 U.S.C. 7502(e).
>
> *South Coast*, 472 F.3d at 888.

Further, as noted above, EPA believes that *South Coast* supports our reliance on section 172(e) principles to approve Rule 3170 and SJVUAPCD's alternative program as fulfilling section 185 requirements for the revoked 1-hour standard. As the court stated, "EPA was not, as the Environmental petitioners contend, arbitrary and capricious in withdrawing the one-hour requirements, having found in 1997 that the eight-hour standard was 'generally even more effective in limiting 1-hour exposures

of concern than is the current 1-hour standard.' . . . The only remaining requirements as to the one-hour NAAQS are the anti-backsliding limitations." *Id.* (citation omitted).

C. EPA's Proposed Action and Consistency With Section 172(e)

1. Statutory analysis for alternatives to a 185 program.

Comment: EPA's different and inconsistent tests for determining "not less stringent" undermine the reasonableness of these options as valid interpretations of the Act. EPA's interpretation means that a program that achieves the same emission reductions as section 185 and a program that achieves fewer emission reductions than section 185 can both be considered "not less stringent." However, stringency is either a measure of the emission reductions achieved or it is not. If it is, then a program that does not achieve equivalent reductions cannot pass the test. EPA did not actually interpret the term "stringent" and offers no basis for claiming that Congress intended this term to have different meanings and allow for different metrics for guarding against backsliding.

Response: We believe that the three alternatives we identified in our proposed action (i.e., same emission reductions; same amount of revenue to be used to pay for emission reductions to further improve ozone air quality; a combination of the two) are reasonable and consistent with Congress' intent.

First, we note that Congress did not define the phrase "not less stringent" or the term "stringent" in the Act. EPA, therefore, may use its discretion and expertise to reasonably interpret section 172(e). Furthermore, we note that the D.C. Circuit, in *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. 2011), while finding that EPA's guidance document providing our initial presentation of various alternatives to section 185[4] should have been promulgated through notice-and-comment rulemaking, declined to rule on whether the types of alternative programs we considered in connection with our proposed action on SJVUAPCD Rule 3170 were illegal, stating, "neither the statute nor our case law obviously precludes [the program alternative]." *Id.* at 321.

We do not agree that evaluating a variety of metrics (e.g., fees, emissions reductions, or both) to determine whether a state's alternative program meets section 172(e)'s "not less stringent" criterion undermines our interpretation. On its face, section 185 results in assessing and collecting emissions fees, but the fact that section 185 is also part of the ozone nonattainment requirements of Part D, Subpart 2, suggests that Congress also anticipated that section 185 might lead to emissions reductions that would improve air quality, and

[4] "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS, Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors, Regions I-X, Jan. 5, 2010," vacated, *NRDC v. EPA,* 643 F.3d 311 (D.C. Cir. 2011).

ultimately facilitate attainment of the 1-hour ozone standard.[5] Thus, EPA believes it is reasonable to assess stringency of alternative programs on the basis of either the monetary or emissions-reduction aspects of section 185 or on the combination of both.

Lastly, as discussed in our proposal, SJVUAPCD has demonstrated that Rule 3170 will result in the collection of at least as much revenue from owners/operators of relevant emission sources as a fee program directly implemented under section 185. In addition, it is reasonable to expect that SJVUAPCD's alternative program will achieve more emission reductions than direct implementation of section 185 because the District's alternative program uses fees to reduce emissions, while section 185 has no such direct requirement. While the comment suggests that EPA's logic, if unreasonably extended, might theoretically lead it to approve a program that achieves fewer emission reductions than a program directly implemented under section 185, we are clearly not doing that here, and have no intention of doing so in the future.

2. "Not less stringent" and target of fees.

[5] EPA previously articulated the dual nature of section 185 in its now-vacated section 185 guidance. *See id.* at 4. Although the section 185 guidance policy has been vacated, we agree with, and here in this notice and comment rulemaking adopt, its reasoning on this point.

a. Comment: To be "not less stringent," a control must be no less rigorous, strict, or severe; all of these qualities focus on the burden to the entities responsible for complying with the rule or standard. The purpose of Rule 3170 is less stringent than section 185 because Rule 3170 exempts large categories of major industrial sources and dilutes section 185's target by spreading its impact across the millions of individuals registering cars in the SJV.

Response: It is difficult to try to assess the relative stringency of section 185 and Rule 3170 based on a comparison of which entities are responsible for paying fees. The two types of fee programs target different types of sources, such that all stationary sources have the fee obligation under section 185 while less well-controlled stationary sources, along with motor vehicle owners have the obligation under Rule 3170. Overall, however, we believe that SJVUAPCD's alternative program is not less stringent than section 185 because it will generate at least as much revenue as a program that directly implements section 185. Rule 3170 by its explicit terms requires a demonstration that the revenue generated by the alternative program will equal or exceed the amount that would have been generated by a 185 program.

In addition, we believe that SJVUAPCD's alternative program

will result in emissions reductions because the demonstration required by Rule 3170 must rely on "California Vehicle Code fees" to offset any fees that would otherwise be due from direct implementation of section 185. Rule 3170's definition of "California Vehicle Code fees" specifies that these fees "are required by Health and Safety Code Section 40612 to be expended on establishing and implementing incentive-based programs . . . These fees shall therefore be used in programs designed to reduce NO_x and VOC emissions in the San Joaquin Valley." In addition, state law clearly requires that the fees be directed towards programs that reduce NO_X and VOC emissions in the San Joaquin Valley. Cal. Health and Safety Code 40612.

Furthermore, we note that, according to the District, stationary sources currently contribute approximately 20 percent of the ozone precursor emissions, while mobile sources are responsible for approximately 80 percent of such emissions in the SJVUAPCD.[6] The District also states that most stationary sources in its jurisdiction have already installed air pollution controls as a result of new source review or retrofitting requirements and that the only options to such businesses to avoid fees would be

[6] District comment letter dated August 24, 2011 and the California Air Resources Board's *California Emissions Projection Analysis Model (CEPAM): 2009 Almanac* found at: http://www.arb.ca.gov/app/emsinv/fcemssumcat2009.php

to either curtail production or to cease operation.[7] Rule 3170 places the burden of fees under its equivalent alternative program on major stationary sources that do not qualify as "clean emissions units" and on motor vehicle owners. To the extent that stringency can be evaluated based on which entities are subject to fees, we believe that SJVUAPCD's alternative program is not less stringent than section 185 because it imposes the fee obligation on the sources most responsible for continuing ozone pollution in the Valley. And, as noted, it also requires that the fees be used to fund ozone reduction, something section 185 does not do.

b. Comment: Rule 3170 is less stringent than section 185. Section 185 is not a standard-based provision, nor is it based on a specific fee collection amount. The purpose of section 185 is to penalize major stationary sources in Severe and Extreme nonattainment areas. The stringency of section 185 does not stem from a dollar figure or emission target, but rather from three requirements: (i) each major stationary source pay a fee; (ii) the fee be equal to $5000, adjusted for inflation, per ton of VOC

[7] "Most stationary sources in the San Joaquin Valley are already equipped with Best Available Retrofit Control Technology (BARCT) or Best Available Control Technology (BACT) . . . most businesses have already made significant investments and installed the most advanced controls available for their facilities." Memorandum from Seyed Sadredin, Executive Director / APCO to SJVUAPCD Hearing Board, re "Alternatives for the Equitable Application of Mandated Federal Nonattainment Penalties to Sources within the San Joaquin Valley through the use of Motor Vehicle Fees," Oct. 21, 2010, at 4.

or NO_X emitted in excess of 80 percent of the baseline; and (iii) the baseline amount be established from the attainment year inventory, unless the source's emissions are irregular, cyclical, or otherwise varying significantly from year to year. Charging motor vehicle fees merely adds a revenue stream. It fails to make up for the shortfall of not charging all major stationary sources penalty fees and basing those fees on the attainment year baseline, etc.

Response: We do not agree that an alternative program must adhere to the specific criteria identified by the commenter. In the context of the revoked 1-hour ozone NAAQS, and applying the principles of section 172(e) as upheld by the D.C. Circuit, the alternative program must be demonstrated to be "not less stringent" than the otherwise applicable required "control," i.e., section 185. We are approving Rule 3170 into the California SIP and as part of the District's equivalent alternative program because we have determined that Rule 3170 will result in the collection of fees at least equal to the amount that would be collected under section 185, that the fees will be used to reduce ozone pollution, and that the program therefore satisfies the requirements of CAA section 185, consistent with the principles of section 172(e). Moreover, as explained above, we believe that the District's alternative

program, by imposing fees on mobile sources -- the sources most responsible for the Valley's continuing ozone nonattainment problems – advances the legislative policy of creating incentives to facilitate attainment that underlay section 185 when it was enacted by Congress in 1990.

In addition, we note that Rule 3170 allows only money generated by motor vehicle registration fees and spent on ozone pollution reduction projects in the Valley to offset fees that would otherwise be due from direct implementation of section 185. In addition, state law requires that these fees be used to reduce NO_X and VOC pollution in the San Joaquin Valley which is consistent with section 185's place within the ozone non-attainment provisions of CAA Title 1, part D, subpart 2.

3. "Not less stringent" and equivalent fees.

Comment: A program that raises an equivalent amount of money is not supported by section 185's structure and legislative history. Section 185 was not intended as a revenue generating provision.

Response: Section 185 explicitly mandates a specific fee, requires that the fee be indexed for inflation, establishes a baseline for measuring such fees, and authorizes an alternative method for calculating that fee. For those reasons, and the additional reasons discussed above, we believe that section 185

has both monetary and emissions-related aspects and that it is reasonable for EPA to assess stringency of alternative programs on the basis of either aspect of section 185 or on the combination of both. Nevertheless, EPA notes that Rule 3170 imposes fees on those major stationary sources that do not meet the criteria for the "clean emissions unit" exemption and thereby provides an incentive for those stationary sources to reduce their emissions.[8] In addition, SJVUAPCD's alternative program imposes a fee on motor vehicles, the largest source of emissions in the Valley, thereby supporting emissions reductions from that source as well and in that respect will be no less effective in reducing ozone-formation than a section 185 fee program on major sources not meeting the "clean emissions unit" exemption would be. We further note that SJVUAPCD's alternative program will direct the revenues generated from the motor vehicle registration fee to VOC and NO_X emissions reductions programs.

4. "Not less stringent" and equivalent emission reductions.

a. Comment: The measure of equivalency should be section 185's emission reduction incentive. Penalties end if an area attains the standard or a source reduces its emissions by 20 percent. As the D.C. Circuit noted, "these penalties are designed to

[8] Rule 3170's clean unit exemption applies only to: (i) units equipped with emissions control technology that meets a minimum control efficiency of at least 95% or 85% for lean-burn internal combustion engines; or (ii) units equipped with BACT as accepted by the APCO during 2006 through 2010).

constrain ozone pollution." Nothing in the legislative history indicates that Congress' intent was to collect a certain amount of money.

Response: The comment correctly points to the fact that section 185 states that fees must be paid until an area is redesignated to attainment for ozone and that section 185 does not require fees from sources that reduce emissions by 20 percent (compared to emissions during the baseline period). Thus, one consequence of a section 185 fee program may be a reduction in VOC and/or NO_X emissions. However, EPA does not agree with the comment to the extent it is saying that emission reductions must be the sole basis for determining whether an alternative program is "not less stringent" than a section 185 program. As we stated above, we believe the stringency of an alternative program may be evaluated by comparing either the fees (which must be used to pay for emissions reductions) or emission reductions otherwise achieved from the proposed alternative program to the fees or emissions reductions directly attributable to application of section 185 (or by comparing a combination of fees and reductions).

In addition, the comment does not acknowledge that section 185 allows major sources to pay fees and not reduce emissions. The comment also does not acknowledge that SJVUAPCD is required

by state law to use the revenues generated by the alternative fee program to fund incentive-based programs that will result in NO_X and VOC emissions reductions in the San Joaquin Valley. We believe this aspect of the District's alternative program reflects the emission reductions aspects of section 185. We also believe that it is possible that SJVUAPCD's alternative program could result in more emission reductions than a section 185 program that funds unrelated programs.

b. Comment: Section 185 is a market-based policy device to internalize the external costs of pollution and thereby incentivize emission reductions at major stationary sources. EPA should assess how the incentives in Rule 3170 compare to the incentives in section 185. This analysis would look at how a pollution tax might drive sources to improve controls, and how the potential increase in the price of goods would cause consumers to look for alternatives that are not subject to the same tax.

Response: We do not agree that the comparison of "incentives" or a pollution tax proposed by the commenter is the only approach to evaluating the relative stringency of an alternative program, as explained above. In addition, we believe that Rule 3170 will have a beneficial effect on air quality in the San Joaquin Valley because state law requires that the fees

generated by the rule be spent on air pollution reduction programs in the Valley.

c. Comment: Rule 3170 severs the link between the fee and pollution levels. A new Prius is subject to the same fee as a dirty clunker, while stationary sources exempted from the fee have no incentive to improve performance.

Response: While we agree that in theory a section 185 program may reduce emissions, section 185 in itself does not mandate such reductions. Moreover, the link between section 185 and emission reductions is uncertain to the extent that section 185 requires fees from a unit that lowered its emissions by less than 20 percent at any time, or even by more than 20 percent if it did so before the attainment year deadline, but creates a perverse incentive by exempting a source that defers 20 percent emission reductions until after the attainment year.

In addition, as stated above, Rule 3170 continues to impose section 185 fees on emissions units that have not taken the emission reduction measures needed to qualify for the "clean emissions unit" exemption. Moreover, the District has determined that most stationary sources have installed pollution controls that meet BARCT or BACT standards and thus there is little more these sources can do to reduce emissions other than curtailing production or ceasing operation.

5. "Not less stringent" and alternative baseline.

Comment: Rule 3170 is less stringent because it exempts certain stationary sources from paying penalty fees and because it allows sources to use an alternative baseline of a 2 year average even if the source's emissions are not irregular, cyclical or otherwise vary from year to year.

Response: We do not agree that the District's alternative program is less stringent than section 185. As explained above, section 185 has both monetary and emissions reductions characteristics. We believe that the District's alternative program implements both aspects of section 185 by assessing fees on major contributors to air pollution in the San Joaquin Valley (major sources not qualifying for the clean unit exemption and motor vehicles), and by obligating these fees to NO_X and VOC pollution reduction programs. Moreover, as explained previously, we are approving SJVUAPCD's program as a not less stringent alternative program for anti-backsliding purposes and therefore determine that it complies with the statute even though it does not strictly follow the requirements of 185.

6. "Not less stringent" and process for revenues to be spent on air quality programs.

a. Comment: EPA's analysis did not demonstrate that Rule 3170 includes a process for revenues to be spent on emission

reductions to improve ozone air quality. EPA states that alternative programs might include those that raise the same amount of revenue and establish a process where the revenues would be used to pay for emission reductions that will further improve ozone air quality. But Rule 3170 includes no process or mention of how fees will be spent.

Response: Rule 3170, section 7.2 requires the District to prepare an "Annual Fee Equivalency Demonstration Report." Section 7.2.2 specifies that the report must demonstrate whether the sum total of fees collected under Rule 3170 and "California Vehicle Code fees" is equal to or greater than the fees that would be due under a direct implementation of section 185. Rule 3170's definition of "California Vehicle Code fees" specifies that these fees "are required by Health and Safety Code Section 40612 to be expended on establishing and implementing incentive-based programs . . . These fees shall therefore be used in programs designed to reduce NO_x and VOC emissions in the San Joaquin Valley." We believe that Rule 3170, therefore, will result in the expenditure of fees on ozone air pollution reduction programs.

In addition, we note that Health & Safety Code section 40612(a)(1) authorizes SJVUAPCD to increase motor vehicle fees by up to $30 per motor vehicle per year to establish and maintain

incentive-based programs that are intended to address air pollution caused by motor vehicles and achieve and maintain state and federal air quality standards. Health & Safety Code section 40612(b) specifies that at least ten million dollars of motor vehicle registration fees be used to mitigate air pollution impacts on disadvantaged communities. Section 40612(c) requires the District and the California Air Resources Board (CARB) to take certain steps to effectuate the supplemental motor vehicle fee: (1) the District must notify CARB that it has adopted the fee and provide an estimate of the amount of revenue that will be generated; (2) CARB must file with the California Secretary of State written findings that the District has performed the above requirements and that the District has undertaken all feasible measure to reduce nonattainment air pollutants from sources within the District's jurisdiction and regulatory control.

To demonstrate its authority to charge the supplemental motor vehicle registration fee, the District submitted Governing Board Resolution No. 10-10-14 dated October 21, 2010 to document that its governing board had exercised its authority to increase motor vehicle fees by $12 per year per motor vehicle and that it estimated the additional fee would generate approximately $34 million in additional funds. The District also submitted California Air Resources Board Executive Order G-10-126, dated

December 10, 2010, to document that CARB had made the findings required by Health & Safety Code 40612, as well as documentation that the findings had been submitted to the California Secretary of State.

b. Comment: Although the state law AB2522 requires the District to use revenues to fund incentive based programs resulting in NO_X and VOC emission reductions in the SJVUAPCD, there is no analysis or demonstration of how or whether the District will comply with this requirement.

Response: In our above response to the preceding comment, we explained how Rule 3170 will result in the expenditure of fees on ozone air pollution reduction programs. We also provided additional explanation of how state law requires the District to use the supplemental motor vehicle fees to fund incentive-based programs that will result in NO_X and VOC emission reductions in the San Joaquin Valley. We believe it is reasonable to presume that the District will obey the law and the documents noted above indicated that it has done so for 2010 and 2011.

c. Comment: EPA has not previously given emission reduction credit for incentive based programs. It is arbitrary for EPA to now assume that funds collected by Rule 3170 will in any way improve ozone air quality.

Response: Our basis for approving Rule 3170 is that it is

not less stringent than the requirements of section 185 because it will result in the collection of fees equal to the fees that would be collected under section 185. Furthermore, we have determined that Rule 3170 provides adequate oversight and enforcement mechanisms though an annual demonstration of fee equivalency that will be made available to the public and mailed to EPA by November 1 of each year. Additionally, we believe that the District's alternative program will result in improvements in air quality by providing the District with approximately $34 million annually to use on projects that will reduce NO_X and VOC emissions in the Valley. Finally, we note that section 185 does not require that the fees paid pursuant to a directly implemented section 185 program be directed to any particular purpose. This finding is consistent with our actions referenced in the comment regarding other incentive programs. In those cases, we acknowledged that SJVUAPCD's incentive programs would result in some emission reductions but noted that SJVUAPCD had not adequately demonstrated a specific amount of reductions. Similarly, while SJVUAPCD has not demonstrated a specific amount of emission reductions from Rule 3170's fees, it is reasonable to expect that it could be more than the reductions resulting from direct implementation of section 185, which does not require that fees be directed towards emission reductions.

D. Enforceability of Rule 3170

1. Emission standards or limitations.

a. Comment: Section 110(a)(2)(A) requires each SIP to include enforceable emission limitation and control measures such that any person can enforce such standards or limitations under section 304(a). Rule 3170 provides no standards or limitations and is unenforceable.

Response: Section 110(a)(2)(A) provides that each SIP shall "include enforceable emissions limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter." Rule 3170 contains enforceable requirements such as annual emissions reporting and annual equivalency demonstrations. Therefore, we disagree that Rule 3170 does not meet the enforceability requirements of the Act and should not be approved.

b. Comment: Because the equivalency demonstration is not an emission standard or limitation, citizens are not able to enforce the manner in which the District demonstrates equivalency. The air district methodology provided to calculate equivalency is not

an emission standard or limitation upon which citizens can bring suits.

Response: We note that CAA section 304(f)(4) defines the term "emission standard or limitation" for the purposes of citizen suit enforcement, including "any other standard, limitation, or schedule established . . . under any applicable State implementation plan approved by the Administrator." Further, we note that Rule 3170, section 6 contains affirmative obligations on subject sources to report emissions and Rule 3170, section 7 requires the District to track actual emissions and to demonstrate equivalency between fees obtained through the alternative program and fees that would have been due under a direct implementation of a section 185 fee program. We believe the obligations set forth in these provisions are sufficiently clear and specific that they meet the definition of emissions standard or limitation and thus the failure of a source or the District to comply could be enforced.

2. Practical Enforceability.

Comment: Enforcement of Rule 3170 is not practical because it is virtually impossible for citizens or EPA to determine whether CARB and the District have, in fact, raised funds equivalent to that which would be generated under the section 185 penalty fee program.

Response: We disagree that it is virtually impossible to determine if the District has demonstrated equivalent funds. Section 7.2.1.3 of Rule 3170 specifically requires the District to calculate the fees that would have been collected from major stationary sources under Section 185 of the Act. This provision is consistent with Section 185. The fee obligation is calculated based on a source's actual emissions in 2010 for the baseline year as well as actual emissions in the relevant demonstration year.

Sections 7.1 and 7.2 specify the procedures for the equivalency demonstration and require the District to track collected fees and demonstrate equivalency. The tracking provisions are clear and straightforward. If the amount of fees collected is not at least equal to the amount of fees that would have been collected under a direct implementation of section 185, Rule 3170 requires the District to collect additional fees from stationary sources to make up the shortfall. If approved into the SIP, Rule 3170, including the District's obligations, become federally enforceable and may serve as the basis of citizen suits. We do not agree that citizens cannot enforce the manner in which the District demonstrates equivalency.

3. Federal enforceability.

Comment: CARB and the District propose to implement the $12 motor vehicle fee through state law mechanisms which are not federally enforceable. Neither EPA nor private citizens can enforce the state mandated $12 motor vehicle fee. Rule 3170 does not include the motor vehicle registration funding mechanism itself, but rather relies on state law to implement and enforce the fee. Even if Rule 3170 becomes part of the California SIP, EPA will have no way to enforce the fee.

Response: As the commenter states, the District's alternative program relies in part on the collection of a $12 motor vehicle fee. The commenter is correct that EPA's action will not make the payment of the motor vehicle fee federally enforceable. However, the requirement for the District to demonstrate equivalency under Rule 3170 is federally enforceable, as is the requirement to collect additional fees from major stationary sources if necessary to cover any shortfall and demonstrate equivalence.

4. Analysis of Enforceability.

Comment: The proposed rule fails to include any analysis or make any finding with respect to enforceability. The TSD sets forth a single, conclusory sentence stating that the rule is enforceable. EPA must articulate a rational connection between the facts found and the choice made. Because EPA fails to make

any factual finding of enforceability, and fails to articulate a rational basis for concluding that Rule 3170 is enforceable, EPA's decision to approve Rule 3170 is arbitrary and capricious.

Response: EPA's proposed rule described the various requirements of Rule 3170 that the District is obligated to perform. For example, our proposed rule described Rule 3170's requirements for the APCO to track emissions data, calculate, assess and collect fees from stationary sources and track motor vehicle registration fees. 76 FR 45214. Our proposal also described Rule 3170's requirement for the APCO to prepare and submit to EPA an annual report that shows that the sum of fees collected from stationary sources and motor vehicle registrations are equal to or greater than the fees that would have been collected under a direct implementation of section 185. *Id.* Our proposal also described Rule 3170's requirement that the APCO collect additional funds from stationary sources if the annual demonstration shows a shortfall. *Id.* Our intention in describing these provisions and referring to them as "requirements" was to communicate our conclusion that Rule 3170 contained enforceable provisions that "will result in the collection of fees equal to the fees that would be collected under section 185." *Id.* at 45215.

To further clarify our determination with respect to the

enforceability of Rule 3170, we add that the provisions of Rule 3170 are sufficiently clear and specific as to what is required and when these obligations must be completed. In particular, we are referring to the requirements in Sections 6 and 7 of Rule 3170. Section 6 requires sources to report baseline period actual emissions information by a date certain and to provide annual emission statements for the prior calendar year. *See* Rule 3170, Sections 6.1 and 6.2. Section 7 requires the APCO to track emissions and to conduct an annual reconciliation process comparing fees under Rule 3170 to fees that would have been collected under a direct implementation of section 185 and to submit a report with the results of this analysis to EPA by November 1 of each year. *See* Rule 3170, Sections 7.1 and 7.2. Finally, if there is a shortfall in funding, section 7.3 requires the District to bill major sources, within 90 days following the demonstration of the shortfall, "sufficient fees to recover the entire amount of the shortfall." *See* Rule 3170, Section 7.3. Because these provisions are clear and specific and compliance can be determined by a date certain, we determined that Rule 3170 is enforceable.

E. Title VI Implications

1. Rule 3170 and disparate impact.

Comment: Rule 3170 penalizes vehicle owners instead of owners of major stationary sources. Because the motor vehicle owners in the Valley are largely low-income and people of color, where owners of major stationary sources are not, this rule disparately impacts low-income and people of color, in violation of Title VI of the Civil Rights Act, EPA's regulations implementing Title VI, and President Clinton's Executive Order 12898. Because the District receives federal funding, it is EPA's duty to ensure that the District does not administer its Clean Air Act programs in a manner that violates Title VI.

Response: In response to the comment on environmental justice, this action does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994). Specifically, under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act and EPA regulations. Accordingly, this action merely approves state law as meeting Federal requirements and does not

impose additional requirements beyond those imposed by state law. For that reason, this action does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994). In response to the comment on Title VI, EPA Region 9 forwarded a copy of this comment to the Office of Civil Rights in Washington, DC, which as provided in EPA's regulations implementing Title VI of the Civil Rights Act, has the responsibility to administer Title VI in the Agency, including the decision to accept, reject or refer to another Federal agency the matter for investigation. 40 CFR 7.20, 7.125.

Finally, we note that enabling legislation for the District's alternative fee program, AB2522, provides: "At least ten million dollars ($10,000,000) shall be used to mitigate the impacts of air pollution on public health and the environment in disproportionately impacted environmental justice communities in the San Joaquin Valley." Cal. Health & Safety Code, § 40612((b).

F. Miscellaneous Comments

1. Other Demonstrations of "Not Less Stringent".

Comment: One commenter asked EPA to clarify in our final action that alternative programs meeting the "not less stringent"

criteria would not be limited to just fee-equivalent, emissions reduction-equivalent, or a hybrid of the two. The commenter suggested other options, including 1) programs that have a broader environmental purpose and would not be limited to only those programs that can reduce NO_X and VOC emissions, and 2) result in reductions of NO_X and VOC in different proportion to that on which the 185 fees were assessed.

Response: Our action relates to SJVUAPCD Rule 3170 and SJVUAPCD's alternative program, which rely on an annual fee equivalency demonstration to show that it is not less stringent than section 185. We acknowledge the comment and the possibility that another program could use different elements to demonstrate that it meets the not less stringent than standard in section 172(e). EPA has not assessed any such elements in this rulemaking and will do so if and when such alternatives are submitted.

2. Types of Projects to Improve Air Quality.

Comment: One commenter recommended that EPA allow sources to apply the calculated section 185 fees to a number of projects at the major stationary source or at other sources in either the nonattainment area or upwind areas. The commenter suggested ten examples of eligible projects including installing emissions control technology, enhancing existing pollution control

equipment, energy efficiency and renewable energy measures, lower emitting fuels, retirement or repowering of a higher emitting facility, mobile source retrofit program, clean vehicle fleets, and increasing mass transit ridership.

Response: EPA is acting on SJVUAPCD's Rule 3170 and SJVUAPCD's alternative program, which do not include these program features. If these program features are included in a specific SIP submittal for another alternative program, EPA would evaluate them at that time.

G. Interim Final Determination to Defer Sanctions

1. Sanctions should continue to apply because Rule 3170 contains two deficiencies and should be disapproved.

Comment: Rule 3170 is deficient because it exempts "clean units" from fee requirements and because it allows for an alternative baseline period of two consecutive years if the APCD determines it would be more representative of normal operations.

Response: Our proposed action was to approve Rule 3170 and SJVUAPCD's alternative program in the context of the revoked 1-hour ozone NAAQS. We concluded that Rule 3170 is approvable into the California SIP and as part of the District's alternative fee-equivalent program because we have determined that Rule 3170 will result in the collection of fees at least equal to the amount that would be collected under section 185, that the fees will be

used to reduce ozone pollution, and that the program therefore satisfies the requirements of CAA section 185, consistent with the principles of section 172(e). Our proposed action contained our analysis of how the District's alternative fee-equivalent program meets the "not less stringent than" criterion of section 172(e), and we are providing additional explanation in this notice. For these reasons we conclude that the SIP deficiency has been corrected and sanctions would no longer be appropriate.

2. EPA's interim final determination violates the Administrative Procedures Act (APA).

a. Comment: EPA did not provide an opportunity for comment before the action took effect. Considering whether public comments warrant a reversal of action is not the same as providing an opportunity to participate in the rulemaking.

Response: As explained in our Interim Final Rule, we invoked the good cause exception under the APA as the basis for not providing public comment before the action took effect. Our review of the State's submittal indicated that it was more likely than not that the State had submitted a revision to the SIP that addressed the issues we identified in our earlier action that started the sanctions clocks. We concluded that it was therefore not in the public interest to impose sanctions. We also explained that the offset sanction was due to be imposed 18

months after February 12, 2010, or August 12, 2011, which was approximately 15 days from the date of publication of the Interim Final Rule. Therefore, it would not have been possible for us to provide an opportunity for comment before the offset sanction would have been imposed. Our use of the good cause exception thus relieved a restriction and avoided the imposition of sanctions that, as explained below, were unnecessary because the State had already taken the steps it needed to take to submit an approvable rule. The only action that remained to be taken was EPA's action to complete our rulemaking, including reviewing and responding to public comments on our proposed action. As explained in our Interim Final Rule, we could have disapproved the rule, if justified by public comments. However, we are now finalizing our action with an approval of the State's submittal, which further supports the reasonableness of our use of the good cause exception to avoid needless hardship on entities and individuals in the San Joaquin Valley.

b. Comment: The Good Cause exception does not apply because deferring sanctions does not present an "imminent threat" or otherwise qualify for the exception. The danger is actually in deferring monetary pressure because it relieves pressure to achieve cleaner air.

Response: At the time of our Interim Final Rule, the State had already taken the steps necessary to correct the issues we had identified in a previous action. Specifically, on May 19, 2011, SJVUAPCD adopted a revised version of Rule 3170 and on June 14, 2011, CARB submitted the revised rule to EPA. Thus, the deferral of sanctions accomplished by EPA's Interim Final Rule did not "relieve pressure" on the District or CARB. For the same reasons, EPA believes that the imposition of sanctions would not have had any effect towards achieving clean air, as the local agency and the State had already revised the rule and submitted it to EPA for incorporation into the State Implementation Plan.

IV. EPA Action

EPA is finalizing approval of Rule 3170, "Federally Mandated Ozone Nonattainment Fee," as a revision to SJVUAPCD"s portion of the California SIP. EPA is also finalizing approval of SJVUAPCD's fee-equivalent program, which includes Rule 3170 and state law authorities that authorize SJVUAPCD to impose supplemental fees on motor vehicles, as an alternative to the program required by section 185 of the Act for anti-backsliding purposes with respect to the 1-hour ozone standard.

No comments were submitted that change our assessment that Rule 3170 and SJVUAPCD's alternative program comply with the relevant CAA requirements. Therefore, as authorized in section

110(k)(3) of the Act, EPA is fully approving Rule 3170 into the California SIP and SJVUAPCD's alternative program as an equivalent alternative program, consistent with the principles of section 172(e) of the Act. Final approval of Rule 3170 and SJVUAPCD's equivalent alternative program satisfy California's obligation under sections 182(d)(3), (e) and (f) to develop and submit a SIP revision for the SJVUAPCD 1-hour ozone nonattainment area to meet the requirements for a program no less stringent than that of section 185. Final approval of Rule 3170 and SJVUAPCD's equivalent alternative program also permanently terminates all sanctions and the Federal Implementation Plan (FIP) implications associated with section 185 for the 1-hour ozone NAAQS and previous action (75 FR 1716, January 13, 2010) regarding SJV.

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose

additional requirements beyond those imposed by State law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15

U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take

effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: June 11, 2012

Jared Blumenfeld,
Regional Administrator,
Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52 [AMENDED]

1. The authority citation for Part 52 continues to read as follows:

AUTHORITY: 42 U.S.C. 7401 et seq.

Subpart F – California

2. Section 52.220 is amended by adding paragraph (c)(412) to read as follows:

§52.220 Identification of plan.

* * * * *

(412) New regulations were submitted on June 14, 2011 by the Governor's designee.

(i) Incorporation by Reference.

(A) San Joaquin Valley Unified Air Pollution Control District.

(*1*) Rule 3170, "Federally Mandated Ozone Nonattainment Fee," amended on May 19, 2011.

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[FR Doc. 2012-20268 Filed 08/17/2012 at 8:45 am; Publication Date: 08/20/2012]