that is a qualified nonpersonal use vehicle as defined in section 274(i) and § 1.274–5(k).

* * * * *

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: May 5, 2010.

Michael Mundaca,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2010–11767 Filed 5–18–10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0269; FRL–9152–6]

Approval and Promulgation of Implementation Plans; State of California; Legal Authority

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to clarify the contents of the applicable implementation plan for the State of California under the Clean Air Act. Specifically, EPA is taking final action to clarify that the statutory provisions submitted by California and approved by EPA in 1972 supporting the State's legal authority chapter of the original implementation plan were superseded by a subsequent approval by EPA in 1980 of California's revision to the legal authority chapter of the plan. EPA is taking this action to clarify the status in the California plan of the statutory provisions submitted and approved in 1972.

DATES: *Effective Date:* This rule is effective on June 18, 2010.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2009–0269 for this action. The index to the docket is 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 in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* 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: Gerardo Rios, Chief, Permits Office (AIR–3), U.S. Environmental Protection Agency, Region IX, (415) 972–3974: *rios.gerardo@epa.gov.*

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

Table of Contents

I. Proposed Action

On January 29, 2010 (75 FR 4742), under the Clean Air Act (CAA or "Act"), we proposed to clarify that the statutory provisions submitted by California in 1972 supporting the State's legal authority chapter of the original implementation plan were superseded by a subsequent approval by EPA in 1980 of a revision to California's legal authority chapter of the plan.

In support of our proposed action, we provided a detailed account of the regulatory context in which the original California State implementation plan (SIP) was submitted and approved by EPA. We also described in detail the contents of the original California SIP, which consisted of 13 parts, the first part ("State General Plan") of which included a chapter 7 ("Legal Considerations"), referred to herein as the "legal authority" chapter. The original SIP also included an appendix (entitled "Appendix II: State Statutes and other Legal Documents Pertinent to Air Pollution Control in California") to the legal authority chapter. The legal authority chapter included many citations to individual sections within the California Health & Safety Code (CH&SC) and other California codes, as well as citations to (then) recently approved legislation, and attorney general opinions as support for the assurance that adequate legal authority exists in the State to meet CAA and EPA SIP requirements.

As described in the proposal, the appendix to the legal authority chapter in the plan (herein, "appendix II") included the specific sections of California code and other legal documents cited in chapter 7, but also included many sections of California code that were not cited specifically in chapter 7. Our proposed rule describes in detail the contents of appendix II and its 14 categories of statutory and other legal documents.

In May 1972, we approved in part and disapproved in part the original California SIP. *See* 37 FR 10842 (May 31, 1972) and 40 CFR 52.220(b). EPA's approval included both chapter 7 and the statutory and other documents contained in appendix II as described above.

As explained in our proposed rule, in response to EPA's request and in response to the Clean Air Act Amendments of 1977, California undertook a comprehensive update to the California SIP. On March 16, 1979, the California Air Resources Board (ARB) submitted a revision to the legal authority chapter of the SIP, entitled "Chapter 3—Legal Authority, Revision to State of California Implementation Plan for the Attainment and Maintenance of Ambient Air Quality Standards (December 1978)," (also referred to herein as "Chapter 3—Legal Authority" or the "revised legal authority" chapter). Much like the original legal authority chapter, the revised legal authority chapter provides an overview of air pollution control in California. While the general topics covered in the revised legal authority chapter were similar to those covered in the original legal authority chapter, the discussion is completely re-organized and updated to reflect, among other things, recodifications of statutory provisions. Also, like the legal authority chapter in the original SIP, the revised legal authority chapter includes numerous citations to individual sections of the CH&SC (which had been re-numbered and re-codified since the time of the original SIP), certain citations to other California codes and other legal documents. However, unlike the legal authority chapter in the original SIP, the revised legal authority chapter, as submitted in 1979, did not include physical copies of the actual statutory provisions nor the other documents cited in the chapter. Instead, the 1979 SIP revision simply incorporates by reference the 1978 edition of *California Air Pollution Control Laws* as "appendix 3–A" to the chapter. Later in 1979, we proposed approval of the revised SIP "Chapter 3—Legal Authority" as an update and clarification of the 1972 SIP. *See* 44 FR 38912 (July 3, 1979). The following year, we took final action, effective September 10, 1980, to approve the revised legal authority chapter. *See* 45 FR 53136 (August 11, 1980) and 40 CFR 52.220(c)(48). Since that time, EPA has not approved any other revision to the chapter that addresses legal authority in the California SIP.

Based upon our review of the relevant provisions of the original California SIP and the related 1979 SIP revision, and the corresponding EPA approval actions, we proposed to clarify the contents of the SIP to reflect our determination that the statutory provisions and other legal documents

submitted in support of the legal authority chapter in the original SIP were superseded by our 1980 approval of the revised legal authority chapter of the California SIP (codified at 40 CFR 52.220(c)(48)) and are no longer part of the California SIP. Our determination that the 1979 submittal of the revised legal authority chapter represented a wholesale replacement of the original chapter was based on the nature and scope of the revised chapter and the mismatch between the statutory citations in the revised chapter and those contained in the original chapter.[1] We also noted that the actual statutory provisions and other legal documents relied upon to support a State's assurance of adequate legal authority need not be approved into the SIP under CAA section 110 or EPA's SIP regulations in 40 CFR part 51 (although such provisions are required to be submitted with the plan). Thus, EPA could approve, consistent with CAA and EPA requirements, and did so in this instance, a wholesale revision to the original legal authority chapter without also approving the actual statutory provisions and other legal documents cited therein.[2]

To memorialize our interpretation of the effect of our 1980 approval of the revised legal authority chapter of the California SIP, we proposed under CAA section 301(a)(1)[3] to revise 40 CFR 52.220(b)(12)(i) to clarify that none of the statutory provisions (and other legal documents) submitted in connection with chapter 7 ("Legal Considerations") of the original California SIP remain in the SIP, not just the few provisions currently listed as being deleted.[4]

Additional background information for today's action can be found in our January 29, 2010 proposed rule (75 FR 4742).

II. Public Comments and EPA Responses

Our January 29, 2010 proposed rule (75 FR 4742) provided for a 30-day comment period. During that period, we received comments from four groups: Earthjustice, on behalf of the Sierra Club, by letter dated March 1, 2010; Center on Race, Poverty & the Environment (referred to herein as "AIR"), on behalf of the Association of Irritated Residents and many other community and environmental groups, by letter dated March 1, 2010; San Joaquin Valley Air Pollution Control District ("District"), by letter dated February 24, 2010; and Greenberg-Glusker law firm (referred to herein as "Dairy Cares"), on behalf of Dairy Cares, a coalition of California's dairy producer and processor associations, by letter dated March 1, 2010.

Earthjustice expresses support for EPA's proposed rule. The three other commenters object to our proposed action. Dairy Cares joins in the District's comments and adds comments of its own. In the following paragraphs, we provide a summary of all significant adverse comments and we provide our corresponding responses. For the purposes of this section of the document, "District" refers herein to both the District and Dairy Cares, whereas "Dairy Cares" is used in reference to the additional comments submitted by this commenter.

Comment #1: AIR contends that there has never been an exemption for agricultural sources in the SIP as it relates to San Joaquin Valley. Under the *Safe Air* case, AIR contends that there can be no exemptions in the SIP by virtue of the original 1972 SIP and 1978 SIP Revision because the SIP's plain language as adopted and submitted contains no exemption and the vague references to California statutory authority are not in the SIP as incorporated by reference in the Code of Federal Regulations (CFR). AIR also asserts that EPA could not have lawfully approved the original 1972 SIP and 1978 SIP Revision with exemptions for agricultural sources without violating the Clean Air Act.

Response #1: We recognize that our approval of the original California SIP in 40 CFR 52.220(a) ("Title of plan: 'The State of California Implementation Plan for Achieving and Maintaining the National Ambient Air Quality Standards' ") and (b) ("The plan was officially submitted on February 21, 1972") on May 31, 1972 (37 FR 10842, at 10851) says nothing about the contents of the original SIP. To uncover its contents, we reviewed a copy of the original SIP maintained in the collection of materials at the National Archives and Record Center in San Bruno, California. From that copy, we determined that the original SIP contained an appendix to the legal authority chapter that contained various statutory provisions, and other legal documents.

Among the statutes in the appendix was CH&SC section 24265, which excludes certain categories of emission sources, including equipment used in agricultural operations in the growing of crops or raising of fowls or animals, from the general grant of authority to local air districts to require permits for new and existing emissions sources (herein, "agricultural permitting exemption"). We found no evidence in the original SIP itself that the materials in the appendix to the legal authority chapter were not intended by the State to be included in the plan itself. Nor did we find any evidence in our approval action that we did not intend to approve the entire contents of the appendix to the legal authority chapter of the original California SIP. In our May 31, 1972 final approval of the original California SIP, we added 40 CFR 52.233, which states: "With the exceptions set forth in this subpart, the Administrator approves California's plan for the attainment and maintenance of the national standards." *See* 37 FR 10842, at 10852. In the case of our May 1972 action on the original SIP, none of the "exceptions set forth in this subpart," such as our findings in 40 CFR 52.225 ("Legal Authority") that the California SIP failed to provide sufficient legal

[1] ARB described the nature and purpose of that agency's comprehensive update of the California SIP during the late 1970's as follows: "The [EPA] has formally requested that the [ARB] update the *State of California Implementation Plan for Achieving and Maintaining the National Ambient Air Quality Standards,* usually referred to simply as the 'SIP.' The original SIP document, submitted to EPA in 1972, has become obsolete largely because of the many modifications to Federal, state, and local air pollution rules and regulations and substantial advancements in technical aspects of air pollution prediction and control. A new *SIP 1978 Working Document* has been prepared as an initial response to the EPA request and contains an updated summary and description of the California SIP. * * * The SIP 1978 Working Document is a step towards replacing the obsolete 1972 SIP." *See* page 1 of Chapter 1 ("Introduction") (April 1978) of the SIP—78 Working Document. Therefore, the revised legal authority chapter was intended by ARB, and approved by EPA, as a wholesale replacement of the original legal authority chapter, including the related statutory provisions and other materials submitted in support of the original chapter.

[2] We view the revised legal authority chapter's incorporation (as appendix 3–A) of the 1978 edition of *California Air Pollution Control Laws* as simply providing a general reference to where the statutory citations in the chapter could be located rather than as having the effect of a literal reading of the provisions into the chapter.

[3] CAA section 301(a)(1) states: "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. * * *." We believe that our rule proposed herein today is necessary to clarify the contents of the California SIP and thereby carry out the functions of EPA in connection with the state's plan.

[4] As noted in the proposed rule, the status of the statutory provisions from the original SIP has recently come into question in the context of third party litigation, an EPA rulemaking action on a revision to new source review rules in the San Joaquin Valley, and a lawsuit filed against EPA challenging certain EPA actions on the premise that such actions were arbitrary and capricious if a certain statutory provision submitted and approved by EPA in connection with the original SIP remains in effect as part of the current applicable California SIP. Thus, we believe that clarification of the status of the statutory provisions (and other legal documents) submitted in connection with the original SIP is necessary and appropriate at this time.

authority to meet the requirements related to air pollution emergencies and to make emissions data publicly available, provide evidence that we disapproved any of contents of the appendix to the legal authority chapter of the original SIP. Therefore, we concluded that the statutory provisions and other legal documents contained in the appendix to the legal authority chapter of the original California SIP were approved along with the rest of the plan in May 1972, and the agricultural permitting exemption found in CH&SC section 24265 was swept into the SIP by virtue of being included among the appendix materials so approved.

AIR points to the *Safe Air* case in support for its contention that no exemptions are in the SIP by virtue of the original 1972 SIP (submitted and approved in 1972) and the "1978 SIP Revision" (*i.e.,* the revision to the legal authority chapter, which was adopted in December 1978, submitted in March 1979, and approved in September 1980). In so doing, AIR states that the SIP's plain language contains no exemption and asserts that the vague references to California statutory authority are not in the SIP as incorporated by reference in the CFR. In the *Safe Air* case, the court held that "SIPs are interpreted based on their plain meaning when such a meaning is apparent, not absurd, and not contradicted by the manifest intent of EPA, as expressed in the promulgating documents available to the public." *See Safe Air for Everyone v. EPA,* 488 F.3d 1088, 1100 (9th Cir. 2007). Under the circumstances of the *Safe Air* case, the court found that the plain language of the Idaho SIP did not include the State's statutory restrictions on regulation of field burning, nor were the statutory restrictions on regulation of field burning made manifest in EPA's approval of the State's open burning rule, and thus, were not relevant in interpreting the existing SIP.

With respect to the agricultural permitting exemption and the California SIP, the existence of the exemption as part of the original California SIP as approved by EPA is apparent from a review of the submitted plan itself. We also do not believe our approval of the exemption in 1972 to be absurd or contradicted by the manifest intent of the State of California or EPA. As such, our interpretation is consistent with the holding of the *Safe Air* case. As clarified in today's action, our approval of California's 1979 update to the legal authority chapter of the California SIP superseded the original legal authority chapter and the related supporting appendix materials in the California SIP, including the agricultural permitting exemption.

Lastly, AIR asserts that EPA should interpret the Agency's California SIP approvals under the presumption that, absent a demonstration to the contrary, we acted consistent with the CAA and related Agency policies, and because in AIR's view, we could not have lawfully approved the original 1972 SIP and the "1978 SIP Revision" with exemptions for agricultural sources without violating the Clean Air Act, then the presumption should be that the exemptions were not approved into the SIP. First, we did not approve the agricultural permitting exemption when we took action in 1980 to approve California's 1979 update to the legal authority chapter of the SIP. As discussed in our January 29, 2010 proposed rule, we have concluded, however, that we did approve the agricultural permitting exemption in 1972 when we approved the original California SIP.

We disagree that our 1972 approval did not comport with the requirements for SIPs under the Clean Air Act and EPA's regulations in effect at that time. Given the state of air pollution knowledge at the time, a SIP exemption from permitting for agricultural sources is not surprising. In 1972, stationary sources had yet to be divided under the Clean Air Act into "major" and "minor" categories (the requirement for permitting of "major" sources came later), and given the state of knowledge concerning air pollution sources and control methods at the time, it is certainly plausible that neither the State of California nor EPA foresaw that regulation of new and modified agricultural sources, as opposed to new and modified factories and smelters, and the regulation of motor vehicles, would be necessary to attain and maintain the national ambient air quality standards (NAAQS).

As noted above, we have concluded that the agricultural permitting exemption, along with the other statutes and legal documents, submitted in the appendix to the legal authority chapter in the original 1972 SIP were approved by EPA and made part of the applicable SIP. To the extent, however, that uncertainty remains on this point, it does not matter from the standpoint of the California SIP over the past 30 years, because, as we are clarifying in this final rule, our 1980 approval of the legal authority chapter superseded the 1972 approval of the corresponding chapter (and its related appendix) such that the agricultural exemption was no longer in the SIP beginning with the effective date of our final rule approving the revised chapter (*i.e.,* September 10, 1980).

Comment #2: The District contends that California's agricultural permitting exemption was approved into the SIP in 1972.

Response #2: We agree. As explained in detail in the January 29, 2010 proposed rule (75 FR at 4743), we have concluded that the statutory provisions contained in appendix II to chapter 7 of the original California SIP, including the agricultural permitting exemption in CH&SC section 24265, were indeed approved into the California SIP. Our interpretation of SIP requirements is that, while the SIP must provide "necessary assurances" of "adequate authority" and must identify the provisions of law that provide for "adequate authority," the statutes themselves need not be approved as part of the SIP. That does not mean that the statutes supporting the legal authority portion of a SIP cannot be approved into the SIP, only that they need not be. In 1972, California submitted the statutes supporting the legal authority chapter of the original California SIP to EPA, and EPA approved the original SIP, with exceptions not relevant here. Thus, while the statutory provisions need not have been approved into the California SIP, we agree that they in fact were so approved in 1972.

Comment #3: The District disagrees with EPA's finding that the statutes supporting California's revised legal authority chapter, as submitted in 1979, were not physically submitted as part of the SIP revision containing the revised chapter. In support of its position, the District cites "appendix 3–A" to "chapter 3—Legal Authority," which was submitted in 1979 and approved by EPA in 1980, and which, in the District's view, contains the 1978 edition of the *California Air Pollution Control Laws,* including the agricultural permitting exemption [by then re-codified to CH&SC section 42310(e)].

Response #3: The legal authority chapter and appendix, as revised in 1979 by California and submitted to EPA, includes several references to the 1978 edition of *California Air Pollution Control Laws.* On page 1, the revised legal authority chapter states:

> "All section references hereafter in this chapter are to the Health and Safety Code unless otherwise indicated. The 1978 edition of *California Air Pollution Control Laws* include all applicable sections of the Health and Safety Code, the Business and Professional Code, and the Vehicle Code. This edition is incorporated as appendix 3–A to this chapter available separately from the ARB Public Information Office, P.O. Box 2815, Sacramento, CA 95812."

As noted in footnote 3 of our January 29, 2010 proposed rule (at 75 at 4744), we view the phrase "this edition is incorporated as appendix 3–A" as simply providing a general reference to where the statutory citations in the chapter could be located, rather than as having the effect of a literal reading of the provisions into the chapter. Our view is supported by the fact that the revised legal authority chapter does not "incorporate by reference" the 1978 edition of *California Air Pollution Control Laws* nor does the chapter identify any State law or rule that provides for a literal reading of large volumes of text into another State document, similar in purpose to the Office of the Federal Register's rules concerning "incorporation by reference" in connection with Federal rules (*See* 1 CFR part 51). In contrast, the statutory provisions and other legal documents supporting the legal authority chapter were physically submitted in "appendix II" to the original California SIP, as discussed above. "Appendix 3–A" itself is only found in the table of contents to the 1979 revised legal authority chapter. Next to the listing of "Appendix 3–A" in the table of contents is the following statement: "*California Air Pollution Control Laws,* 1978 Edition, California Air Resources Board, Sacramento, CA 95812 (available from ARB's Public Information Office)."

Given the facts discussed above, we believe that the District is incorrect in claiming that appendix 3–A to the 1979 revised legal authority chapter "contains" the 1978 edition of *California Air Pollution Control Laws.* At most, it refers to the 1978 edition of *California Air Pollution Control Laws.* Not only did the revised legal authority chapter not contain the statutes, we believe that ARB's approach to keeping the statutes themselves physically separate from the revised legal authority chapter evinces an intent on the part of ARB not to include the statutes themselves in the SIP.

Comment #4: Regardless of whether the statutes were resubmitted, the District claims that EPA provides no support for its finding that the statutory provisions and other legal documents contained in the 1972 SIP were superseded by its approval of California's 1979 revised legal authority chapter.

Response #4: In our proposed rule (75 FR at 4744), we provide the following support for our conclusion that our approval of the 1979 legal authority chapter superseded our earlier approval of the legal authority chapter as well as the statutes and other legal documents submitted in support of the legal authority chapter from the original California SIP:

- Contemporaneous statements by ARB as to the wholesale nature of the SIP update undertaken in 1978 and 1979;
- The mismatch between the statutory citations in the revised legal authority chapter and the statutes submitted in support of the legal authority chapter of the original SIP; and
- Our conclusion that statutes providing support for a State's "necessary assurances" of adequate legal authority for the purposes of CAA section 110(a)(2)(E) need not be approved in the SIP.

As to the third bulleted item, above, the District objects to EPA's conclusion that the statutes providing support for a State's "necessary assurances" of adequate legal authority need not be approved in the SIP to meet CAA and EPA SIP requirements. The District contends that EPA's reading of the SIP requirements in this regard is illogical and unsupported because there is no reason to conclude that statutes that must be submitted with the plan need not be approved into the plan. However, as explained below, the language of both the statute itself and our SIP regulations support our finding that the statutes supporting a State's "necessary assurances" of adequate legal authority need not be approved into the SIP. In other words, the statutes may be approved into the SIP, but are not required to be approved into the SIP.

First, under CAA section 110(a)(2), each SIP shall "(E) provide (i) necessary assurances that the State * * * will have adequate * * * authority under State * * * law to carry out such implementation plan * * *." The statute thus requires that SIPs provide "necessary assurances," of adequate legal authority, not that SIPs must include statutes that establish legal authority. A State's demonstration of "necessary assurances" must be contained in the SIP, but the form in which the demonstration is made can take various forms, including but not limited to a narrative discussion (*e.g.,* legal authority chapter), an Attorney General's letter, the statutes themselves, or some combination of the above. In contrast, for other SIP elements, the CAA requires the underlying regulations to be included in the SIP, not just "necessary assurances" of such regulations. For instance, under section 110(a)(2)(A), each SIP must "include enforceable emission limitations and other control measures * * *." A State's "necessary assurances" of such enforceable emission limitations is not enough to satisfy this CAA requirement. The State must submit the enforceable emission limitations themselves, which generally take the form of air pollution control rules and regulations, to comply with the relevant CAA requirement.

Second, the relevant EPA SIP regulations require that "Each *plan must show* that the State has legal authority to carry out the plan, * * *" (emphasis added) (*See* 40 CFR 51.230), but, as to the statutes themselves, EPA's regulations state: "The provisions of law or regulation which the State determines provide the authorities required * * * must be specifically identified, and copies of such laws or regulations be submitted *with the plan*." (emphasis added). *See* 40 CFR 51.231(a). The phrase, "each plan must show," refers to elements that must be included as part of the plan, whereas the latter phrase, "submitted with the plan," is, at most, ambiguous as to whether the items that must be submitted must also be included in the plan itself. But, when considered with the statutory language in CAA section 110(a)(2)(E) that requires the SIP to include "necessary assurances" of adequate legal authority, not the statutes themselves, it is reasonable to interpret 40 CFR 51.231(a) as requiring the submittal of the statutory provisions (providing support for the necessary showing of adequate legal authority) for the purpose of allowing EPA to conduct an informed review of a State's demonstration of "necessary assurances" of adequate legal authority, and as not requiring approval of the statutory provisions themselves as part of the SIP.

Lastly, the District points to EPA's own description of the Agency's approval of the revised legal authority chapter as "nonsignificant" and "administrative in nature" as inconsistent with EPA's contention that the approval of the revised legal authority chapter superseded the earlier chapter and related statutory provisions given the significance that the District attaches to the supersession of those provisions. However, EPA's description of its action approving the revised legal authority chapter as "administrative" mirrors ARB's foreword to the revised legal authority chapter: "Chapter 3 is an Air Resources Board (ARB) revision to the State of California Implementation Plan for the Attainment and Maintenance of Ambient Air Quality Standards (SIP). It is an administrative chapter which outlines the State's legal authority to implement the measures contained in the State Implementation Plan required by the Clean Air Act * * *." Our approval action was thus

consistent with ARB's description of the revised legal authority action.

Retention of the statutory provisions that had been submitted as part of the original SIP would imply that they have significance outside of their purpose in providing support for the State's "necessary assurances" of adequate legal authority, which ARB submitted in the form of a narrative chapter. But, ARB's description of the chapter itself as "administrative" shows that the underlying statutory provisions have no place in the applicable SIP other than with the demonstration of "necessary assurances." Our conclusion that the statutes submitted in support of the original chapter were superseded upon our approval of the revised chapter is consistent with this understanding of the inherent connection between the "necessary assurances" demonstration in the SIP and the supporting statutory provisions.

As described above, the statutes submitted by a State in support of the "necessary assurances" demonstration of adequate legal authority may be approved as part of the SIP (*e.g.,* original California SIP) but are not required to be part of the SIP. Where EPA has approved the supporting statutes into the SIP, EPA views the statutes as "nonregulatory" provisions of the SIP. *See, e.g.,* 62 FR 27968, at 27971 (May 22, 1997) ("Examples of nonregulatory SIP provisions include, but are not limited to, the following subject matter: SIP narratives * * * State Statutes * * *."); and again in 72 FR 64158, at 64160 (November 15, 2007) ("EPA-approved non-regulatory control measures include * * * State statutes * * * which have been submitted for inclusion in the SIP by the State. * * * Examples of EPA-approved documents and materials associated with the SIP include, * * * State Statutes submitted for the purposes of demonstrating legal authority; * * *."). ARB's and EPA's description of the revised legal authority chapter of the California SIP as "administrative" is consistent with the idea that even if the supporting statutes had been approved into the SIP in 1980 (which they were not), EPA would have categorized the statutes as "nonregulatory."

The statutes are considered "nonregulatory" because statutes that provide State or local administrative agencies with the authority to establish regulatory requirements do not in themselves establish the requirements. Rather, the rules promulgated under the relevant authorities establish the requirements. In this instance, such rules have included permitting rules that were adopted by the individual county-based air districts in San Joaquin Valley (and later by the San Joaquin Valley Unified Air Pollution Control District) exempting agricultural sources, that were approved by EPA as part of the San Joaquin Valley portion of the California SIP, and that continued in effect in the SIP until 2004, notwithstanding the supersession of the underlying statutory provision back in 1980. Hence, EPA's description of the Agency's approval of the revised legal authority chapter as being "nonsignificant," because no new requirements would be imposed nor would any requirements be withdrawn, is correct. Such requirements are not established in the statutes providing the legal authorities, but are found in the approved State and local district rules.[5]

Comment #5: The District states that the agricultural permitting exemption was removed from State law in 2003 as it relates to major sources, but states that the change in State law was never submitted to EPA as a SIP revision and thus the agricultural permitting exemption remains in the SIP.

Response #5: We agree that the State law replacing the full agricultural permitting exemption with a limited permitting exemption for certain minor agricultural sources (Senate Bill 700) has never been submitted to EPA as a SIP revision. However, as we clarify through this final rule, California did not need to submit SB 700 to EPA as a SIP revision to remove the agricultural permitting exemption from the SIP because it was removed from the California SIP upon the effective date of our 1980 final rule approving the State's revision to the legal authority chapter of the California SIP.

Comment #6: The District contends that Clean Air Act section 301(a)(1) does not authorize EPA to unilaterally amend the agricultural exemption out of the California SIP.

Response #6: We agree that CAA section 301(a)(1) does not authorize EPA to unilaterally amend the SIP. To amend the SIP, EPA is authorized to take action under CAA section 110. For instance, our action in 1980 to approve California's revised legal authority chapter of the California SIP was an action taken by EPA under section 110. We do not view our action today as amending the California SIP. Our view as expressed in the proposed rule and in responses to comments above is that we are simply clarifying the effect of a previous rulemaking. We are taking this action to avoid further confusion as to the current status of the statutory provisions (such as the agricultural permitting exemption) submitted as part of the original 1972 California SIP.

CAA section 301(a) authorizes EPA to prescribe such regulations as are necessary to carry out the Agency's functions under the CAA. One of the basic functions of the Agency under the CAA is to take actions on SIPs and SIP revisions (*See* section 110(k)), and in doing so, we are responsible for ensuring that the regulatory effect of our action is clearly set forth through rules published in the **Federal Register** and that our codification of SIP approvals in 40 CFR part 52 reasonably identifies the approved provisions.

In this instance, we have discovered that our 1979 proposed rule and 1980 final rule approving a revision to the California SIP did not clearly identify the materials being superseded, and we appropriately rely upon our rulemaking authority under CAA section 301(a) to clarify the superseding effect of our 1980 action. In so doing, we are not amending the California SIP, but merely clarifying what the current SIP includes, or to be more specific, what the current SIP does not include.

Comment #7: Dairy Cares notes that, in 2004, EPA undertook a rulemaking to remove from the SIP several specific statutes that were included in the 1972 original California SIP, and claims that such action would have been unnecessary if the statutory provision submitted with the original California SIP had been superseded by EPA's approval action on the revised legal authority chapter of the California SIP in 1980. Dairy Cares asserts that EPA's action in 2004 reveals the Agency's understanding then that the statutory provisions from the original California SIP remain in the SIP, and concludes that there is simply no way to reconcile EPA's actions in 2004 with the action it now proposes as they are entirely inconsistent.

Response #7: In our January 29, 2010 proposed rule, we recognize that our 2004 rulemaking (69 FR 67062, November 16, 2004) removed certain variance-related statutory provisions from the California SIP. *See* 75 FR at 4742, at 4744. We agree that our conclusion in the current rulemaking that all of the statutory provisions submitted in connection with the legal

[5] The District refers to 40 CFR 52.220(b)(12)(i) as an instance where California removed certain sections of the CH&SC approved in 1972 from the California SIP. California did not remove these CH&SC sections; EPA did so under the error correction authority of CAA section 110(k)(6). *See* 69 FR 67062 (November 16, 2004). We now recognize that we did not need to do so, since all of the statutory provisions submitted in support of the original legal authority chapter of the SIP had been superseded by our approval of the revised legal authority chapter in 1980. *See* response to comment #7.

authority chapter of the original California SIP were superseded in 1980 is not consistent with our 2004 rulemaking. We also agree that, if all of the statutory provisions in question had been superseded in 1980, then removal of the specific variance-related provisions in 2004 would not have been necessary.

Upon review of the 2004 rulemaking, however, we find no evidence of the type of detailed research into the contents of the California SIP that was conducted for this rulemaking. Furthermore, we believe that the Agency's own mistaken understanding in 2004 of the status of the variance-related statutory provisions simply highlights the need for the Agency to take some action, such as the one taken today, to clarify the status of the statutory provisions and other legal documents submitted in support of the legal authority chapter of the original California SIP. As described above, we have the authority under CAA section 301(a) to identify the superseding effect of a prior rulemaking (in this case, a rulemaking in 1980) and to thereby clarify the contents of the current California SIP.

III. Final Action

None of the comments have caused us to modify our proposed rule, and thus, under CAA section 301(a)(1) and for the reasons discussed in the proposed rule and in this final rule, EPA is taking final action to clarify that the statutory provisions and other legal documents approved in connection with the legal authority chapter of the original 1972 California SIP were superseded in the California SIP by EPA's approval of a revised legal authority chapter in 1980 (and codified at 40 CFR 52.220(c)(48)). We are memorializing our interpretation of the effect of the 1980 final rule by revising the relevant provision in 40 CFR 52.220 accordingly.

IV. 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 clarifies the effect of a previous approval by EPA of a State submittal 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, 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 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. section 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 rule 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. section 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 July 19, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Oxides of nitrogen, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 5, 2010.

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 revising paragraph (b)(12)(i) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(b) * * *

(12) * * *

(i) Previously approved on May 31, 1972 in paragraph (b) and deleted without replacement, effective September 10, 1980, chapter 7 ("Legal Considerations") of part I ("State General Plan") of the plan submitted on February 21, 1972, and all of the statutory provisions and other legal documents contained in appendix II ("State Statutes and other Legal Documents Pertinent to Air Pollution Control in California") to chapter 7.

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