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 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, 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, these rules do 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 March 15, 2010. 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, Particulate matter, Reporting and recordkeeping requirements.

Dated: November 23, 2009.

Laura Yoshii,

Acting 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 paragraphs (c)(363)(i)(A)(*3*) and (*4*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(363) * * *

(i) * * *

(A) * * *

(*3*) Rule 4306, "Boilers, Steam Generators and Process Heaters—Phase 3, " adopted on October 16, 2008.

(*4*) Rule 4307, "Boilers, Steam Generators and Process Heaters—2.0 MMbtu/hr to 5.0 MMbtu/hr," adopted on October 16, 2008.

* * * * *

[FR Doc. 2010–352 Filed 1–12–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0024; FRL–9097–2]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing a limited approval and limited disapproval of revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) portion of the California State Implementation Plan (SIP). This action was proposed in the **Federal Register** on August 19, 2009, and concerns a local fee rule that applies to major sources of volatile organic compound and nitrogen oxide emissions in the San Joaquin Valley ozone nonattainment area. Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), this action simultaneously approves a local rule that regulates these emission sources and directs California to correct rule deficiencies.

DATES: *Effective Date:* This rule is effective on February 12, 2010.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2009–0024 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and 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: Mae Wang, EPA Region IX, (415) 947–4124, *wang.mae@epa.gov*.

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

Table of Contents

I. Proposed Action

On August 19, 2009 (74 FR 41826), EPA proposed a limited approval and limited disapproval of the following rule that was submitted for incorporation into the California SIP.

Local agency	Rule No.	Rule title	Adopted	Submitted
SJVUAPCD	3170	Federally Mandated Ozone Nonattainment Fee	05/16/02	08/06/02

We proposed a limited approval because we determined that this rule improves the SIP and is largely consistent with the relevant CAA requirements. We simultaneously proposed a limited disapproval because some rule provisions do not fully meet the statutory CAA section 185 requirement. These provisions include the following:

1. An exemption for units that begin operation after the attainment year.

2. An exemption for any "clean emission unit."

3. The definition of the baseline period as two consecutive years.

4. The allowance of averaging baseline emissions over a period of 2–5 years "if those years are determined by the APCO as more representative of normal source operation."

5. An inappropriate definition of the term "Major Source." Our proposed action contains more information on the basis for this rulemaking and on our evaluation of the submittal.

II. Public Comments and EPA Responses

A. Commenting Parties

EPA's proposed action provided a 30-day public comment period. During this period, we received the following 12 comment letters from 11 parties:

1. American Chemistry Council, letter from Lorraine Gershman, dated September 18, 2009.

2. American Petroleum Institute, letter from Ted Steichen, dated September 18, 2009.

3. Association of Irritated Residents, letter from Brent Newell, Center on Race, Poverty, and the Environment, dated September 18, 2009.

4. California Small Business Alliance, letter from William R. La Marr, dated August 11, 2009.

5. The Clean Energy Group, letter from Michael Bradley, dated September 18, 2009.

6. County Sanitation Districts of Los Angeles County, letter from Stephen R. Maguin and Gregory M. Adams, dated August 11, 2009.

7. County Sanitation Districts of Los Angeles County, letter from Stephen R. Maguin and Gregory M. Adams, dated September 18, 2009.

8. EarthJustice, letter from Paul Cort, dated September 18, 2009.

9. San Joaquin Valley Unified APCD, letter from Seyed Sadredin, dated September 17, 2009.

10. The Section 185 Working Group, letter from Jason C. Moore, Baker Botts, dated August 13, 2009.

11. Southern California Air Quality Alliance, letter from Curtis L. Coleman, Esq., dated August 12, 2009.

12. Western States Petroleum Association, letter from David R. Farabee, Pillsbury Winthrop Shaw Pittman LLP, dated September 18, 2009.

B. Summary of Comments and EPA Responses

The comments and our responses are summarized below. The comments have been grouped into general categories.

1. EPA Response to the Clean Air Act Advisory Committee Letter

On May 15, 2009, the Clean Air Act Advisory Committee (CAAAC) sent a letter to EPA Acting Assistant Administrator Elizabeth Craig regarding issues related to the implementation of CAA section 185. The CAAAC asked EPA to review and address whether it is "legally permissible under either section 185 or 172(e) of the Clean Air Act for a State to exercise discretion" to develop fee program SIPs employing one or more of a list of CAAAC-identified program options (*see http://www.epa.gov/air/caaac/185wg*).

Comments: Several commenters specifically requested that EPA respond to the CAAAC letter prior to taking final action on SJVUAPCD Rule 3170. Commenters also suggested that EPA provide final guidance regarding flexibility under either CAA section 185 or 172(e) before disapproving any elements of SJVUAPCD Rule 3170.

Response: EPA intends to respond more fully to the issues raised by the CAAAC letter. EPA, however, cannot delay action on SJVUAPCD Rule 3170 because we are under a legal obligation to sign a **Federal Register** notice for our final action on Rule 3170 by December 11, 2009. This obligation is imposed by a consent decree between EPA and the Center for Race, Poverty and the Environment (CRPE) to settle CRPE's litigation alleging that EPA had failed to act on Rule 3170 in a timely manner. The consent decree was entered on August 18, 2009, by the U.S. District Court for the Northern District of California, case number 08–cv–05650 CW.

We note that CAA section 172(e) does not directly apply to the transition from the 1-hour ozone standard to the 1997 8-hour ozone standard because that provision applies only where the revised standard is less stringent than the standard it replaces. However, because the CAA does not directly address anti-backsliding where there is a new more stringent standard, EPA determined to apply the principles of CAA section 172(e) for purposes of addressing anti-backsliding for the transition from the 1-hour standard to the 1997 8-hour standard. EPA also notes that the State has not requested that EPA review Rule 3170 pursuant to the principles in CAA section 172(e) and thus, for purposes of taking action on Rule 3170, it is not necessary for EPA to take a final position regarding

whether it could approve a substitute program for the program specified under CAA section 185.

2. Consideration of Rule 3170 as an Alternative Program

CAAAC's May 15, 2009, letter identifies as a program option an exemption from fees for "well-controlled" sources. In our proposed action on Rule 3170, we noted this exemption as a basis for not being able to fully approve the rule as meeting section 185 of the Act. We further noted that the State has not requested that EPA review the SIP to determine whether it would be equivalent to CAA section 185 under the principles of section 172(e) and has not made a demonstration that the program it has submitted would ensure controls that are "not less stringent" than those required under section 185. Thus, we stated that we were not addressing whether it is legally permissible for a State to adopt an alternative program at least as stringent as a section 185 fee program, or if so, whether such alternative program could contain a clean unit exemption.

Comments: One commenter encouraged EPA to work with SJVUAPCD to consider Rule 3170 as an alternative program under the provisions of CAA section 172(e). The commenter felt that this rule as written would encourage area-wide emission reductions and meet the goals of CAA section 185 without sacrificing stringency.

One commenter stated that even if the District had submitted Rule 3170 pursuant to 172(e), or attempts to make a 172(e) demonstration to justify the clean unit exemption or other deficiency, CAA section 172(e) does not apply in this situation and cannot justify Rule 3170's failure to comply with CAA section 185. The commenter stated that section 172(e) only applies where EPA has relaxed a national primary ambient air quality standard (NAAQS). As a result, CAA section 172(e) does not support the exemptions in Rule 3170.

Response: We agree with the comment that CAA section 172(e) does not directly apply where EPA has promulgated a more stringent NAAQS. However, as noted above, because the Act does not address the principles that apply when there is a transition to a more stringent NAAQS, EPA determined that it was reasonable to apply the principles in section 172(e). Thus, to the extent section 172(e) would authorize EPA to allow alternatives to statutory programs such as the fee program in CAA section 185, EPA's application of the principles in section 172(e) to the anti-backsliding requirements for the 1-hour standard would provide EPA with the discretion to authorize an alternative program. Also, as noted above, EPA has not yet stated whether it would approve such programs for purposes of the anti-backsliding requirements of the 1-hour ozone standard.

Because the State has not submitted the program as an alternative program consistent with the principles in CAA section 172(e), EPA is not required to take a position in this rulemaking on whether it would approve such alternatives or whether the submitted program is consistent with those principles. We will continue to work with the State to ensure that they adopt a program that is fully consistent with the requirements of the CAA.

3. Exemption for Units That Begin Operation After the Attainment Year

Section 4.2 of SJVUAPCD Rule 3170 exempts units that begin operation after the attainment year. In its proposed action, EPA stated that CAA section 185 does not provide for an exemption for emission units that begin operation after the attainment year, so this exemption does not fully comply with the CAA. Rather, it requires "each major source" to pay the fee (*see* CAA section 185(a)).

Comments: Several commenters disagreed with EPA's proposed action on this particular provision. They felt that this exemption is consistent with the CAA requirements and therefore should not be considered a deficiency. They also felt that imposing fees on these units would be an unfair burden, resulting in an unfair business environment. One commenter expressed that imposing fees on new units would only serve to hinder the ability of new, cleaner units to displace older, dirtier units. Another commenter expressed that while CAA section 185 does not provide an express exemption for new units, EPA has sufficient discretion to approve the new unit exemption in Rule 3170.

Two commenters agreed with EPA's proposed action on this particular provision. They felt that this exemption violates the requirements of CAA section 185 and is a rule deficiency that is a basis for disapproval of the rule. One commenter stated that the CAA section 185 language is plain and unambiguous, and clearly does not allow such an exemption. The other commenter added that there is no statutory authority for splitting a stationary source into separate emission units for the purpose of determining fees.

Response: CAA section 185 does not provide for an exemption for units beginning operation after the attainment year. Rather, it requires that "each major stationary source" must pay the fee and that the baseline emissions are those from the major source in the attainment year. The word "each" does not lend itself to an interpretation that would exclude new major sources or new units at existing major sources from the fee obligation. The equity concerns cannot override the statutory requirement.

4. Exemption for "Clean Emission Units"

Section 4.3 of SJVUAPCD Rule 3170 exempts any "clean emission unit" from the requirements of the rule. Section 3.6 defines a clean emission unit as a unit that is equipped with an emissions control technology that either has a minimum 95% control efficiency (85% for lean-burn internal combustion engines), or meets the requirements for achieved-in-practice Best Achievable Control Technology as accepted by the APCO during the 5 years immediately prior to the end of the attainment year. The District's staff report for Rule 3170 states that the exemption is intended to address "the difficulty of reducing emissions from units with recently installed BACT." In its proposed action, EPA expressed that although EPA understands the District's intention, the exemption does not comply with CAA section 185, for the same reason as noted above for new emission units.

Comments: Several commenters disagreed with EPA's proposed action on this particular provision. They felt that this exemption is consistent with the CAA requirements and therefore should not be considered a deficiency. Several commenters believe that Congress did not intend to impose fees on units that are already as clean as possible. The imposition of fees on these units may, in many cases, force a curtailment in operations to reduce emissions.

Two commenters agreed with EPA's proposed action on this particular provision. They felt that this exemption violates CAA section 185 requirements and is a rule deficiency that is a basis for disapproval of the rule. These commenters stated that the CAA section 185 language is plain and unambiguous, clearly does not allow such an exemption, that there is no suggestion in the CAA that the best controlled sources are entitled to any other "reward" or exemption, and that section 185 is not a program to penalize only the less-regulated sources. One commenter expressed that Congress understood that the level of control among sources might vary because CAA section 185(b)(2)

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 only subject to limits provided under the SIP. The commenter stated that it would defeat this express language to exempt sources from paying a fee based on some arbitrary notion of being "clean enough."

Response: As explained above, CAA section 185 mandates that the fee is paid by "each" major source based on the emissions from that source in the baseline year. There is nothing in the language of CAA section 185 that contemplates that certain sources or that certain emissions from a source are not subject to the fee.

5. Defining the Baseline Period as the Attainment Year and the Immediately Preceding Year

Section 3.2.1 of Rule 3170 defines the baseline period as two consecutive years consisting of the attainment year and the year immediately prior to the attainment year. In contrast, CAA section 185(b)(2) establishes the attainment year as the baseline period. While CAA section 185(b)(2) also provides discretion to calculate baseline emissions over a period of more than one calendar year, that option is limited to sources with emissions that are irregular, cyclical, or otherwise vary significantly from year to year. Thus, in its proposed action, EPA stated that section 3.2.1 of SJVUAPCD Rule 3170 is inconsistent with the CAA because it provides a different baseline than that required by the CAA (two years instead of one) regardless of whether the emissions are irregular, cyclical or vary significantly from year to year.

Comments: Six commenters disagreed with EPA's proposed action on this particular provision. They felt that this provision is consistent with the CAA requirements as interpreted in a March 21, 2008 memorandum from William Harnett, Director of the Air Quality Policy Division, to the Regional Air Division Directors, entitled, "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," ("Section 185 Baseline Guidance") and therefore should not be considered a deficiency.[1] Commenters objected to EPA's view that the five-year lookback option in SJVUAPCD Rule 3170 be available only upon a site-specific consideration of representativeness or cyclicality. One commenter stated that NSR reform was enacted precisely to replace such a case-by-case review. The commenter also stated SJVUAPCD's approach was consistent with EPA's New Source Review approach for multi-year baselines. The commenter felt that a simple multi-year baseline would flexibly and efficiently satisfy the statutory language and intent.

Two commenters agreed with EPA's proposed action on this particular provision. They felt that this exemption violates the CAA section 185 requirements and is a rule deficiency that is a basis for disapproval of the rule. One commenter stated that CAA section 185 language is plain and unambiguous, and clearly does not allow the baseline to be calculated over two years for all sources. The second commenter stated that section 3.2.1 of Rule 3170 should be revised to clarify that the baseline for most sources will be the emissions in the attainment year of 2010, and provide clear criteria for allowing sources to use an alternative baseline period.

Response: The language of CAA section 185 provides EPA with discretion to issue guidance that would allow for the baseline period to be more than one calendar year. However, CAA section 185 allows EPA to do so only for sources whose emissions are irregular, cyclical, or otherwise vary significantly from year to year. EPA's Section 185 Baseline Guidance referred to this connection by stating that, "where source emissions are irregular, cyclical, or otherwise vary significantly, the CAA provides that the U.S. Environmental Protection Agency (EPA) may issue guidance providing an alternative method to calculate the baseline amount." EPA issued the Section 185 Baseline Guidance to provide guidance for an alternative method for calculating the emissions baseline in these situations. Hence, section 3.2.1 of Rule 3170 does not conform to CAA section 185 because it allows all sources to calculate their baseline over a two-year period, regardless of whether emissions are irregular, cyclical, or otherwise vary significantly.

6. Allowing Averaging Over 2–5 Years To Establish Baseline Emissions

Section 3.2.2 of Rule 3170 allows averaging over 2–5 years to establish baseline emissions. CAA section 185(b)(2) states that EPA may issue guidance authorizing such an alternative method of calculating baseline emissions. EPA's Section 185 Baseline Guidance addresses the issue of alternative methods for calculating baseline emissions. The use of these alternative methods is associated with sources whose emissions are irregular, cyclical, or otherwise vary significantly from year to year. The averaging period allowed in section 3.2.2 of Rule 3170 appears consistent with EPA's Section 185 Baseline Guidance. The language in section 3.2.2, however, allows such averaging "if those years are determined by the APCO as more representative of normal source operation." In its proposed action, EPA stated that it considers this language as less stringent than the criteria in the CAA, and therefore the rule should be amended to specify use of the expanded averaging period only if a source's emissions are irregular, cyclical, or otherwise vary significantly from year to year.

Comments: Several commenters disagreed with EPA's proposed action on this particular provision. They felt that this exemption is consistent with the CAA requirements and the Section 185 Baseline Guidance, and therefore should not be considered a deficiency. The SJVUAPCD stated that its intention in implementing this provision is that the criteria of being "more representative of normal source operation" would require a source to demonstrate to the satisfaction of the APCO that the emissions are irregular, cyclical, or otherwise vary significantly from year to year. One commenter disagreed with EPA's assessment that the phrase, "more representative of normal source operation" was less stringent that the CAA section 185 language.

Two commenters agreed with EPA's proposed action on this particular provision. They felt that this exemption violates the CAA section 185 requirements and is a rule deficiency that is a basis for disapproval of the rule. One commenter stated that the CAA section 185 language is plain and unambiguous, and clearly does not allow such an exemption.

Response: EPA disagrees that unlimited APCO discretion in determining normal source operation is consistent with CAA section 185. Rule 3170 does not specify any criteria for how the APCO would make a determination that a certain baseline is "more representative of normal source operation" than the baseline specified by CAA section 185 (*i.e.,* the attainment year). It is not clear that the APCO's

[1] EPA's Section 185 Baseline Guidance provides that an acceptable alternative baseline for sources whose emissions are irregular, cyclical, or otherwise vary significantly from year to year is the 10-year lookback period found in EPA's regulations for Prevention of Significant Deterioration of Air Quality (PSD) (40 CFR 52.21(b)(48)).

discretion would involve an assessment of whether a source's emissions are irregular, cyclical, or otherwise variable. Therefore, EPA continues to view the language in section 3.2.2 of Rule 3170 as a deficiency that needs to be corrected.

7. Stationary Versus Mobile Sources

Comment: Several commenters stated that most ozone nonattainment areas classified as severe or extreme are now dominated by mobile source emissions, and that stationary sources are not the major contributor of emissions. Commenters stated that CAA section 185 is functionally obsolete and will result in substantial adverse financial impacts to facility operators with little or no air quality benefit. One commenter stated that individual sources do not have the ability to assure attainment of the standard; consequently, the fee is an unconstitutional bill of attainder.

Response: The approach outlined in the CAA to reduce emissions in defined air basins acknowledges that no single source is responsible for an area's nonattainment, but that the total collective contribution of many individual sources affects an area's pollution problem. As such, the CAA extensively regulates both mobile sources and stationary sources. Whether or not CAA section 185 is functionally obsolete is an issue for Congress. As long as CAA section 185 remains the law, EPA's obligation is to ensure compliance with it. We disagree with the commenter that claims that since individual sources cannot ensure attainment of the ozone NAAQS, section 185 is an unconstitutional bill of attainder. Section 185 does not result in any party being declared guilty of a crime. Rather, it is a means of encouraging certain sources to reduce emissions of pollutants that contribute to unhealthy ambient ozone levels. The Courts have long held that the Commerce clause gives Congress the authority to regulate sources of air pollution. The fee provision of CAA section 185 acts as an incentive for major sources of air pollution to reduce emissions. Thus, it is a proper exercise of Congressional authority under the Commerce clause.

8. Impacts of Rule 3170 on Small Businesses

Comment: Commenters stated that hundreds of small businesses will be affected by CAA section 185 requirements, as well as hospitals, medical centers, schools and other essential public services. Commenters stated that applying CAA section 185 fees to small businesses that are in compliance with all applicable regulations will demonstrate that the fees are unreasonable, expensive, and do nothing to reduce and assure emission reductions. One commenter stated that the fees would be inconsistent with the Small Business Regulatory Flexibility Act and that the fees should not be applied to businesses meeting the definition of "small" under CAA section 507.

Response: Although CAA section 185 allows for exemptions for certain low-population areas (see section 185(e)), section 185 does not grant States or EPA discretion to exempt small businesses from the requirements of the program. The Regulatory Flexibility Act applies where EPA is promulgating regulations that may have a significant impact on a substantial number of small businesses. Here, it is the CAA, not EPA's action that imposes the fee on sources. Moreover, in this instance, EPA is not promulgating regulations, but rather reviewing a State plan. EPA does not have the authority to consider the impacts on small businesses that result from direct application of the statute or through applications of the State program. Moreover, even if EPA were promulgating a regulation that was determined to have a significant impact on a substantial number of small entities, we note that the RFA does not prohibit any specific regulatory result, as suggested by the commenters. Rather it only requires that the Agency take certain actions in order to fully consider the potential impacts of the regulation.

9. Unintended Consequences of Rule 3170

Comment: One commenter stated that renewable energy facilities may need to reduce throughput as a result of CAA section 185 requirements and this would be contrary to efforts to reduce greenhouse gases and increase the penetration of renewable energy.

Response: Sources have several ways to comply with the requirements of CAA section 185, and this could include reducing throughput to eliminate or reduce the fee amount. Regardless of the consequence of the manner in which a major source chooses to comply with the requirements, section 185 does not provide States or EPA with authority to exempt major stationary sources from complying with section 185.

10. Incorrect Statement of Baseline Emissions

Comment: One commenter stated that section 5.1 of Rule 3170 needs to be revised to accurately define the baseline emissions to be used in the calculation of the fee amount. In addition, the definition of baseline emissions fails to include the possibility that a source will not have a permit issued for the attainment year, in which case the allowable emissions are to be based on the emissions allowed under the applicable implementation plan (*see* CAA section 185(b)(2)). While such circumstances may be rare, the District should include language that mirrors the statute to avoid any potential conflict.

Response: While we think it is unlikely that any sources would not fall within the current definition, we agree with the commenter and recommend that the calculation in section 5.1 of Rule 3170 be revised to more closely conform to the language in CAA section 185. The definition of the variable "B" in the fee calculation should include the clarification that if no permit has been issued for the attainment year, then "B" should be the lower of the actual VOC or emissions during the baseline period, or the amount of VOC or NO_X emissions allowed under the applicable implementation plan during the baseline period.

11. Ambiguity on Fees for Both VOCs and NO_X

Comment: One commenter expressed that the fee calculation in section 5.0 of Rule 3170 is ambiguous regarding whether the fee is due for VOCs and NO_X, or just one or the other. Sources must pay a fee for both VOC emissions in excess of 80% of the VOC baseline emissions and NO_X emissions in excess of 80% of the NO_X baseline emissions. Section 5.0 of Rule 3170 should be revised to clarify this point.

Response: EPA agrees that the fee is required for both VOC and NO_X emissions. We believe that the District and sources understand the fee program applies to both VOC and NO_X emissions, and that the language in section 5.1 of SJVUAPCD Rule 3170 is sufficiently clear in that respect. For example, the District staff report for Rule 3170 contained a sample fee calculation which also made it clear that a separate fee would be assessed for VOC emissions and NO_X emissions. While we do not believe any revisions to the rule are necessary, we recommend that SJVUAPCD consider whether further clarification might be helpful.

12. Definition of "Major Source"

Section 3.4 of Rule 3170 defines the term "Major Source" by referring to the definition in SJVUAPCD Rule 2201 (New and Modified Stationary Source Review Rule). The current SIP-approved

version of Rule 2201 was adopted by the SJVUAPCD on December 19, 2002, and approved by EPA on May 17, 2004 (69 FR 27837). This version of Rule 2201 defines "Major Source" as a stationary source with VOC or NO_X emissions of over 50,000 pounds per year (25 tons per year). The CAA defines the major source threshold as 10 tons per year for ozone nonattainment areas classified as extreme. The SJVUAPCD amended Rule 2201 on December 18, 2008, and submitted it for inclusion in the SIP on March 17, 2009. This amended version includes the 10 tons per year threshold, but has not been approved into the SIP. Therefore, in its proposed action, EPA stated that Rule 3170's reliance on Rule 2201 to define major sources is not approvable at this time. If a version of Rule 2201 that contains the appropriate major source threshold is approved into the SIP prior to finalizing the proposed action, then section 3.4 would no longer be cited as a deficiency in Rule 3170.

Comments: Several commenters disagreed with EPA's proposed action on this particular provision. They felt that this discrepancy would be resolved prior to the assessment or collection of any section 185 fees when Rule 2201 is approved into the SIP. One commenter also expressed that the thresholds in Rule 2201 are currently binding under State law, and therefore the "Major Source" definition in Rule 3170 should not be considered a deficiency that would result in the disapproval of the rule.

Two commenters agreed with EPA's proposed action on this particular provision. One commenter felt that this definition is currently inconsistent with CAA requirements, noting that EPA has allowed Rule 2201 to remain out of date for 5 years. However, in the current situation, the commenter agreed that this definition is a rule deficiency that is a basis for disapproval of the rule. One commenter added that the definition of "Major Source" in Rule 2201 does not match the definition in CAA section 182(e). For example, Rule 2201's definition excludes fugitive emissions for certain sources, only includes potential emissions from units with valid permits, and credits limits in authorities to construct that may or may not reflect actual emissions. As a result, the commenter felt that EPA is incorrect in suggesting that this deficiency will be resolved once the revised version of Rule 2201 is approved into the SIP. The commenter felt that section 3.4 of Rule 3170 should be revised to mirror the definition of "major source" in CAA section 182(e), which includes all emissions of VOC or NO_X, and looks at the larger of actual or potential emissions.

Response: EPA disagrees with the statement that the December 18, 2008, version of Rule 2201 is currently binding under State law. That version of the rule specifically states that it does not go into effect until EPA issues final approval of the rule into the SIP. The "Major Source" definition in Rule 3170 continues to be a deficiency until it is revised to be consistent with the CAA. Further, we agree that since we have not yet fully reviewed and acted on Rule 2201, we cannot say for a certainty that approval of that rule would eliminate any deficiency with respect to the definition of major sources under Rule 3170. We will continue to work with the State to ensure that it develops a section 185 program that fully complies with the Act.

13. Sunset Provision for Section 185 Fees

Comment: One commenter highlighted the need for EPA to address the legality and process of establishing a sunset provision for section 185 fees, an issue identified in the CAAAC letter. Because the 1-hour ozone standard has been replaced with the 8-hour standard, EPA may not be able to make the findings necessary to redesignate an area as attainment for the 1-hour standard. This situation would require the imposition of fees indefinitely. The commenter feels that this issue must be resolved if EPA finalizes action on Rule 3170.

Response: EPA is aware of the issue raised by the commenter and intends to address in future guidance or rulemaking the issue of when section 185 fees would no longer apply.

III. EPA Action

No comments were submitted that change our assessment of the rule as described in our proposed action. Therefore, as authorized in sections 110(k)(3) and 301(a) of the Act, EPA is finalizing a limited approval of the submitted rule. This action incorporates the submitted rule into the California SIP, including those provisions identified as deficient. As authorized under section 110(k)(3), EPA is simultaneously finalizing a limited disapproval of the rule. As a result, sanctions will be imposed unless EPA approves subsequent SIP revisions that correct the rule deficiencies within 18 months of the effective date of this action. These sanctions will be imposed under section 179 of the Act according to 40 CFR 52.31. In addition, EPA must promulgate a Federal implementation plan (FIP) under section 110(c) unless we approve subsequent SIP revisions that correct the rule deficiencies within 24 months. Note that the submitted rule has been adopted by the SJVUAPCD, and EPA's final limited disapproval does not prevent the local agency from enforcing it.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals and limited approvals/limited disapprovals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because this limited approval/limited disapproval action does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must

prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or Tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the limited approval/limited disapproval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or Tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or Tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications." This final rule does not have Tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it approves a State rule implementing a Federal standard.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Congressional Review Act

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 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. 804(2). This rule will be effective February 12, 2010.

K. Petitions for Judicial Review

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 March 15, 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, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 11, 2009.

Laura Yoshii,

Acting 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)(303)(i)(C)(*4*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(303) * * *

(i) * * *

(C) * * *

(*4*) Rule 3170, "Federally Mandated Ozone Nonattainment Fee," adopted on May 16, 2002.

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[FR Doc. 2010–353 Filed 1–12–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No.0910091344–9056–02]

RIN 0648–XT71

Fisheries of the Exclusive Economic Zone Off Alaska; Chiniak Gully Research Area for Vessels Using Trawl Gear

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule.

SUMMARY: NMFS is rescinding the trawl closure in the Chiniak Gully Research Area. This action is necessary to allow vessels using trawl gear to participate in directed fishing for groundfish in the Chiniak Gully Research Area.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), August 1, 2010, through 1200 hrs, A.l.t., September 20, 2010.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Gulf of Alaska (GOA) exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The Chiniak Gully Research Area is closed to vessels using trawl gear from August 1 to a date no later than September 20 under regulations at § 679.22(b)(6)(ii)(A). This closure is in support of a research project to evaluate the effects of commercial fishing on pollock distribution and abundance, as part of a comprehensive investigation of Stellar sea lion and commercial fishery interactions.

The regulations at § 679.22(b)(6)(ii)(B) provide that the Regional Administrator, Alaska Region, NMFS, (Regional Administrator) shall rescind the trawl closure if relevant research activities will not be conducted. The Regional Administrator has determined that research activities will not be conducted in 2010 in the Chiniak Gully Research Area. Therefore, the Regional Administrator is rescinding the trawl closure of the Chiniak Gully Research Area. All other closures remain in full force and effect.

Classification

Pursuant to 5 U.S.C. 553 (b)(B), the Assistant Administrator for Fisheries, NOAA (AA) finds good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment is unnecessary. Notice and comment is unnecessary because the rescission of the trawl closure is non-discretionary; pursuant to § 679.22(b)(6)(ii)(B), the Regional Administrator has no choice but to rescind the trawl closure once it is determined that research activities will not be conducted in the area.

Pursuant to 5 U.S.C. 553(d)(1), this rule is not subject to the 30–day delay in effective date requirement of 5 U.S.C. 553(d) since the rule relieves a restriction.

This action has been determined to be not significant for purposes of Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 7, 2010.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–495 Filed 1–12–10; 8:45 am]

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