

Venture designated representative, the on-site project manager by telephone number 785-953-1465 or on Marine Band Radio VHF-FM channels 13 and 16 from the pusher tug Miss Stacy to request permission. If permission is granted, mariners must proceed at their own risk and strictly observe any and all instructions provided by the COTP, Skanska-Corman-McLean, Joint Venture, or designated representative to the mariner regarding the conditions of entry to and exit from any area of the safety zone. The COTP or the COTP's representative can be contacted by telephone number 410-576-2693 or on Marine Band Radio VHF-FM channel 16 (156.8 MHz).

(3) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue marine information broadcasts on VHF-FM marine band radio announcing specific enforcement dates and times.

(d) *Enforcement officials.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement period.* This section will be subject to enforcement from 12:01 a.m. on November 08, 2023, to 11:59 p.m. on January 30, 2023.

Dated: October 05, 2023.

**David E. O'Connell,**

*Captain, U.S. Coast Guard, Captain of the Port Maryland-National Capital Region.*

[FR Doc. 2023-22545 Filed 10-11-23; 8:45 am]

**BILLING CODE 9110-04-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 2 and 51

[EPA-HQ-OAR-2004-0489; FRL-8604-04-OAR]

### Revisions to the Air Emissions Reporting Requirements

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** The Environmental Protection Agency (EPA) is extending the comment period for the proposed revisions to the Air Emissions Reporting Requirements (AERR), published in the **Federal Register** on August 9, 2023. The current comment period for the proposed rule is set to end on October 18, 2023. EPA has received numerous requests to extend the comment period given the complexity and length of the proposed rulemaking. The EPA is extending the

comment period for the proposed action to November 17, 2023. The EPA is also extending the comment period for the associated Information Collection Request (ICR), number 2170.09, for the proposed AERR to November 17, 2023.

**DATES:** The comment period for the proposed rule and ICR published on August 9, 2023, at 88 FR 54118 is extended. Comments must be received on or before November 17, 2023.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2004-0489, by one of the following methods:

- *www.regulations.gov:* Follow the online instructions for submitting comments.

- *Email:* [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).

Fax: (202) 566-9744.

- *Mail:* Air Emissions Reporting Requirements Rule, Docket No. EPA-HQ-OAR-2004-0489, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. Please include two copies.

- *Hand Delivery:* Docket No. EPA-HQ-OAR-2004-0489, EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Marc Houyoux, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Emission Inventory and Analysis Group (C339-02), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541-3649; email: [NEI\\_Help@epa.gov](mailto:NEI_Help@epa.gov) (and include "AERR" on the subject line).

**SUPPLEMENTARY INFORMATION:** On Wednesday, August 9, 2023, the EPA published proposed revisions to the Air Emissions Reporting Requirements along with an associated ICR in the **Federal Register**. The comment period for the proposed AERR was for 70 days, ending on October 18, 2023. On September 14, 2023, the EPA reopened the comment period for the ICR (88 FR 63046). The EPA received numerous comments requesting that the Agency extend the comment period for the proposed AERR. To ensure the public has sufficient time to review the proposed AERR and the associated ICR,

the EPA is extending the comment periods for both by 30 days, ending on November 17, 2023.

Dated: October 5, 2023.

**Richard A. Wayland,**

*Director, Air Quality Assessment Division, Office of Air Quality and Planning Standards.*

[FR Doc. 2023-22530 Filed 10-11-23; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R09-OAR-2023-0494; FRL-11442-01-R9]

### Air Plan Approval; California; South Coast Air Quality Management District

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve a revision to the South Coast Air Quality Management District (SCAQMD or "the District") portion of the California State Implementation Plan (SIP) as SIP strengthening. This revision concerns emissions of oxides of nitrogen (NO<sub>x</sub>) and particulate matter (PM) from indirect sources associated with warehouses. The EPA is proposing to approve SCAQMD Rule 2305, "Warehouse Indirect Source Rule—Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program," to regulate these emission sources under the Clean Air Act (CAA or the Act). The EPA is taking comments on this proposal and plans to follow with a final action.

**DATES:** Comments must be received on or before November 13, 2023.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R09-OAR-2023-0494 at <https://www.regulations.gov>. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not

consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets/>. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable

accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. **FOR FURTHER INFORMATION CONTACT:** La Kenya Evans-Hopper, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972-3245 or by email at [evanshopper.lakenya@epa.gov](mailto:evanshopper.lakenya@epa.gov). **SUPPLEMENTARY INFORMATION:** Throughout this document, “we,” “us,” and “our” refer to the EPA.

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**I. The State’s Submittal**

*A. What rule did the State submit?*

Table 1 lists the rule addressed by this proposal with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

**TABLE 1—SUBMITTED RULE**

Local agency	Rule #	Rule title	Amended	Submitted
SCAQMD .....	2305	Warehouse Indirect Source Rule—Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program.	05/07/2021	08/13/2021

On February 13, 2022, the submittal for SCAQMD Rule 2305 was deemed complete by operation of law with respect to the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.

*B. Are there other versions of this rule?*

SCAQMD Rule 2305 is a new rule. There are no previously approved versions of the rule in the applicable SIP.

*C. What is the purpose of the rule?*

Emissions of NO<sub>x</sub> contribute to the production of ground-level ozone, smog and PM, which harm human health and the environment. Emissions of PM, including PM equal to or less than 2.5 microns in diameter (PM<sub>2.5</sub>) and PM equal to or less than 10 microns in diameter (PM<sub>10</sub>), contribute to effects that are harmful to human health and the environment, including premature mortality, aggravation of respiratory and cardiovascular disease, decreased lung function, visibility impairment, and damage to vegetation and ecosystems. Section 110(a) of the CAA requires States to submit regulations that control NO<sub>x</sub> and PM emissions for purposes of attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) and to meet other CAA requirements.

The purpose of SCAQMD Rule 2305 is to reduce local and area-wide emissions of NO<sub>x</sub> and PM, by facilitating emission reductions associated with warehouses and the mobile sources attracted to warehouses in order to assist in meeting State and Federal air quality standards for ozone

and PM<sub>2.5</sub>. Mobile sources of emissions associated with warehouses include the trucks that deliver goods to and from the facilities, yard trucks, transport refrigeration units (TRUs) located on trucks and trailers, and passenger vehicle trips associated with employees and visitors.<sup>1</sup> Most of these vehicles are diesel powered, except for passenger vehicles which are typically gasoline powered. Heavy-duty trucks contribute roughly 90% of the overall mobile source inventory of NO<sub>x</sub> emissions from warehouse operations, followed in order of importance from an emissions standpoint by TRUs, passenger vehicles, and then yard trucks.<sup>2</sup> Additional emissions sources can include onsite stationary equipment (*e.g.*, diesel backup generators or manufacturing equipment).<sup>3</sup> The rule applies within the jurisdiction of the SCAQMD, which includes all of Orange County, the non-desert portions of Los Angeles and San Bernardino counties, and all of Riverside County (except for the Palo Verde Valley in far eastern Riverside County).

Also, through adoption of the 2016 South Coast Air Quality Management Plan (AQMP), the SCAQMD committed to assess and identify potential actions to further reduce emissions associated with emission sources operating in and

out of warehouse distribution centers,<sup>4</sup> and the SCAQMD adopted Rule 2305 to fulfill that commitment. The purpose of the 2016 South Coast AQMP is to establish a path toward the goal of attainment for ozone and PM<sub>2.5</sub> NAAQS in the nonattainment areas subject to SCAQMD jurisdiction.

The EPA has taken several actions on the 2016 South Coast AQMP. With certain exceptions not relevant here, the EPA approved portions of the 2016 South Coast AQMP addressing the Serious Area requirements for the 2006 24-hour PM<sub>2.5</sub> NAAQS in the South Coast Air Basin (“South Coast”); the portions of the 2016 South Coast AQMP updating the control strategies and attainment demonstrations for the 1-hour and 1997 8-hour ozone NAAQS, and addressing the 2008 8-hour ozone NAAQS in the South Coast; the portions of the 2016 South Coast AQMP addressing the Moderate Area requirements for the 2012 annual PM<sub>2.5</sub> NAAQS in the South Coast; and the portions of the 2016 South Coast AQMP addressing the Severe Area requirements for the 2008 8-hour ozone NAAQS in Coachella Valley.<sup>5</sup> In so doing, the EPA approved the SCAQMD’s Stationary and Mobile

<sup>1</sup> SCAQMD, Final Staff Report, “Proposed Rule 2305—Warehouse Indirect Source Rule—Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program and Proposed Rule 316—Fees for Rule 2305”, May 2021, “SCAQMD Final Staff Report”, 12.

<sup>2</sup> SCAQMD Final Staff Report, 13.

<sup>3</sup> *Id.*

<sup>4</sup> SCAQMD, Final 2016 Air Quality Management Plan, March 2017, pages 4–25, 4–28, and 4–29. The 2016 South Coast AQMP designates the warehouse measure as MOB-03 (“Emission Reductions at Warehouse Distribution Centers”).

<sup>5</sup> 84 FR 3305 (February 12, 2019), corrected at 84 FR 19680 (May 3, 2019) (2006 PM<sub>2.5</sub> NAAQS); 84 FR 52005 (October 1, 2019) (1-hour, 1997 and 2008 Ozone NAAQS in South Coast); 85 FR 71269 (November 9, 2020) (2012 PM<sub>2.5</sub> NAAQS); and 85 FR 57714 (September 16, 2020) (2008 Ozone NAAQS in Coachella Valley).

Source Control Measures, including the facility-based mobile source measures such as the Emission Reductions at Warehouse Distributions Center measure. The 2016 South Coast AQMP includes enforceable commitments by the SCAQMD to achieve certain aggregate emissions reductions by certain years through adoption and implementation of the SCAQMD's Stationary and Mobile Source Control Measures.

*D. What requirements does the rule establish?*

Rule 2305 applies to owners and operators of warehouses located in the SCAQMD with greater than 100,000 square feet of indoor floor space in a single building and who operate at least 50,000 square feet of the warehouse for warehousing activities. Warehouse operators are required either to earn points, as discussed below, from emission reducing activities, or to pay a mitigation fee. Warehouse facility owners or warehouse land owners may opt in to earn Warehouse Actions and Investments to Reduce Emissions Points ("WAIRE Points") and transfer these points to a warehouse operator at the same site. Both warehouse facility owners and operators must comply with certain recordkeeping and reporting requirements under the rule. Warehouse facility owners were required to submit initial Warehouse Operations Notifications to the SCAQMD by September 1, 2021, and then again within certain prescribed periods thereafter if certain conditions occur. Warehouse operators are also required to submit their Initial Site Information Reports (ISIR) and Annual WAIRE Reports to the SCAQMD. All of the notifications and reports are to be submitted through the WAIRE Program Online Portal (WAIRE POP). In addition, records which document the accuracy and validity of all information submitted to the SCAQMD as required by the rule must be kept by the warehouse owner, or operator as applicable, for a minimum of seven years from the reporting deadline. Records must be made available upon request to the SCAQMD during normal business hours.

The principal substantive requirement in the rule is the requirement that each warehouse operator meet an annual compliance obligation by earning WAIRE Points. The annual compliance obligation, referred to as the WAIRE Points Compliance Obligation (WPCO), for each warehouse operator is calculated based on Weighted Annual Truck Trips (WATTs) multiplied by a stringency factor (0.0025 points per

WATT) and an annual variable (which accounts for the phased implementation of the rule).<sup>6</sup> WATT reflects all trips in a given year by trucks with gross vehicle weight ratings (GVWR) greater than 8,500 pounds but multiplies trips by trucks with GVWRs greater than 33,000 pounds ("Class 8" trucks) by 2.5.<sup>7</sup> The WATTs parameter serves as a proxy for overall warehouse activity and emissions.<sup>8</sup> A warehouse owner may earn WAIRE Points and may transfer them to any warehouse operator at the site where the WAIRE Points were earned within a three-year period.

The requirement to earn WAIRE points to meet a WPCO does not apply to warehouse operators who use less than 50,000 square feet for warehousing activities of a warehouse that is greater than or equal to 100,000 square feet.<sup>9</sup> This exemption does not apply if the same parent company owns or controls multiple operators in the same building who collectively use more than 50,000 square feet of space for warehousing activity.<sup>10</sup> A warehouse operator with a WPCO that is less than 10 in any compliance period also is exempt from earning WAIRE Points for that compliance period. In both cases, certain recordkeeping and reporting requirements (as stated above) under the rule continue to apply.

In situations where investments or actions that were completed by a warehouse owner or operator perform significantly lower than anticipated due to unforeseen circumstances beyond the control of the warehouse owners or operators resulting in lower than anticipated earned WAIRE Points, the warehouse owner or operator may apply

<sup>6</sup> SCAQMD Rule 2305(d)(1)(A) and Tables 1 and 2.

<sup>7</sup> SCAQMD Rule 2305(d)(1)(B).

<sup>8</sup> SCAQMD Final Staff Report, 27, 35. As explained in footnote 44 of the SCAQMD Final Staff Report, the SCAQMD adopted WATTs as the parameter for determining the WPCO for warehouses rather than emissions or vehicle miles travelled (VMT). SCAQMD decided against a parameter like emissions or VMT to reduce the administrative burden on warehouse operators and the SCAQMD compliance staff. Also, the SCAQMD notes that motor carriers had expressed concern that they do not want to reveal where or how far they travel to warehouse operators or SCAQMD in order to keep their clients private.

<sup>9</sup> In Rule 2305(c)(33), the term "warehousing activities" is defined as meaning operations at a warehouse related to the storage and distribution of goods, including but not limited to the storage, labelling, sorting, consolidation and deconsolidation of products into different size packages. Supporting office administration, maintenance, manufacturing areas, or retail sales areas open to the general public, within the same warehouse building, that are physically separate from the warehouse area, are not considered warehousing activities for the purpose of the rule.

<sup>10</sup> The exemptions are set forth in SCAQMD Rule 2305(g).

to the Executive Officer<sup>11</sup> for a partial or complete exemption.<sup>12</sup> This application must specify what portion of the WPCO that the malfunctioning equipment would have satisfied, and all relevant details on why the anticipated action was unable to earn the expected WAIRE Points. The Executive Officer will use the following criteria to grant a partial or complete exemption: (a) there is a manufacturing defect or an installation defect when using manufacturer-approved methods, and (b) the warehouse operator can demonstrate that despite good faith efforts for repairs on the vehicle or equipment, through either the warranty or other manufacturer and/or installer-approved methods, the repairs were not completed in a timely manner.

Warehouse owners (who opt in) and operators are required to earn WAIRE Points either: through the completion of specified actions from the list of actions in the WAIRE Menu,<sup>13</sup> completion of actions in an approved custom plan, through payment of a mitigation fee, or through a combination of these three options.<sup>14</sup> The WAIRE Points provision within Rule 2305 includes a WAIRE Menu with a list of specific actions that a warehouse owner or operator may take to earn points to meet the annual WPCO.<sup>15</sup> The menu includes nine different types of actions or investments that qualify for points: (i) acquire Zero Emission (ZE)/Near-Zero Emission (NZE) Trucks, (ii) number of ZE/NZE Truck Visits,<sup>16</sup> (iii) acquire ZE Yard Truck, (iv) use ZE Yard Truck, (v) install onsite ZE charging or fueling infrastructure, (vi) use onsite ZE charging or fueling infrastructure, (vii) install and energize onsite solar panels, (viii) use onsite solar panels, and (ix)

<sup>11</sup> Executive Officer refers to the Executive Officer or designee of the SCAQMD. The Executive Officer is the Air Pollution Control Officer for the SCAQMD.

<sup>12</sup> For example, if a warehouse operator purchases a zero-emission truck and anticipates using this same truck to earn WAIRE Points, but a malfunction in the powertrain due to an equipment manufacturer defect (e.g., malfunctioning electric motor, fuel cell stack, etc.) results in an inability to use the equipment, then the operator may apply for relief for the WAIRE Points that would have been earned. The exemption would be granted if the vehicle or equipment is shown to be due to a manufacturer defect or an installation defect. SCAQMD Final Staff Report, 37.

<sup>13</sup> SCAQMD Rule 2305, Table 3.

<sup>14</sup> SCAQMD Rule 2305(d)(1) and (2).

<sup>15</sup> SCAQMD Rule 2305, Table 3.

<sup>16</sup> NZE and ZE truck visits can come from the warehouse operator's own fleet or by any other third-party fleet (whether contracted by the warehouse operator or not). See SCAQMD Final Staff Report, at 99. The term "truck visits" refers to the round-trip a truck takes to and from a warehouse. For example, 520 "truck visits" is the same as 1,040 one-way "truck trips" as explained in the SCAQMD Final Staff Report, 30.

install MERV 16 or greater filters or filter systems in residences, schools, daycares, hospitals, or community centers.

Rule 2305 specifies the number of points for the different types of actions or investments, ranging from 1 point (per 165,000 kilowatt-hours) from the use of onsite solar panels to 1,680 points for installation of a 700-kilogram-per-day hydrogen (H<sub>2</sub>) fueling station. SCAQMD assigned WAIRE Points to the different types of actions or investments based on three key parameters: cost, regional emissions reductions, and local emissions reduction.<sup>17</sup> For example, under Rule 2305, acquiring a new class 8 ZE/NZE truck in the warehouse operator fleet would be worth 126 points. Similarly, 365 visits by class 8 ZE/NZE trucks to a warehouse would be worth 51 points during a given annual compliance period.

Based on the most current information contained in the first Annual Report for the WAIRE Program, the average WPCO per warehouse operator was rounded to 80 points for the 2022 compliance period.<sup>18</sup> The same number of WATTs in 2023 and 2024 (and beyond) for the same warehouse operators would result in an average WPCO of 160 points and 240 points, respectively, taking into account the annual variable under Phase I (which applies to warehouses equal to or greater than 250,000 square feet) for those years.<sup>19</sup>

Under the rule, the Custom WAIRE Plan is a second option that allows warehouse owners or operators to earn WAIRE Points through a customized plan specific for a warehouse facility.<sup>20</sup> Custom WAIRE Plan applications must demonstrate how the proposed action will earn WAIRE Points based on the incremental cost of the action, the NO<sub>x</sub> emission reductions from the action, and the diesel PM (DPM) emission reductions from the action, relative to baseline conditions. Custom WAIRE Plans may not include actions that are included in the WAIRE Menu on Table 3 of Rule 2305. The methodology to determine the total WAIRE Points for an

action in a Custom WAIRE Plan application must be consistent with methods in the WAIRE Program Implementation Guidelines.<sup>21</sup> Any WAIRE Points earned from a Custom WAIRE Plan for emission reductions must be quantifiable, verifiable, and real as determined by the Executive Officer and consistent with the WAIRE Implementation Guidelines.

Warehouse owners or operators have a third option to meet the annual compliance obligation that involves payment of a mitigation fee in the amount of \$1,000 for each WAIRE Point.<sup>22</sup> The mitigation fee is an option for warehouse operators to fulfill all or a portion of their WPCO. In adopting Rule 2305, the SCAQMD Governing Board directed the Executive Officer to develop the WAIRE Mitigation Program with funds generated from mitigation fee payments.<sup>23</sup> Any solicitations for requests for funding, or funding allocations that would be spent from the WAIRE Mitigation Program, must be approved by the SCAQMD Governing Board in a public meeting.<sup>24</sup> In adopting the Rule 2305, the Board also specified that proposed solicitations and project awards must be presented to the Governing Board no less frequently than on an annual basis. The Board directed the Executive Officer to track mitigation fees paid by warehouse operators according to the Source Receptor Area (SRA)<sup>25</sup> and county in which they are located to achieve or facilitate emission reductions in the same SRAs and counties in which the mitigation fees were paid. As adopted by the Board, if sufficient projects are not identified in each individual SRA relative to the available funding, then funds may be directed either to an adjacent SRA in the same county or held for a subsequent funding. The SCAQMD states that the mitigation fees collected from Rule 2305 will go towards the purchase of NZE and ZE trucks, installation of ZE charging and/or hydrogen fueling infrastructure.<sup>26</sup> Funds may also be combined with other incentive programs, such as Carl Moyer and Proposition 1B, as allowable on a case-by-case basis.

As noted above, warehouse operators have three basic options, or any combination of these options, through which to earn or obtain points sufficient to meet their WPCO. Warehouse owners may also earn WAIRE Points using the same methods or options available to warehouse operators and may transfer these WAIRE Points to any warehouse operator at the site where the WAIRE Points were earned within a three-year period.

In the SCAQMD's first Annual Report for the WAIRE Program, the SCAQMD compiled information from 380 ISIR's that had been submitted by warehouse operators through September 30, 2022. The first Annual Report suggests that warehouse operators expect to meet their WPCOs, at least in the early years of the program, primarily through ZE hostler usage, (*i.e.*, yard tractors that move trailers and containers around warehouse facilities; approximately 40% of the anticipated WAIRE points based on the ISIRs received), NZE Class 8 Truck Visits (approximately 27%), and ZE hostler acquisition (approximately 8%).<sup>27</sup> The submitted ISIRs also suggest that, in addition to taking actions from the WAIRE Menu, warehouse operators anticipate earning about 5,500 points through mitigation fees, representing about 3% of total points earned, and about \$5.5 million.<sup>28</sup>

The SCAQMD developed emissions reduction estimates for various scenarios representing different compliance approaches to Rule 2305.<sup>29</sup> The estimates of reductions in emissions of NO<sub>x</sub> and DPM vary widely among the scenarios and from year to year but represent positive emission reductions beyond those that are expected by the SCAQMD to occur due to CARB regulations (such as CARB's Advanced Clean Trucks, Low NO<sub>x</sub> Omnibus, and Heavy Duty Inspection and Maintenance (I/M) regulations).<sup>30</sup>

Lastly, the rule includes recordkeeping and reporting requirements. The three types of reports that are due under Rule 2305 include: (1) the Warehouse Operations Notification (WON), which is the responsibility of the warehouse owner, (2) the ISIR, and (3) the Annual WAIRE Report, both of which are the responsibility of warehouse operators. The rule also specifies a sunset date after the EPA finds that all air basins within the SCAQMD have attained the

<sup>17</sup> SCAQMD Final Staff Report, 111.

<sup>18</sup> SCAQMD, Annual Report for the Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program, January 2023, 16. The report represents 47% of warehouses in the SCAQMD. The average WPCO estimate of 80 points reflects SCAQMD's anticipated aggregate WPCO of approximately 30,000 divided by 380, the number of Phase I warehouses for which Initial Site Information Reports (ISIR) were submitted in time for the report. The 30,000 aggregate point value reflects a 0.33 annual variable for the first compliance period for Phase I warehouses.

<sup>19</sup> Rule 2305, table 2 ("Annual Variable").

<sup>20</sup> SCAQMD Rule 2305(d)(4).

<sup>21</sup> SCAQMD Final Staff Report, 86. A copy of the current version of the SCAQMD's WAIRE Implementation Guidelines, version 1.1, is included in the docket for this rulemaking.

<sup>22</sup> SCAQMD Rule 2305(d)(5).

<sup>23</sup> SCAQMD, Resolution 21-9, signed June 4, 2021, 6.

<sup>24</sup> SCAQMD Final Staff Report, 40.

<sup>25</sup> Source Receptor Areas (SRAs) are shown in a SCAQMD-prepared map titled "General Forecast Areas & Air Monitoring Areas".

<sup>26</sup> SCAQMD Final Staff Report, 40.

<sup>27</sup> SCAQMD, Annual Report for the Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program, January 2023, 15.

<sup>28</sup> *Id.*

<sup>29</sup> SCAQMD Final Staff Report, Tables 15 and 16.

<sup>30</sup> SCAQMD Final Staff Report, 62.

2015 ozone NAAQS and that CARB finds that all air basins within the SCAQMD have attained the California ozone ambient air quality standard (which is numerically the same as the 2015 ozone NAAQS).<sup>31</sup>

## II. The EPA's Evaluation and Action

### A. How is the EPA evaluating the rule?

The EPA has evaluated SCAQMD Rule 2305 against the applicable procedural and substantive requirements of the CAA for SIPs and SIP revisions and has concluded that, with certain exceptions discussed below, Rule 2305 meets the applicable requirements and would strengthen the SIP. Generally, SIPs must include enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary to meet the requirements of the Act (see CAA section 110(a)(2)(A)); must provide necessary assurances that the State will have adequate personnel, funding, and authority under State law to carry out such SIP (and is not prohibited by any provision of Federal or State law from carrying out such SIP) (see CAA section 110(a)(2)(E)); must be adopted by a State after reasonable notice and public hearing (see CAA section 110(a)(1); section 110(a)(2); section 110(l)); and must not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act (see CAA section 110(l)).<sup>32</sup>

The SCAQMD jurisdiction covers all the South Coast Air Basin, and portions of the Salton Sea and Mojave Desert Air Basins, and includes air quality planning areas that are designated as nonattainment for the 1-hour ozone NAAQS and the 1997, 2008 and 2015 8-hour ozone NAAQS (South Coast and Coachella Valley areas); the 1997 24-hour and annual PM<sub>2.5</sub> NAAQS, the 2006 24-hour PM<sub>2.5</sub> NAAQS and the 2012 annual PM<sub>2.5</sub> NAAQS (South Coast area), and the 1987 24-hour PM<sub>10</sub> NAAQS (Coachella Valley area).<sup>33</sup> The South Coast Air Basin is currently

classified as an Extreme nonattainment area for the 1-hour ozone NAAQS and the 1997, 2008, and 2015 8-hour ozone NAAQS, as a Moderate nonattainment area for the 1997 annual and 24-hour PM<sub>2.5</sub> NAAQS, and as a Serious nonattainment area for the 2006 24-hour and 2012 annual PM<sub>2.5</sub> NAAQS. The Coachella Valley portion of the Salton Sea Air Basin is classified as a Severe nonattainment area for the 1-hour ozone NAAQS, as an Extreme nonattainment area for the 1997 and 2008 8-hour ozone NAAQS,<sup>34</sup> as a Severe nonattainment area for the 2015 8-hour ozone NAAQS; and as a Serious nonattainment area for the 1987 24-hour PM<sub>10</sub> NAAQS.

CAA section 172(c)(1) requires States with ozone nonattainment areas to implement all reasonably available control measures (RACT), including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology (RACT), as expeditiously as practicable. CAA sections 182(b)(2) and 182(f) specify that implementation of RACT under CAA section 172(c)(1) is required for all major stationary sources of NO<sub>x</sub> in the area. In addition, the CAA requires States with Serious PM<sub>10</sub> and PM<sub>2.5</sub> NAAQS nonattainment areas to implement Best Available Control Measures (BACM), including Best Available Control Technology (BACT) (see CAA section 189(b)(1)(B)). As noted above, SCAQMD includes both Extreme and Severe ozone nonattainment areas and Moderate and Serious PM nonattainment areas.

With respect to rule stringency, the EPA is prohibited by the CAA from requiring States and local air agencies to submit indirect source review (ISR) programs as a condition to approving a SIP.<sup>35</sup> Because the EPA cannot require a State or local air agency to adopt and implement an ISR program, the EPA

reasons that it likewise cannot require that such a program meet any particular level of stringency otherwise required to meet SIP requirements, such as attainment plan requirements for the ozone or PM NAAQS. Therefore, the EPA is not evaluating SCAQMD Rule 2305 for compliance with the RACM/RACT or BACM/BACT requirements.

### B. Does the rule meet the evaluation criteria?

1. Did the State provide for reasonable public notice and hearing prior to adoption?

Under CAA section 110(l), SIP revisions must be adopted by the State, and the State must provide for reasonable public notice and hearing prior to adoption. Pursuant to 40 CFR 51.102, States must provide at least 30-days' notice of any public hearing to be held on a proposed SIP revision. States must provide the opportunity to submit written comments and allow the public the opportunity to request a public hearing within that period. Rule 2305 was adopted by SCAQMD on May 7, 2021, through Resolution 21-9, following a public hearing held on the same day. Prior to adoption, the SCAQMD published notice of the May 7, 2021 public hearing on March 31, 2021, and provided more than 30 days for submission of written comments. The CARB subsequently adopted the rule as a revision to the SIP on August 13, 2021, through Executive Order S-21-012. The CARB then submitted SCAQMD Rule 2305 to the EPA on August 13, 2021, as an attachment to a letter with the same date. Various other materials comprising the SIP submission package were submitted as well, including copies of public comments received during the comment period, District responses to comments, and environmental and socioeconomic impact assessments.

Based on the materials provided in the August 13, 2021 SIP submission summarized above, we propose to find that the District and the CARB have met the procedural requirements for adoption and submission of SIPs and SIP revisions under CAA section 110(l) and 40 CFR 51.102.

2. Does the State have adequate legal authority to implement the rule?

The SCAQMD has been granted both general and specific authority under the California Health & Safety Code (CH&SC) to adopt and implement Rule 2305.<sup>36</sup> Specific authority is found in CH&SC section 40440 ("Rules and

<sup>34</sup> The EPA recently finalized a reclassification requested by CARB for Coachella Valley from Severe to Extreme for the 2008 ozone NAAQS. 88 FR 14291 (March 8, 2023).

<sup>35</sup> CAA section 110(a)(5)(A)(i); *National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District*, 627 F.3d 730, 737-38 (9th Cir. 2010) ("NAHB v. SJVUAPCD") ("Congress added section 110(a)(5) to the Act in 1977 after the EPA had tried to force the states to regulate indirect sources of pollution. When the states had not regulated indirect sources to the EPA's satisfaction, the EPA began to promulgate its own rules for indirect sources. The EPA's move 'drew heavy criticism because [it] represented a significant federal intrusion into the traditionally local domain of land use control.' In response to the EPA's actions, a 1977 amendment to the Act 'severely limit[ed] the EPA's authority' over indirect sources, but 'left largely to the states' the matter of 'whether and how to regulate' indirect sources." (Internal citations omitted)).

<sup>36</sup> General authority is found in CH&SC sections 40000 and 40001.

<sup>31</sup> SCAQMD Rule 2305(e) and (h).

<sup>32</sup> CAA section 193, which prohibits any pre-1990 SIP control requirement relating to nonattainment pollutants in nonattainment areas from being modified unless the SIP is revised to insure equivalent or greater emission reductions of such air pollutants, does not apply to the SCAQMD Rule 2305 because, as a new rule, it does not represent a pre-1990 SIP control requirement.

<sup>33</sup> 40 CFR 81.305. In addition, a portion of Los Angeles County is designated nonattainment for the lead NAAQS, but SCAQMD Rule 2305 does not affect lead emissions, and thus, the lead NAAQS is not germane to our proposed action and is not discussed further.

regulations”), which authorizes the SCAQMD to provide for indirect source controls in those areas of the South Coast District in which there are high-level, localized concentrations of pollutants.

Moreover, the EPA knows of no obstacle under State or Federal law in the SCAQMD’s ability to implement Rule 2305. With respect to State law, the EPA notes that, during the rule development phase, certain commenters challenged the mitigation fee option in Rule 2305 on the grounds that it imposes an unlawful tax under State law. However, CARB’s August 13, 2021 SIP submission package includes a legal analysis from the State Attorney General’s Office<sup>37</sup> that concludes that the mitigation fee is not an unlawful tax under the California Constitution because, as a compliance option, the fee is not compulsory.<sup>38</sup> In explaining how the mitigation fee option is not compulsory, the State Attorney General’s Office letter notes that, under Rule 2305, “warehouse operators have numerous options to reduce their emissions or otherwise earn compliance points. If they elect not to take actions to reduce their emissions or environmental impacts, warehouse operators may comply by paying the in-lieu fee. A ‘hallmark’ of a tax is that ‘it is compulsory.’ The in-lieu fee is not compulsory, so it is not a tax.”<sup>39</sup> (Internal citations omitted.) Also, even if viewed as compulsory, the Attorney General’s Office explains how the mitigation fee option falls under two exceptions to the meaning of “tax” under the relevant provisions of State law.<sup>40</sup> The EPA proposes to find that the State Attorney General’s Office letter provides the necessary assurances that State law with respect to the mitigation fee option is not an obstacle to the SCAQMD’s ability to implement Rule 2305.

With respect to Federal law, the EPA is aware of an ongoing legal challenge by the California Trucking Association (CTA), among others, to the SCAQMD’s legal authority to implement Rule 2305 in litigation to which the EPA is not a party.<sup>41</sup> In the CTA case, plaintiff CTA and plaintiff-intervenor Airlines for America assert that implementation and

enforcement of Rule 2305 by the SCAQMD is preempted under the CAA, the Airline Deregulation Act (ADA) and the Federal Aviation Administration Authorization Act (FAAAA or F4A). Based on the information currently before the EPA at this time, the EPA proposes to find that Rule 2305 is not preempted under the CAA, ADA or the F4A. If the District Court were to issue a decision against the SCAQMD in the pending litigation before the EPA takes final action on Rule 2305 pursuant to this proposal, we will take that decision into account and evaluate appropriate action at that time.<sup>42</sup>

With respect to the CAA, the EPA’s evaluation of Rule 2305 indicates that the SCAQMD is authorized to adopt this program for inclusion into the California SIP. CAA section 110(a)(5) authorizes States to include any ISR program in their SIPs. Under CAA section 110(a)(5), the EPA may not require a State to adopt an ISR program as part of its SIP, but the EPA may approve an ISR program that a State chooses to adopt and submit for inclusion into its approved SIP. In this context, “indirect source” means a facility, building, structure, installation, real property, road, or highway that attracts, or may attract, mobile sources of pollution.<sup>43</sup> “Indirect source review program” means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

- Exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date; or
- Preventing maintenance of any such standard after such date.<sup>44</sup>

<sup>42</sup> For instance, the EPA may re-propose action or supplement the proposed action depending upon the implications of the decision on the District’s authority to implement and enforce the rule, among other considerations. If an adverse decision were to be issued after the EPA approves Rule 2305, then the EPA would consider withdrawal of the approval, again, depending upon the implications of the decision on the District’s authority to implement and enforce the rule, among other considerations.

<sup>43</sup> CAA section 110(a)(5)(C). The term “indirect source” as defined in the CAA includes parking lots, and parking garages, and other facilities subject to any measure for management of parking supply, including regulation of existing off-street parking but such term does not include new or existing on-street parking. “Indirect source” does not include direct emissions sources or facilities at, within, or associated with, any indirect source.

<sup>44</sup> CAA section 110(a)(5)(D). Indirect source review programs are not considered “transportation control measures.” CAA section 110(a)(5)(E).

Rule 2305 involves the facility-by-facility review of existing and new warehouses, which are facilities that attract mobile sources of air pollution. Based on this review, the rule provides a list of specific measures that, when implemented by the warehouse operator, will reduce or offset the related mobile source emissions that contribute to the exceedances of the NAAQS for PM<sub>2.5</sub> and ozone in areas under SCAQMD jurisdiction. The rule also provides options to allow the operator of the warehouse to develop a custom WAIRE plan or pay a mitigation fee or a combination of these options. More specifically, under Rule 2305, warehouse operators are required, on an annual basis, to earn or obtain WAIRE points sufficient to meet their WPCO, a value that reflects the WATTs associated with each warehouse. As noted previously, the WATTs parameter represents a calculated value that reflects the number of truck trips to and from a warehouse in a given year and serves as a proxy for overall warehouse activity and emissions.

To earn or obtain WAIRE points, warehouse owners and operators have the option of: (i) taking various types of actions or making variety types of investments specified in the WAIRE menu; (ii) following an approved Custom WAIRE Plan; (iii) paying a mitigation fee; (iv) or any combination of such options (see section I.D of this document). The SCAQMD anticipates that the same types of actions and investments that are specified in Rule 2305 will also occur under the WAIRE Mitigation Program funded by the mitigation fee option under the rule (see section I.D of this document). As such, Rule 2305 is designed to reduce, offset, or mitigate the emissions generated by mobile sources attracted to warehouses in the SCAQMD. This includes the associated contribution to area-wide exceedances of the NAAQS and to the local pollutant burden on communities in the vicinities of warehouses.

Rule 2305 is similar to the ISR review program previously adopted by the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) to reduce or offset emissions of NO<sub>x</sub> and PM in the San Joaquin Valley from the construction-phase and operational-phase of development projects through design features, on-site measures, and through off-site measures paid through implementation of an in-lieu mitigation fee.<sup>45</sup> The SJVUAPCD ISR program was

<sup>45</sup> SJVUAPCD Rule 9510 (“Indirect Source Review (ISR)”), approved by the EPA at 76 FR

<sup>37</sup> Robert Swanson, Deputy Attorney General, California Department of Justice, letter to Ellen Peter, Chief Counsel, CARB, dated May 6, 2021, included as an enclosure to Ellen M. Peter, Chief Counsel, CARB, letter to Wayne Natri, Executive Officer, SCAQMD, dated May 6, 2021.

<sup>38</sup> Id. at 12–14.

<sup>39</sup> Id. at 12.

<sup>40</sup> Id. at 12–14.

<sup>41</sup> *California Trucking Association v. South Coast Air Quality Management District*, C.D. Cal., Docket #21-cv-06341 (CTA).

upheld by the Ninth Circuit in a challenge that claimed that the program was characterized as an ISR program but was in reality a rule regulating emissions from nonroad equipment in violation of CAA section 209(e).<sup>46</sup>

Commenters, objecting to Rule 2305 during its adoption, contended that an ISR program, for the purposes of CAA section 110(a)(5), is limited to new or modified indirect sources and that, therefore, Rule 2305 is not authorized under the CAA, at least as it applies to existing warehouses. This contention is based on the clause in the definition of the term “indirect source review program” describing such programs as “including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution.”<sup>47</sup>

In its own rulemaking process, the SCAQMD responded to this issue by noting that the SCAQMD’s authority derives from State law, not Federal law. State law does not limit the authority of the SCAQMD to regulating only new or modified (as opposed to existing) indirect sources.<sup>48</sup> The SCAQMD also noted that CAA section 110(a)(5) does not prescribe limits on State authority but rather prescribes certain limits on the EPA. Finally, the SCAQMD stated that it has authority under CAA section 116 for this type of provision.

In reviewing Rule 2035, the EPA has specifically evaluated whether it is consistent with the requirements of CAA section 110(a)(5). When taking action on any SIP submission, the EPA must evaluate whether the SIP provisions as issue meet applicable statutory and regulatory requirements. The EPA acknowledges that there are ambiguities in the language of section 110(a)(5). For example, section 110(a)(5)(D) superficially appears to define the term “indirect source review program” in terms of “new or modified”

indirect sources. That provision in relevant part defines an indirect source program as one “including” such measures at new or modified sources. The EPA does not, however, interpret this definition to restrict States from having such programs that extend to existing sources if they elect to do so. Instead, the use of “including” preceding the reference to “new or modified indirect source” indicates that regulation of new or modified indirect sources is illustrative of the scope of this provision, not limiting.

Other provisions support this interpretation. Section 110(a)(5)(C) defines the term “indirect source” itself to include many things such as a building “which attracts, or may attract, mobile sources of pollution.” This definition could encompass both existing and future structures. By contrast, with respect to parking, section 110(a)(5)(C) expressly states that an indirect source program can include “existing off-street parking” but not “new or existing on-street parking.” If such an “indirect source program” could apply to existing off-street parking, then it is unclear why this conceptually would not extend to other existing sources such as existing buildings, notwithstanding the reference to new or modified sources in the definition of “indirect source program.” At most, there is a small degree of ambiguity with respect to whether Congress actually intended the definition of “indirect source program” to function as a restriction on the EPA’s authority to approve a State indirect source program that extends to existing buildings into the State’s SIP. The EPA does not consider such a restrictive reading of the provision to be reasonable or logical, absent a clearer prohibition.

As further support for this interpretation, the EPA notes that CAA section 116 explicitly provides that States retain authority to regulate more stringently in SIP provisions than otherwise required by Federal law, except where preempted from doing so. Even if Congress anticipated that States might typically elect to adopt such programs that would include new or modified sources, Congress did not explicitly appear to preclude States from adopting indirect source programs that extend to existing sources as well, except with respect to “new or existing on street parking.” In other words, by defining the term “indirect source program” in CAA section 110(a)(5)(D), Congress was not diminishing existing State authority under CAA section 116 to adopt such programs that apply to existing sources, such as existing warehouses, if they elect to do so. Thus,

the EPA concludes that the State is not precluded from regulating both existing and new warehouses in Rule 2305, and thus this poses no issue with respect to the EPA proposing approval of the rule into the SIP.

During the rule development process, the SCAQMD received comments objecting to Rule 2305 on the grounds that the rule, while structured as an ISR program, represents a de facto purchase mandate for ZE or NZE trucks and is thus preempted under CAA section 209(a). These adverse comments cited to the Supreme Court decision in *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (*EMA*). In *EMA*, the Supreme Court held that a “standard” under CAA section 209(a), which the Court described as “a requirement that a vehicle or engine not emit more than a certain amount of pollutant, be equipped with a certain type of pollution-control device, or have some other design feature related to the control of emissions,” is preempted under Section 209(a) whether applied to manufacturers through a sales mandate or to buyers through a purchase mandate.<sup>49</sup>

As noted above, the question of whether an ISR program is preempted under Section 209 of the CAA was squarely addressed by the Ninth Circuit in *NAHB v. SJVUAPCD*. The EPA agrees with the Ninth Circuit’s interpretation of the statute on this point and proposes to find that Rule 2305 is similar in relevant respects to the ISR program the Court determined in *NAHB* was not preempted. Most critically, Rule 2305 regulates at the level of the indirect source, and not at the level of mobile sources the indirect source may attract. In Rule 2305 “[t]he ‘baseline’ amount of emissions, and the required reduction in emissions from that baseline, are both calculated in terms of the [indirect source site] as a whole.”<sup>50</sup> This “site-based” approach to regulating emissions “is precisely what allows the Rule to avoid preemption under section 209(e)(2).”<sup>51</sup> That Rule 2305 is properly characterized as an ISR program under Section 110(a)(5) distinguishes it from the vehicle purchase mandate at issue in the Supreme Court *EMA* case.<sup>52</sup>

26609 (May 9, 2011), and approved as amended at 86 FR 33542 (June 25, 2021).

<sup>46</sup> *NAHB v. SJVUAPCD*, 627 F.3d 730, 734 (9th Cir. 2010); at 739: “The Act, by allowing states to regulate indirect sources of pollution, necessarily contemplates imputing mobile sources of pollution to an indirect source as a whole. If an indirect source review program could not attribute the emissions from mobile sources, while they are stationed at an indirect source, to the indirect source as a whole, states could not adopt any indirect source review program. What allows Rule 9510 to qualify as an indirect source review program under section 110(a)(5) is precisely what allows the Rule to avoid preemption under section 209(e)(2): its site-based regulation of emissions. In this way, the two sections do not conflict, but rather fit together neatly like two interlocking puzzle pieces.”

<sup>47</sup> CAA section 110(a)(5)(D).

<sup>48</sup> Final SCAQMD Staff Report, Master Responses, 157–158.

<sup>49</sup> *Engine Manufacturers Ass’n v. South Coast Air Quality Management District*, 541 U.S. 246, 253–255 (2004).

<sup>50</sup> *NAHB v. SJVUAPCD*, 627 F.3d 730, 737.

<sup>51</sup> *Id.*, 739.

<sup>52</sup> “Rule 9510 escapes preemption because its regulation of construction equipment is indirect. Rule 9510 does not measure emissions by fleets or groups of vehicles; it measures emissions on a “facility-by-facility” basis. 42 U.S.C. 7410(a)(5)(D). Its unit of measurement is the indirect source, not the fleet. It regulates development sites directly, but as the term “indirect source” implies, it regulates

The EPA has previously acknowledged the possibility that a rule styled as an ISR program may in effect be a regulation of direct sources, including motor vehicles or nonroad sources. In other words, the EPA is not obligated merely to accept at face value a State or local authority's characterization, but may consider how the program will work in practice. In its 2011 final approval action on the SJVUAPCD ISR, the EPA noted factors that might indicate a rule ostensibly measuring emissions from a site was a *de facto* regulation of nonroad engines.<sup>53</sup> As explained below, Rule 2305 lacks the indicia of a *de facto* regulation of either motor vehicles or nonroad vehicles or engines.

As explained in section I.D above, Rule 2305 applies to warehouse operators and provides multiple options for meeting the annual WPCO. As noted by the SCAQMD in response to comments on proposed Rule 2305, "the WPCO is not based on truck emissions; it is based on truck trips. The proposed rule uses truck trips as a proxy for total warehouse emissions when setting the compliance obligation because the number of truck visits is representative of the total activity at, and emissions associated with, a warehouse."<sup>54</sup> The various options available (WAIRE Menu, Custom WAIRE Plan, or Mitigation Fee) to warehouse operators that do not involve acquisition of, or contracting for, ZE or NZE trucks to earn WAIRE Points support a conclusion that in Rule 2305, the SCAQMD has not adopted or attempted to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines for the purposes of CAA section 209(a).<sup>55</sup>

mobile emissions only indirectly. For that reason, the fleet-based regulations [that were at issue in *EMA*] are not analogous to Rule 9510." *NAHB v. SJVUAPCD*, 627 F.3d 740.

<sup>53</sup> "[I]n the TSD, EPA evaluates the potential for Rule 9510, as an ISR rule otherwise authorized under CAA section 110(a)(5), to nevertheless run afoul of CAA section 209(e), and in so doing, EPA identified two ways that an ISR rule that on its face is authorized under CAA section 110(a)(5) could nonetheless be preempted. First, the ISR rule could be preempted if the rule in practice as applied acts to compel the manufacturer or user of a nonroad engine or vehicle to change the emission control design of the engine or vehicle, or second, an ISR rule could be preempted if it creates incentives so onerous as to be in effect a purchase mandate." 76 FR 26609, 26611 (May 9, 2011).

<sup>54</sup> SCAQMD Final Staff Report, 160.

<sup>55</sup> SCAQMD's Final Socioeconomic Impact Assessment for Proposed Rule 2305—Warehouse Indirect Source Rule—Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program and Proposed Rule 316—Fees for Rule 2305 (May 2021), particularly pages ES-5—ES-7, and table 18, indicates that the ZE/NEZ non-acquisition (or contracting) scenarios are generally 4 to 5 times more costly (in terms of average annual dollars per

Commenters objecting to the SCAQMD's adoption of Rule 2305 contended that the requirements are preempted under the ADA and F4A. Under the ADA, with certain exceptions not applicable here, a State or political subdivision of a State may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).<sup>56</sup> The F4A extends the same preemptive language to any motor carrier ("common carrier") or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.<sup>57</sup> Rule 2305 applies to owners and operators of warehouses greater than 100,000 square feet of indoor floor space in a single building, and both air carriers and common carriers are subject to the requirements of Rule 2305 because both types of carriers own or operate such warehouses in the SCAQMD.

The EPA does not consider the requirements under Rule 2305 as relating directly to the "price, route, or service" of any air carrier or common carrier but do recognize that an indirect effect on price is a foreseeable consequence of the additional costs borne by warehouse owners or operators to comply with the annual WAIRE points compliance obligation. However, the EPA proposes to find that Rule 2305 is not preempted under either the ADA or F4A because any price effect is indirect and remote. Moreover, the District is acting under its delegated police powers to protect public health in a way that is explicitly authorized under CAA section 110(a)(5) and CAA section 116. Any incremental increase in price for delivery services due to compliance with Rule 2305 internalizes costs otherwise borne by the public, particularly members of the public living and working in the vicinities of warehouses, through the types of health

square foot) than the ZE/NZE acquisition (or contracting) scenarios so as to incentive acquisition and use of ZE/NZE trucks over the non-acquisition options. However, the scenarios were developed to identify the widest range of possible costs assuming that warehouse owners and operators would only comply with a single scenario approach from 2022 through 2031. The EPA expects warehouse operators will select multiple points-earning actions or investments along with mitigation fees to meet the annual compliance obligation, and that the selection will change over the years in light of the ever-changing circumstances of individual businesses and the composition of vehicle fleets.

<sup>56</sup> 49 U.S.C. 41713(b).

<sup>57</sup> 49 U.S.C. 14501(c)(1).

effects associated with elevated concentrations of PM.

3. Is the rule enforceable as required under CAA section 110(a)(2)?

The EPA has evaluated the enforceability of Rule 2305 with respect to applicability and exemptions; standard of conduct; compliance dates; sunset provisions; discretionary provisions; and test methods, recordkeeping and reporting,<sup>58</sup> and the EPA believes, for the reasons given below, that the regulation is generally enforceable for the purposes of CAA section 110(a)(2) but with certain deficiencies.

First, with respect to applicability, the EPA generally finds that Rule 2305 is sufficiently clear as to which entities are subject to the requirements in the regulation and which entities are exempt.<sup>59</sup> The EPA finds that Rule 2305 is sufficiently specific so that the persons affected by the regulation are fairly on notice as to what the requirements and related compliance dates are.<sup>60</sup> To a large extent, the EPA has already described the substantive requirements and compliance dates set forth in Rule 2305 in section I.D of this document. The EPA notes, however, that two definitions in Rule 2305 cite to sections of the California Code of Regulations (CCR), and thus, the two definitions in Rule 2305 would be ambiguous for the purposes of enforcement of the SIP unless the CCR sections on which Rule 2305 relies are submitted and approved into the SIP.<sup>61</sup> The CCR sections on which Rule 2305 relies are included in two new CARB mobile source regulations that the EPA anticipates that CARB will submit to the EPA for approval as part of the California SIP. If these two CCR sections are submitted and the EPA subsequently approves them into the SIP, then Rule 2305 will avoid this particular potential ambiguity and the related implications for enforceability.

Second, with respect to compliance dates, the EPA notes that all warehouses subject to the rule will be required to meet their WAIRE points annual compliance obligation requirements beginning with calendar year 2024. This is consistent with achieving emission reductions in advance of the July 20,

<sup>58</sup> These concepts are discussed in detail in an EPA memorandum dated from September 23, 1987, from J. Craig Potter, EPA Assistant Administrator for Air and Radiation, et al., to Addressees, Subject: "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency."

<sup>59</sup> 13 CCR 2023.

<sup>60</sup> 13 CCR 2023.1.

<sup>61</sup> The definitions in Rule 2305 of "Near Zero-Emission" truck and "Zero-Emission" truck cite to 13 CCR 1956.8 and 1963, respectively.



2032 attainment deadline for the South Coast Air Basin and Coachella Valley Extreme nonattainment areas for the 2008 ozone NAAQS. By extension, Rule 2305 compliance dates are compatible with the applicable attainment deadlines for the 2015 ozone NAAQS: August 3, 2033, for the Coachella Valley “Severe” nonattainment area; and August 3, 2038, for the South Coast Air Basin “Extreme” nonattainment area. The compliance dates in Rule 2305 are also consistent with providing emission reductions in advance of the applicable attainment deadlines in the South Coast of October 16, 2025 for the 2006 24-hour PM<sub>2.5</sub> NAAQS and December 31, 2025 for the 2012 annual PM<sub>2.5</sub> NAAQS.<sup>62</sup>

Third, Rule 2305 includes a sunset provision.<sup>63</sup> Specifically, Rule 2305 provides that the WAIRE points annual compliance obligation requirements expire in the year following the determinations by the EPA that the South Coast Air Basin and Coachella Valley have attained the 2015 ozone NAAQS and the determinations by CARB that the South Coast Air Basin and Coachella Valley have attained the State ambient air quality standard for ozone (which is numerically the same as the 2015 ozone NAAQS). Generally, the EPA finds sunset provisions in SIP rules to be a deficiency that must be addressed for full approval because of the potential to interfere with reasonable further progress (RFP) or attainment of the NAAQS, and potential inconsistency with CAA section 110(l) requirements through purported elimination of existing control requirements without a sufficient demonstration at that future date. In this instance, we are not crediting Rule 2305 at this time with a specific level of emissions reductions for RFP or attainment demonstration purposes. This does not mean that the rule would not achieve emissions reductions in practice over the near-term and well into the future and, therefore, does not mean that sunsetting the rule would not result in foregone emissions reductions that would be relevant for both the ozone and PM<sub>2.5</sub> NAAQS at that future time. We recommend that SCAQMD amend Rule 2305 to eliminate the sunset clause. The SCAQMD is free to rescind the rule at any time, but a future rescission of Rule 2305 must be effectuated through adoption and submission of the rescission as a SIP revision to the EPA for review and

action under CAA section 110(k), and consistent with CAA section 110(l), at that time.

The EPA notes that Rule 2305 includes provisions that allow for discretion on the part of the SCAQMD’s Executive Officer. Such “director’s discretion” provisions can undermine enforceability of a SIP regulation, and thus prevent full approval by EPA. In the case of Rule 2305, it allows for director’s discretion in connection with the determination of whether WAIRE Points from a Custom WAIRE Plan are quantifiable, verifiable, and real and the determination of whether the warehouse owner or operator is making adequate progress to complete an approved Custom WAIRE Plan.<sup>64</sup> Inclusion of such provisions that in effect give a State official, unilateral, and unbounded authority to make decisions concerning whether a regulated entity is, or is not, in compliance that bind the EPA or other parties are inconsistent with basic SIP requirements.

Lastly, Rule 2305 includes recordkeeping and reporting requirements that are sufficient to ensure compliance with the applicable requirements.<sup>65</sup> The EPA notes that, in adopting Rule 2305, the SCAQMD Board directed the Executive Officer to develop an online portal for the purpose of submitting required reports and documents as required by Rule 2305. The online portal (WAIRE POP) will provide the public information about how warehouse operators and owners are complying with Rule 2305 and how WAIRE Mitigation Program funds are spent.<sup>66</sup> The SCAQMD has since developed a WAIRE program tab under Rules & Compliance portion of the District’s website. It includes a portal to the WAIRE POP for warehouse operators to submit reports and includes general information on the program such as the implementation guidelines, applications, guidance, and analytical tools, among other things.

4. Does the rule interfere with reasonable further progress (RFP) and attainment or any other applicable requirement of the Act?

The SCAQMD adopted Rule 2305 in part to meet a commitment in the 2016 South Coast AQMP to assess and identify potential actions to further reduce emissions associated with emission sources operating in and out of warehouse distribution centers. While the EPA is not proposing to credit Rule 2305 with achieving a specific amount

of emissions reductions, the EPA’s evaluation of Rule 2305 indicates that the rule will achieve additional emission reductions. These additional reductions will incrementally contribute to the overall reductions needed to attain the NAAQS in the South Coast Air Basin and Coachella Valley air quality planning areas.

However, as discussed previously, we find that the sunset clause in Rule 2305 could interfere with attainment or reasonable further progress by foregoing emissions reductions that may be needed for attainment or maintenance of the NAAQS. Thus, the EPA recommends that the SCAQMD remove the sunset clause and follow the normal course of action in rescinding rules from the SIP, *i.e.*, through a SIP revision and EPA approval under CAA section 110(k) and section 110(l).

5. Will the State have adequate personnel and funding for the rule?

The SCAQMD adopted a specific rule, Rule 316 (“Fees for Rule 2305”), for the purpose of recovering the SCAQMD’s costs associated with implementing Rule 2305. In light of the adoption of Rule 316, the EPA finds that the SCAQMD will have adequate personnel and funding to implement Rule 2305.

6. EPA’s Rule Evaluation Conclusion

Based on the above discussion, the EPA believes Rule 2305 is consistent with the relevant CAA requirements, policies, and guidance, except as otherwise noted. As an ISR program under CAA section 110(a)(5), Rule 2305 is not a required submission. The EPA proposes to find that the District has the authority to implement and enforce Rule 2305 and is not prohibited from doing so by any State or Federal law. While Rule 2305, as stated previously, will reduce emissions associated with warehouses, the EPA proposes to find that the rule is not fully enforceable, and that the amount of associated emissions reductions is not sufficiently quantifiable for credit at the present time. The EPA proposes to find that Rule 2305 is SIP-strengthening and proposes to approve it on this basis. A recent decision by the Ninth Circuit upheld the EPA’s approval of a SIP submission for the San Joaquin Valley on SIP strengthening grounds.<sup>67</sup> In that case, like our proposed action on Rule 2305, the EPA deemed the SIP provision at issue not fully enforceable and accordingly granted no SIP credit for

<sup>62</sup> See 85 FR 57733 (September 16, 2020) and 40 CFR 51.1004(a)(3) (2006 24-hour PM<sub>2.5</sub> NAAQS); and 85 FR 71264 (November 9, 2020) and 40 CFR 51.1004(a)(2) (2012 annual PM<sub>2.5</sub> NAAQS).

<sup>63</sup> SCAQMD Rule 2305(h).

<sup>64</sup> SCAQMD Rule 2305(d)(4)(A)(iii) and (d)(4)(D).

<sup>65</sup> 13 CCR 2023.8 and 2023.9.

<sup>66</sup> SCAQMD Resolution 21–9, 7.

<sup>67</sup> *Association of Irrigated Residents v. EPA*, 10 F.4th 937 (9th Cir. 2021).

emissions reductions from the provision.

### C. Public Comment and Proposed Action

As authorized in section 110(k)(3) of the Act, the EPA proposes to approve the submitted rule. The EPA concludes that, while SCAQMD Rule 2305 does not meet all the evaluation criteria for enforceability, we are proposing approval because the submitted rule is not a required SIP element and would strengthen the SIP. In light of the deficiencies identified above, however, the EPA concludes that the submitted rule should not be credited in any attainment and rate of progress/ reasonable further progress demonstrations.

We will accept comments from the public on the proposed action, the rationale and basis for the proposed action, and other relevant matters until November 13, 2023. If the EPA takes final action to approve the submitted rule, the final action will incorporate this rule into the federally enforceable SIP.

### III. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference SCAQMD Rule 2305, adopted on May 7, 2021, that establishes an ISR program for certain warehouse owners and operators, as described in section I of this preamble. The EPA has made, and will continue to make, these materials available through <https://www.regulations.gov> and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

### 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, the EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely proposes to approve State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office

of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993), 13563 (76 FR 3821, January 21, 2011) and 14094 (88 FR 21879, April 11, 2023);

- 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); and
- 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.

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." The EPA further defines the term fair treatment to mean that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies."

The SCAQMD did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an

evaluation. However, the Community Steering Committees for four environmental justice communities admitted into the State's AB 617 program in the affected area requested development of a warehouse ISR rule due to concerns regarding air pollution impacts from trucks and DPM.<sup>68</sup> The EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being proposed here, this proposed action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

Lastly, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

### 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: October 5, 2023.

**Martha Guzman Aceves,**

*Regional Administrator, Region IX.*

[FR Doc. 2023–22518 Filed 10–11–23; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 152

[EPA–HQ–OPP–2023–0420; FRL–10637–01–OCSPP]

RIN 2070–AL13

### Pesticides; Review of Requirements Applicable to Treated Seed and Treated Paint Products; Request for Information and Comments

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Advanced notice of proposed rulemaking.

**SUMMARY:** The Environmental Protection Agency (EPA) is soliciting public

<sup>68</sup> SCAQMD Final Staff Report, 9 and 10.