Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701; 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T05–0288, to read as follows:

§ 165.T05–0288 Safety Zone; Air Power Over Hampton Roads, Back River, Hampton, VA.

(a) *Regulated area.* The following area is a safety zone: All waters in the vicinity of Willoughby Point on Back River within the area bounded by coordinates 37°05′35″ N/076°20′47″ W, thence to 37°05′43″ N/076°20′14″ W, thence to 37°05′19″ N/076°20′02″ W, thence to 37°05′12″ N/076°20′18″ W. (NAD 1983), in Hampton, VA.

(b) *Definition:* For purposes of enforcement of this section, *Captain of the Port Representative* means any U. S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) *Regulation:* (1) In accordance with the general regulations in 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port, Hampton Roads or his designated representatives.

(2) The operator of any vessel in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a U.S. Coast Guard Ensign; and

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a U.S. Coast Guard Ensign.

(3) The Captain of the Port, Hampton Roads, Virginia can be contacted at telephone number (757) 638–6637.

(4) U.S. Coast Guard vessels enforcing the safety zone can be contacted on VHF–FM marine band radio, channel 13 (156.65 MHz) and channel 16 (156.8 MHz).

(d) *Enforcement period:* This rule will be enforced from 5 p.m. to 9 p.m. on May 13, 2011, from 9 a.m. to 5 p.m. on May 14, and from 9 a.m. to 5 p.m. on May 15, 2011.

Dated: April 21, 2011.

Mark S. Ogle,

Captain, U.S. Coast Guard, Captain of the Port Hampton Roads.

[FR Doc. 2011–11276 Filed 5–6–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2010–0430; FRL–9292–7]

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 approval of revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on May 21, 2010 and concern oxides of nitrogen (NOx) and particulate matter (PM) emissions primarily from indirect sources associated with new development projects as well as NOx and PM emissions from certain transportation and transit projects. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on June 8, 2011.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2010–0430 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.,* Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

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

Table of Contents

I. Proposed Action

On May 21, 2010 (75 FR 28509), EPA proposed to approve the following rule into the California SIP.

Local agency	Rule No.	Rule title	Adopted	Submitted
SJVUAPCD	9510	Indirect Source Review (ISR)	12/15/05	12/29/06

We proposed to approve this rule because we determined that it complied with the relevant CAA requirements. Our proposed action contains more information on the rule and our evaluation.

II. Public Comments and EPA Responses

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

1. Susan Asmus, National Association of Home Builders (NAHB); letter dated July 6, 2010.

2. Lawrence J. Joseph, representing the American Road & Transportation Builders Association (ARTBA); letter dated July 6, 2010.

3. Paul Cort, EarthJustice; letter dated July 6, 2010.

4. Mat Ciremele, email dated May 25, 2010.

The comments and our responses are summarized below.

Comment #1: NAHB asserts that EPA must disapprove Rule 9510 because a state must provide adequate assurances of the legal authority to carry out all SIP revisions and, in light of NAHB's legal challenge to Rule 9510 in the U.S. Court of Appeals and the possibility of the court's finding section 6.1.1 of Rule 9510 preempted and unenforceable, the SJVUAPCD cannot enforce the emission limitations in section 6.1.1 because the limitations are preempted standards or other requirements.

Response #1: The commenter is correct in asserting that a state must provide assurances of legal authority to carry out SIPs and SIP revisions. See CAA section 110(a)(2)(E)(SIPs must "provide (i) necessary assurances that the State * * * will have adequate * * * authority under State (and, as appropriate, local) law to carry out such implementation plan * * * "). In our Technical Support Document (TSD) for

the proposed rule, we recognized the legal challenge brought by NAHB against the SJVUAPCD in connection with enforcement of Rule 9510. At the time we proposed action on Rule 9510, NAHB had appealed to the Ninth Circuit Court of Appeals [in *National Association of Home Builders* v. *San Joaquin Valley Unified Air Pollution Control District* (No. 08–17309)] to overturn a District Court ruling that held that Rule 9510 was not preempted under the CAA, but the Ninth Circuit had not yet reached a decision on the appeal. Based on the information available to us at the time, we concluded that the SJVUAPCD had the authority to adopt and implement Rule 9510 because we believed that the limits in the rule were not preempted under CAA section 209(e), consistent with the District Court ruling.

Since publication of the proposed rule, the Ninth Circuit has published its opinion in *National Association of Home Builders* v. *San Joaquin Valley Unified Air Pollution Control District, 627 F.3d 730 (9th Cir. 2010) ("NAHB").* In an opinion filed December 7, 2010, the Ninth Circuit affirmed the District Court's ruling that Rule 9510 was not preempted. With respect to the express preemption of CAA section 209(e)(1), which preempts states and subdivisions thereof from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from either of two categories of new nonroad vehicles or engines, the court held that Rule 9510 was not preempted because none of the construction equipment that Rule 9510 regulates would be considered "new" under EPA's pre-existing (and permissible, in the court's view) definition of "new."

Before turning to the implied preemption of CAA section 209(e)(2), which preempts states and subdivisions thereof from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from all other types of nonroad vehicles and engines not covered in CAA section 209(e)(1), the court first determined that Rule 9510 was authorized under CAA section 110(a)(5), the CAA section that allows states and subdivisions thereof to include indirect source review (ISR) programs in a SIP. CAA section 110(a)(5)(C) defines "indirect sources" as meaning "a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution," but also provides that "[d]irect emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purposes of this paragraph."

Noting that Rule 9510 is ultimately directed at emissions that come from construction equipment (*i.e.,* direct sources), the court, nonetheless, concluded that Rule 9510 was authorized under section 110(a)(5) because in the court's view, the limitation only makes sense if it is read to prohibit an indirect source review program from targeting direct sources at, within, or associated with, any indirect source *apart* from the program's regulation of an indirect source, and Rule 9510 does not target construction equipment apart from its regulation of development sites. The court also notes that the scope of Rule 9510 indicates that the rule targets sites rather than equipment. The reach of the rule depends on the character of the site, not on the character of the equipment. The court then concluded that the feature that allows Rule 9510 to qualify as an indirect source for the purposes of CAA section 110(a)(5), *i.e.,* its site-based regulation of emissions, was the same feature that allows the rule to avoid preemption under CAA section 209(e)(2).

Given the appellate court's decision, we believe that any significant doubt about the SJVUAPCD's authority to enforce the emissions requirements in section 6.1.1 has been removed, and that our approval of Rule 9510 is consistent with CAA section 110(a)(2)(E) as explained in the proposal.

Comment #2: NAHB asserts that the emission limits of section 6.1.1 of Rule 9510 are preempted under CAA section 209(e)(1) because they represent "standards or other requirements" relating to the control of emissions from new nonroad construction vehicles or engines less than 175 horsepower.

Response #2: CAA section 209(e)(1) states: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from * * * (A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower. (B) New locomotives or new engines used in locomotives. Subsection (b) of this section shall not apply for purposes of this paragraph." The construction equipment to which section 6.1.1 of Rule 9510 applies is not new equipment. Under EPA's nonroad emissions standard regulations, "new" means "a nonroad engine, nonroad vehicle, or nonroad equipment the equitable or legal title to which has never been transferred to an ultimate purchaser. Where the equitable or legal title to the engine, vehicle, or equipment is not transferred to an ultimate purchaser until after the engine, vehicle, or equipment is placed into service, then the engine, vehicle, or equipment will no longer be new after it is placed into service." See 40 CFR 89.2. This definition was upheld by the Court of Appeals for the District of Columbia in *Engine Manufacturers Association* v. *EPA,* 88 F.3d 1075 (DC Cir. 1996) (*EMA* v. *EPA*), and the 9th Circuit, in *NAHB,* also indicated its view that this definition was permissible.

Rule 9510 applies to applicants that seek final discretionary approval for certain development projects, and thus the emission limits in section 6.1.1 of Rule 9510 apply to construction equipment that has already been purchased or placed into service, and brought to a development site to meet the particular construction needs of a given development project. Therefore, the limits do not apply to new construction equipment within the meaning of CAA section 209(e)(1).

Even if the emission limits in the rule could have the consequence of influencing an applicant early in the planning process in connection with the purchase of construction equipment, for the reasons provided in the TSD to EPA's proposed rule on Rule 9510 and in the responses, EPA believes that the emission limits in section 6.1.1 of Rule 9510 do not represent a standard or other requirement relating to the control of emissions from new nonroad engines or nonroad vehicles, and thus are not preempted under CAA section 209(e)(1).

NAHB references the Supreme Court's decision in *Engine Manufacturers Association* v. *South Coast Air Quality Management District,* 541 U.S. 246 (2004) (*EMA* v. *South Coast*). However, that case involved a regulation of vehicles that clearly were "new," as defined in the statute, as the regulations applied to vehicles at the time of purchase. Rule 9510 applies after the time of purchase of the engine and in any case is directed to the site of the project, not the engine, and can be met in ways that do not implicate the purchase of new engines. The Court of Appeals has ruled that Rule 9510 is not preempted under section 209(e)(1) and we follow and agree with that decision.

Comment #3: NAHB asserts that the emission limits of section 6.1.1 of Rule 9510 are preempted under CAA section 209(e)(2) because they apply to used nonroad construction equipment greater than 50 horsepower.

Response #3: CAA section 209(e)(2) applies to, among other categories of nonroad vehicles and engines, used

nonroad vehicles or engines, and it allows EPA to authorize, after notice and opportunity for public hearing, the State of California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if certain criteria are met. As asserted by the commenter, no authorization has been sought from EPA by California for the emission limitations in section 6.1.1 of Rule 9510. However, EPA does not believe such authorization is required because, while section 6.1.1 sets standards relating to the control of emissions from used construction equipment, EPA notes that the standards at issue in this SIP revision relate directly only to emissions associated with development sites. As the Court of Appeals stated, this regulation is authorized as an indirect source review program under section 110(a)(5) of the Act. Rule 9510 does not regulate nonroad engines directly and would not affect nonroad engines apart from the possible effects from the regulation of the indirect source as a whole. The court noted that given the language in section 110 authorizing indirect source programs, they would cautiously examine the Act before concluding that section 209(e)(2) preempted such a program. The court also distinguished the cases cited by NAHB, *EMA* v. *South Coast* and *Pacific Merchant Shipping Ass'n* v. *Goldstene,* 517 F.3d 1108 (9th Cir. 2008), by noting that the regulations in those cases were directed at vehicles, not sites. EPA also notes that Rule 9510 allows compliance with the site-based requirement using actions that would not affect the engines at the site or would only affect the use of the engine, which EPA has already determined is not preempted by section 209(e)(2). See also, *EMA* v. *EPA* and *Pacific Merchant Shipping Ass'n* v. *Goldstene,* 2009 U.S. Dist Lexis 55516, 70 ERC 1337 (E.D. Cal. 2009). Thus any argument that the requirements are de facto standards on nonroad engines is not persuasive. The Court of Appeals has ruled that Rule 9510 is not preempted under section 209(e)(2) and we follow and agree with that decision.

Comment #4: Citing *Engine Manufacturers Association* v. *South Coast Air Quality Management District* [541 U.S. 246 (2004)], NAHB asserts that EPA erred in finding that the emissions limits in Rule 9510 are not preempted under CAA section 209(e) because the standards can be met in numerous ways including options that do not involve any changes to nonroad equipment and that the emission limits in Rule 9510 would be preempted only if they impose burdens so onerous that manufacturers would be forced to alter the design or emission control equipment on new nonroad engines or vehicles.

Response #4: EPA agrees that, if the emission limits in Rule 9510 were standards or other requirements relating to the emissions from nonroad vehicles or engines, then the limits would be preempted under section 209(e) regardless of whether the rule provides for compliance options other than direct reduction of emissions from nonroad vehicles or engines and regardless of whether the limits would in practical effect force manufacturers to alter the design or emission control equipment on new nonroad engines or vehicles. In this case, though, as noted above and as found by the Court of Appeals, the emission limits in Rule 9510 are not such standards.

In the TSD, EPA describes the flexibility provided in Rule 9510 to developers in meeting the emissions limitations not to show that the standards are therefore not preempted, but as further evidence that the rule truly is an indirect source rule that only indirectly regulates emissions from direct sources (such as construction equipment). Furthermore, in 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. EPA concluded, however, that Rule 9510 would not have either type of effect and would not operate in such a way as to amount to a standard controlling the emissions of nonroad vehicles or engines, and thus would not be preempted.

Comment #5: NAHB contrasts EPA's stated position on preemption of state attempts to enforce fleet-based nonroad emissions standards with EPA's proposed approval of section 6.1.1 of Rule 9510 which, in NAHB's view, establishes emissions standards for fleets of construction equipment when used at construction sites subject to Rule 9510.

Response #5: EPA agrees that, if the emission limits in Rule 9510 were standards or other requirements relating to the control of emissions from nonroad vehicles or engines, then the fact that they apply to fleets of construction equipment, rather than to individual nonroad vehicles or engines, would not make any difference as to preemption. Such fleet-based nonroad emission limits would be preempted just as would emission limits that apply to individual nonroad engines or vehicles.

However, as the Court of Appeals found, the emission limits in section 6.1.1. of Rule 9510 are not standards or other requirements relating to the control of emissions from nonroad vehicles or engines, but rather, are emission reduction obligations that relate to the construction-phase at development sites, and as such are not preempted. EPA notes that the rule by its terms (see section 2.0 of the rule) applies to applicants seeking discretionary approval for development projects that meet certain size criteria and to certain transportation or transit projects, not to fleets of nonroad vehicles or engines. EPA also notes that a developer has numerous options to meet the emission reduction obligation in section 6.1.1, including options that do not involve any changes to construction equipment (see section 6.3 of the rule). The flexibility provided in the rule in meeting the emission reduction obligation in section 6.1.1 provides further evidence that the rule is intended to reduce emissions from construction sites as an indirect source of emissions, rather than to regulate the construction equipment directly, either as a fleet or as individual pieces of equipment.

Comment #6: ARTBA petitions EPA to amend EPA's rules implementing CAA section 209(e) to clarify that: (1) Section 209(e) preempts rules based on nonroad fleets to the same extent that it preempts rules based on individual nonroad vehicles and engines; (2) section 209(e)'s preemption lasts throughout nonroad vehicles and engines' useful life; (3) section 209(e)(1)(A) preempts California standards and other requirements related to emissions from farm and construction equipment under 175 horsepower to the same extent that section 209(e)(1)(B) preempts California standards and other requirements related to emissions from locomotives; and (4) section 209(e) preempts emission-based regulation of the use and operation of nonroad vehicles and engines, such as regulations on hours of usage, daily mass emission limits, and fuel restrictions.

Response #6: ARTBA's petition seems to be little more than a renewal of its earlier request for an amendment to

EPA's rule implementing CAA section 209(e). EPA denied ARTBA's petition. See 73 FR 59034 (October 8, 2008). ARTBA's challenge to EPA's denial of ARTBA's petition was dismissed for lack of subject matter jurisdiction by the U.S. Court of Appeals for the DC Circuit. See *Am. Rd. & Transp. Builders Ass'n* v. *EPA,* 588 F.3d 1109 (DC Cir. 2009), petition for cert. denied, No. 09–1485 (U.S. Oct. 4, 2010). ARTBA's petition, except as discussed below, is related to the general preemption issues that ARTBA has raised previously and not specifically to the proposal to add Rule 9510 to the California SIP. EPA has already reviewed these issues several times and is not revisiting these broader issues in this limited proceeding. To the extent ARTBA intends EPA to do so, the request is denied. Further, because EPA did not propose any changes to its rules implementing section 209(e) in this rulemaking on the California SIP, it could not make any such revisions in this final rule in any event.

Comment #7: ARTBA contends that, in EPA's final rule on California's submittal of Rule 9510, EPA should find that EPA's action has "nationwide scope or effect" pursuant to CAA section 307(b)(1) leading to exclusive jurisdiction in the U.S. Court of Appeals for the District of Columbia to ensure nationwide uniformity in the interpretation and enforcement of these important CAA issues.

Response #7: CAA section 307(b)(1) generally provides that judicial review of EPA action in approving a SIP or SIP revisions may be filed only in the U.S. Court of Appeals for the appropriate circuit. Thus, final EPA actions on revisions to the California SIP, such as Rule 9510, are generally subject to timely challenges filed in the U.S. Court of Appeals for the Ninth Circuit. However, judicial review of an EPA SIP action may be filed only in the U.S. Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the EPA finds and publishes that such action is based on such a determination.

We do not believe that our action approving Rule 9510 as a revision to the California SIP is based on a determination of "nationwide scope or effect." While we recognize Rule 9510 as a novel approach for advancing air quality goals, the innovative or unusual nature of the rule alone does not give our approval of it under CAA section 110 "nationwide scope or effect." Once approved, Rule 9510 will become enforceable under the CAA by its terms only to certain development projects within the geographic jurisdiction covered by the SJVUAPCD. Thus, EPA's approval of Rule 9510 is clearly regional in scope and effect.

Of course, EPA's rationale for approval of Rule 9510 sets a precedent for future rulemaking actions on similar ISR rules submitted to EPA as SIP revisions by California or any other state, but the precedential effect in this instance is no different than for EPA actions approving or disapproving any other SIP or SIP revision anywhere in the country. Thus, EPA's action on Rule 9510 is based on a determination of no greater scope or effect than any other EPA action on SIPs, which are reviewable only in the U.S. Courts of Appeal of the appropriate circuit, not necessarily the U.S. Court of Appeals for the District of Columbia.

Comment #8: ARTBA contends that EPA cannot approve Rule 9510 as a SIP revision because: (1) Section 209(e) preempts Rule 9510 as an impermissible standard and "other requirement" related to emissions for construction equipment both above and below 175 horsepower; (2) California and the SJVUAPCD therefore lack authority to enforce Rule 9510, and (3) SIP approval does not meet the criteria or procedures for waiving federal preemption such as California's protectiveness determination, consistency with sections 209 and 202(a), and the opportunity for an EPA hearing.

Response #8: As to preemption issues, please see our responses to comments #2 through #5 above. As to the legal authority to enforce Rule 9510, please see our response to comment #1. Lastly, as to the failure by Rule 9510 to meet the criteria or procedures for waiving preemption, we do not believe that Rule 9510 requires a waiver because, as discussed above and as determined by the Court of Appeals, it is not preempted as it does not establish standards or other requirements relating to the control of emissions of nonroad engines or vehicles for the purposes of CAA section 209(e) but rather establishes standards relating to the control of emissions from an indirect source, the construction phase of development projects.

Comment #9: Citing EPA's TSD for Rule 9510, NAHB notes EPA has concluded that some provisions of Rule 9510 concerning on-site and off-site emissions reductions are not federally enforceable. NAHB asserts that section 172(c)(6) the CAA (42 U.S.C. 7502(c)(6)) prohibits EPA from incorporating into a SIP "any portion of Rule 9510 that it has determined to be federally unenforceable."

Response #9: NAHB misinterprets section 172(c)(6) the Act. As cited by NAHB, section 172(c)(6) does state that SIPs "shall include enforceable emissions limitations." However, NAHB reads this language to mean that SIPs shall *only* include enforceable emissions limitations. This reading is far from correct. SIPs contain many aspects which are not federally enforceable emissions limitations. For example, approved SIPs contain such items as current emissions inventories, future emissions inventory projections based upon economic and technological trends, and air quality modeling. In addition, section 172(c)(6) expressly provides for "other control measures, means or techniques" which may not include enforceable emissions limitations. One example given in section 172(c)(6) is "economic incentives such as fees." The imposition of a fee on a polluting activity may create an incentive to minimize the resulting pollution from that activity, and the incentive might be successful in accomplishing that goal. However, imposition of the fee, in itself, in no way creates an enforceable emissions limitation.

In addition, as noted in EPA's TSD, through policies such as "Guidance for Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (VMEP)" and "Incorporating Emerging and Voluntary Measures into a State Implementation Plan (SIP)," EPA has recognized that measures and rules which are not federally enforceable can be incorporated into a SIP pursuant to the Act in appropriate circumstances.

Finally, in evaluating rules or measures which contain novel and/or voluntary aspects, some issues regarding federal enforceability really concern the amount of emissions reductions which can be legally compelled pursuant to such a rule or measure, and, therefore, what amount of emissions reductions, if any, should be credited toward satisfying the planning requirements of section 110 of the Act. This is the case with Rule 9510. As noted by NAHB, many of the issues described in EPA's TSD concern the mechanisms created by Rule 9510 to accomplish emissions reductions. For example, a project developer subject to Rule 9510 might choose to pay fees instead of reducing emissions associated with the project site. In turn, the SJVUAPCD would use these collected fees to generate off-site emissions reductions. The SJVUAPCD's ability to require these reductions would rely on a contract between the SJVUAPCD and an off-site project applicant.

If Rule 9510 was incorporated into the SIP, EPA could use the Act's

enforcement authority to require that the appropriate fees be collected from a project developer, and that the collected fees be used by the SJVUAPCD to seek off-site emissions reductions. However, the issue of federal enforceability arises because EPA may not be able to enforce the terms of a contract between the SJVUAPCD and an off-site project applicant, and thus the emissions reductions required by that contract, pursuant to its enforcement authority under the Act. Thus the issue is not EPA's ability to enforce the provisions of Rule 9510 as they are written, but whether those provisions create adequate legal authority for EPA to require emissions reductions which are sought or claimed by the rule. In view of these enforceability concerns, among other issues, the TSD recommends approving Rule 9510 into the SIP, but also recommends that "reductions from the Rule should not be credited in any attainment and rate of progress/reasonable further progress demonstrations or used to meet contingency measure requirements until the District corrects the identified problems, which we believe the District should easily be able to do." In today's final rule we therefore approve Rule 9510 but we do not assign any emissions reduction credit to the rule for purposes of any attainment or progress demonstration in any area.

Comment #10: NAHB states that Rule 9510 is not an "incentive" program that "encourages" reductions, but rather Rule 9510 requires developers to achieve emission reductions. NAHB therefore asserts that Rule 9510 is not an economic incentive program and EPA's guidance, "*Improving Air Quality with Economic Incentive Programs*" (EIP Guidance) does not apply.

Response #10: Economic incentive programs (EIPs), as defined by EPA's EIP Guidance,[1] are programs which may include State established measures directed toward stationary, area, and/or mobile sources, to achieve emission reductions milestones to attain and maintain ambient air quality standards, and/or to provide more flexible, lower-cost approaches to meeting environmental goals. EIPs use market-based strategies to encourage reducing emissions in the most efficient manner (see EIP Guidance sections 1.1 and 15.1). While Rule 9510 requires developers subject to the rule to reduce emissions, it also provides developers the flexibility of paying a fee as an alternative means to comply. The developer may choose to pay a fee when it is a lower cost approach to meeting the rule requirements. Rule 9510 also requires SJVUAPCD to administer a program that uses these funds to achieve surplus emission reductions. Because the program as a whole includes this separate program where SJVUAPCD will use the funds to obtain emission reductions, it allows for a more flexible and potentially lower cost approach to getting emission reductions from the program. For these two reasons, Rule 9510 is an economic incentive program and EPA's EIP Guidance applies.

Comment #11: NAHB states that Rule 9510 is not a voluntary program, that it is a mandatory program. NAHB asserts that EPA's "*Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (VMEP)*" does not apply.

Response #11: First, we wish to clarify that EPA proposed to approve Rule 9510 because it strengthens the SIP. EPA did not propose to approve Rule 9510 as a measure under VMEP.[2] Our discussion of VMEP and the Emerging and Voluntary Measures Policy [3] was intended to provide the SJVUAPCD and the public with information concerning certain deficiencies in Rule 9510 and how these deficiencies might be addressed under the policies so that SIP emission reduction credit could be granted for the emission reductions achieved by Rule 9510. In addition, we acknowledge that we may not have made fully clear in the TSD the difference between enforceability in the context of reviewing the provisions of an individual emissions control rule as distinct from being able to assure that a state's commitment to achieve emissions reductions is fully accomplished.

The commenter is correct that entities subject to Rule 9510 are required to comply with the rule, and in that sense the provisions are mandatory. However, the commenter misunderstands the scope and potential applicability of VMEP.

VMEP defines voluntary measures as emission reduction programs that rely on voluntary actions of individuals or other parties for achieving emission reductions. However, a State's obligations with respect to VMEPs must be enforceable at the State and Federal levels. That is, under the VMEP policy guidance, the State is not responsible, necessarily, for implementing a program dependent on voluntary actions. However, the State is obligated to monitor, assess and report on the implementation of voluntary actions and the emission reductions achieved from the voluntary actions and to remedy in a timely manner emission reduction shortfalls should the voluntary measure not achieve projected emission reductions.

While the developer must comply with the rule, several of the developer's compliance options rely upon voluntary emission reductions. For instance, the developer could include on-site mitigation measures designed to reduce vehicle miles travelled by the residents. Emission reductions would occur when residents voluntarily choose to drive less. Alternatively, the developer could also pay a fee in lieu of implementing on-site mitigation measures. While the SJVUAPCD would use the funds to achieve emission reductions, the entities actually providing the emission reductions are voluntarily participating in the program and are not subject to a rule. Because some of the activities generating the actual emission reductions are voluntary, VMEP could be used to help evaluate whether SIP credit is appropriate if the deficiencies discussed in section (5)(f) of our TSD are addressed.

Comment #12: NAHB notes that EPA's guidance "*Incorporating Emerging and Voluntary Measures into a State Implementation Plan (SIP)*" (Emerging and Voluntary Measures Policy) does not apply to emissions from mobile sources. NAHB states that while EPA asserts that developers are the entities subject to the rule, developers are not the "sources" of NO_X and PM_{10} mobile source emissions. NAHB states that nonroad engines and vehicles are the "source" of emissions regulated by Section 6.1.1. NAHB therefore concludes that this policy does not apply.

Response #12: In section (5)(b)(iv) of our TSD (page 13), we discuss enforceability and how prohibitory rules typically hold "sources" of emissions legally responsible for the required emission reductions. Rule 9510 in contrast applies to developers. As the entity subject to the rule and legally responsible for the emission reductions, our reference to the developer as the "source" in Rule 9510 was shorthand to reflect their legal responsibility under Rule 9510. The commenter is correct that sources of emissions are normally

[1] EPA's EIP Guidance, "*Improving Air Quality with Economic Incentive Programs*" published on January 2001 (EPA–452/R–01–001) is available at *http://www.epa.gov/ttn/oarpg/t1/memoranda/eipfin.pdf*.

[2] A copy of VMEP (October 23, 1997) is available at *http://www.epa.gov/otaq/stateresources/policy/general/vmep-gud.pdf*.

[3] This guidance is entitled, "*Incorporating Emerging and Voluntary Measures into a State Implementation Plan (SIP),*" September 2004, and is available at *http://www.epa.gov/ttn/oarpg/t1/memoranda/evm_ievm_g.pdf*.

categorized as mobile, stationary, or area sources. However, as we described in Response #1, the CAA recognizes that development projects are "indirect sources" and can be subject to regulation in a SIP.

Development projects indirectly result in new emissions from mobile, stationary, and area sources, including those from new or longer vehicle trips, fuel combustion from stationary and area sources, use of consumer products, landscaping maintenance, and construction activities.

While the calculation of emission reductions required by Rule 9510 takes into account construction equipment emissions (Section 6.1) and operational emissions (Section 6.2), the emission reduction obligation is expressed in tons of NO_X and tons of PM_{10} without regard to whether the reductions must come from mobile, stationary, or area sources. Indeed, Section 6.3 allows the emission reduction requirement to be met through any combination of on-site measures or off-site fees.

Because the sources of emissions are mobile, stationary, and area sources and the emission reductions could come from all three types of sources, EPA has appropriately considered the guidances "*Incorporating Emerging and Voluntary Measures into a State Implementation Plan (SIP)*" which applies to stationary and area sources, and "*Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (VMEP)*" which applies to mobile sources. As we clarified in Response #11, the discussion in the TSD on the consideration of these policies was largely to provide the SJVUAPCD and the public with information on how rule deficiencies might be addressed in the future.

Comment #13: NAHB states that even if the Emerging and Voluntary Measures Policy applied to non-road mobile sources under Rule 9510, EPA cannot approve Rule 9510 because the non-road mobile source reductions are not permanent. The reductions are not permanent because they are not federally enforceable.

Response #13: As we stated in Responses #11 and #12, EPA did not propose to approve Rule 9510 as a measure under the Emerging and Voluntary Measures Policy, and the discussion in the TSD was largely to provide information on how rule deficiencies might be addressed in the future to obtain SIP credit for emission reductions. While thus not relevant to our action in approving Rule 9510, we will elaborate on the concept of permanent.

Whether a reduction is considered "permanent" is dependent on the duration of the obligation which the particular measure and resulting emission reductions are meant to address. The commenter has noted that EPA identified enforceability concerns with the provisions requiring implementation of the mitigation measure, and Response #9 addresses the enforceability issue. Enforceability is a separate question from whether the non-road mobile source mitigation measure, if implemented, results in permanent reductions. If a developer's mitigation measure is the use of lower emitting construction equipment, the very use of that equipment results in a stream of emission reductions during the construction phase. Although these reductions may not be federally enforceable, they can still be permanent during the relevant time period.

III. EPA Action

No comments were submitted that change our assessment that the submitted rules comply with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving this rule into the California SIP.

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 interfere with Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) because EPA lacks the discretionary authority to address environmental justice in this rulemaking.

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 8, 2011. 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: March 31, 2011.

Jared Blumenfeld,

Regional Administrator, Region IX.

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

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220, is amended by adding paragraph (c)(348) (i)(A)(*3*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(348) * * *

(i) * * *

(A) * * *

(*3*) Rule 9510, "Indirect Source Review (ISR)," adopted on December 15, 2005.

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[FR Doc. 2011–11133 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2007–1073; FRL–9292–4]

Revisions to the California State Implementation Plan, Imperial County Air Pollution Control District (ICAPCD)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the Imperial County Air Pollution Control District portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on February 9, 2011 and concern New Source Review (NSR) permitting requirements and exemptions for various air pollution sources. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on June 8, 2011.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2007–1073 for this action. Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *http://www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports), and some may not be available in either location (e.g., confidential business information (CBI)). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, (415) 972–3534, *yannayon.laura@epa.gov.*

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

Table of Contents

I. Proposed Action

On February 9, 2011 (76 FR 7142), EPA proposed to approve the following rules into the California SIP.

Local agency	Rule No.	Rule title	Amended	Submitted
ICAPCD	201	Permits Required	10/10/06	08/24/07
ICAPCD	202	Exemptions	10/10/06	08/24/07

We proposed to approve these rules because we determined that they complied with the relevant CAA requirements. Our proposed action contains more information on the rules and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted that change our assessment that the submitted rules comply with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving these rules into the California SIP.

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:

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