

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994), establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

We have determined that this final action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 52**

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

Dated: October 30, 2012.

**Howard M. Cantor,**

*Acting Regional Administrator, Region 8.*

For the reasons stated in the preamble, 40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

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

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

**Subpart TT—Utah**

■ 2. Section 52.2320 is amended by adding paragraph (c)(71) to read as follows:

**§ 52.2320 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(71) On May 26, 2011 and September 29, 2011, the State of Utah submitted revisions to its State Implementation Plan to incorporate the requirements of the regional haze program.

(i) Incorporation by reference

(A) Title R307 of the Utah Administrative Code—*Environmental Quality, Air Quality*, Rule R307–150—*Emission Inventories*, sections -1, *Purpose and General Requirements*, -2, *Definitions*, -3, *Applicability*, -5, *Sources Identified in R307–150(3)(2)*, *Large Major Source Inventory Requirements*, -6, *Sources Identified in R307–150–3(3)*, -7, *Sources Identified in R307–150–3(4)*, *Other Part 70 Sources*, and -8, *Exempted Hazardous Air Pollutants*. Effective December 31, 2003; as published in the Utah State Bulletin December 1, 2003 and January 15, 2004.

(B) Title R307 of the Utah Administrative Code—*Environmental Quality, Air Quality*, Rule R307–150—*Emission Inventories*, section -4, *Sulfur Dioxide Milestone Emission Inventory Requirements*. Effective September 4, 2008; as published in the Utah State Bulletin July 1, 2008 and October 1, 2008.

(C) Title R307 of the Utah Administrative Code—*Environmental Quality, Air Quality*, Rule R307–250—*Western Backstop Sulfur Dioxide Trading Program*, sections -1, *Purpose*, -3, *WEB Trading Program Trigger*, -10, *Allowance Transfers*, -11, *Use of Allowances from a Previous Year*, and -13, *Special Penalty Provisions for the 2018 Milestone*. Effective December 31, 2003; as published in the Utah State Bulletin December 1, 2003 and January 15, 2004.

(D) Title R307 of the Utah Administrative Code—*Environmental Quality, Air Quality*, Rule R307–250—*Western Backstop Sulfur Dioxide Trading Program*, sections -2, *Definitions*, -4, *WEB Trading Program Applicability*, -5, *Account Representative for WEB Sources*, -6, *Registration*, -7, *Allowance Allocations*, -8, *Establishment of Accounts*, -9, *Monitoring, Recordkeeping, and Reporting*, and -12, *Compliance*. Effective November 10, 2008; as published in the Utah State Bulletin October 1, 2008 and December 1, 2008.

(ii) Additional materials

(A) Section XX of the Utah Regional Haze State Implementation Plan. Effective April 7, 2011. Published in the Utah State Bulletin February 1, 2011.

[FR Doc. 2012–29406 Filed 12–13–12; 8:45 am]

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA–R09–OAR–2011–0876; FRL–9736–6]

**Revisions to the California State Implementation Plan, South Coast Air Quality Management District**

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

**ACTION:** Final rule.

**SUMMARY:** In this action, EPA is finalizing approval of South Coast Air Quality Management District (SCAQMD) Rule 317, “Clean Air Act Non-Attainment Fee,” as a revision to SCAQMD’s portion of the California State Implementation Plan (SIP). This action was proposed in the **Federal Register** on January 12, 2012 and concerns volatile organic compounds (VOC) and oxides of nitrogen (NO<sub>x</sub>). Rule 317 is a local fee rule submitted to address section 185 of the Clean Air Act (CAA or Act) with respect to the 1-hour ozone standard for anti-backsliding purposes. EPA is finalizing approval of Rule 317 as an alternative to the program required by section 185 of the Act. EPA has determined that SCAQMD’s alternative fee-equivalent program is not less stringent than the program required by section 185, and, therefore, is approvable as an equivalent alternative program, consistent with the principles of section 172(e) of the Act. **DATES:** This rule will be effective on January 14, 2013.

**ADDRESSES:** EPA has established docket number EPA–R09–OAR–2011–0876 for this action. Generally, documents in the docket for this action are available electronically at <http://www.regulations.gov> or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at <http://www.regulations.gov>, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports), and some may not be available in either location (e.g., confidential business information (CBI)). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

**SUPPLEMENTARY INFORMATION:**

Throughout this document, “we,” “us” and “our” refer to EPA.

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**I. Proposed Action**

EPA proposed to approve the following rule into the California SIP, in

the **Federal Register** at 77 FR 1895, January 12, 2012.

Local agency	Rule No.	Rule title	Adopted	Submitted
SCAQMD .....	317	Clean Air Act Non-Attainment Fee .....	02/04/2011	04/22/2011

We proposed to approve this rule because we determined that it complies with the relevant CAA requirements and is approvable as an equivalent alternative to the program required by section 185 of the Act for the 1-hour ozone standard as an anti-backsliding measure. 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 several parties. Most comments supported our proposed action; Earthjustice submitted comments opposing our proposed action. The comments and our responses are summarized below.

*A. Rule 317 and Section 185*

1. Rule 317 and Section 185 Generally

a. *Comment:* Earthjustice commented that Rule 317 does not impose fees on major stationary sources, but instead collects an equivalent amount from other sources including government grants.

*Response:* We agree that section 185 requires major stationary sources to pay fees; however, today’s action is to approve SCAQMD Rule 317 in the context of the revoked 1-hour ozone NAAQS. We conclude that Rule 317 is approvable into the California SIP as the District’s equivalent alternative program because we have determined that Rule 317 contains provisions that ensure that the fee equivalency account will reflect expenditures that are at least equal to the amount that would otherwise be collected under section 185, and they ensure that the funds will be used to reduce ozone pollution. Specifically, Rule 317 contains requirements to calculate the section 185 fee obligation, establish a “section 172(e) fee equivalency account,” track qualified expenditures on pollution control projects, annually demonstrate equivalency, and provide for a backstop if equivalency cannot be demonstrated. We have therefore determined that Rule 317 satisfies the requirements of CAA

section 185, consistent with the principles of section 172(e).

2. Rule 317 and Baseline Issues

a. *Comment:* Earthjustice made several points relating to their general argument that the baseline used to determine the equivalent fee to be collected (and potentially to impose the fee if there is a shortfall) fails to comply with section 185. Another commenter supported Rule 317’s alternative baseline provisions.

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

Rule 317 uses an alternative baseline to calculate the fees owed by all section 185 sources in the South Coast Air Basin.<sup>1</sup> Rather than calculating an

<sup>1</sup>Rule 317 specifies that the baseline for existing major stationary sources in the Salton Sea Air Basin is the attainment year, which is consistent with the express language in CAA section 185. EPA’s

alternative baseline for each source based on EPA’s 2-in-10 PSD concept, Rule 317 sets an alternative baseline for all sources in the South Coast Air Basin by defining the term “baseline emissions” to mean the average of each source’s actual emissions during a specific time period—fiscal years 2005–2006 and 2006–2007.<sup>2</sup>

Therefore, we agree that Rule 317’s baseline for sources in the South Coast Air Basin differs from the attainment year baseline set forth in section 185. We note, however, that we are approving SCAQMD Rule 317 in the context of the revoked 1-hour ozone NAAQS and that Rule 317 satisfies the requirements of CAA section 185, consistent with the principles of section 172(e). We respond below to Earthjustice’s specific points regarding baseline issues.

b. *Comment:* Earthjustice stated that the statute allows for an alternative baseline “for a specific source” if emissions are irregular, cyclical or otherwise vary significantly from year to year and allows for alternative baselines based on the nature of source-specific operations. The commenter stated that Rule 317 renders this source-specific test meaningless. The commenter contended that choosing the baseline should be a source-specific determination that accounts for the variability, cycle or irregularity of the emissions. The commenter stated that the District’s response to variability is a “blanket approach” that has no connection to the source-specific findings required by the Act. The commenter stated that the District’s analysis shows that “all or nearly all” sources had emissions that varied and so undermines the claim that the variability was significant.

*Response:* EPA disagrees with the commenter’s assertion that Rule 317 is inconsistent with section 185 because it does not utilize a “source-specific

Technical Support Document (TSD) dated January 4, 2012 provides greater detail on the various terms used to refer to the geographic area of the Salton Sea Air Basin that is in the SCAQMD.

<sup>2</sup>Rule 317 specifies that the baseline will be programmatically adjusted to account for regulatory effects between 2006 through 2010 and that actual emissions used to calculate the alternative baseline cannot exceed allowable emissions.

determination.” As described in EPA’s proposed action, SCAQMD looked at available emissions data for all 234 sources subject to section 185 fees that reported actual emissions of at least 10 tons per year in 2010 and found that all 234 sources had some variability (see SCAQMD letter dated December 21, 2011, Exhibit D). In addition, SCAQMD conducted a more detailed analysis for 112 sources for which SCAQMD had ten consecutive years of actual emissions data. SCAQMD developed a mathematical formula to define and analyze variability.<sup>3</sup> Applying this formula, SCAQMD found that 107 of the 112 sources (or over 95% of the data set) had greater than 20 percent variability in emissions across a 10-year period.

EPA also disagrees with the commenter’s argument that variability cannot be significant if it is experienced by all sources. The Act itself does not define the phrase “otherwise vary significantly from year to year;” therefore, EPA may supply a reasonable interpretation. SCAQMD separately considered the available information for each of the 234 sources and found that no source had consistent emissions. To the contrary, SCAQMD found that emissions for all sources varied from year to year. While some source’s emissions varied more than others, all evidenced some variation. Moreover, SCAQMD’s data shows that even sources with the smallest variation in emissions experienced a range of approximately 10 percent. As a practical matter, EPA notes that Rule 317’s baseline definition makes little difference with respect to sources that have less emissions variability because, as a matter of course, less variation in emissions means that those sources owe essentially the same amount under either section 185’s attainment year baseline or under Rule 317’s universal alternative baseline using years 2006–2007.

*c. Comment:* Earthjustice stated that the District’s justification of its approach based on the PSD regulations is arbitrary. The commenter further contended that Section 185 does not refer to the new source review program, so the baseline provisions in the PSD regulations are irrelevant to interpreting section 185.

*Response:* EPA disagrees with the comment that the District’s justification of its approach based on EPA’s PSD regulations is arbitrary because section 185 does not refer to the new source

review program. In fact, to establish the default baseline for calculating emission fees, section 185 refers to “the lower of the amount of actual VOC emissions (‘actuals’) or VOC emissions allowed under the permit applicable to the source \* \* \* (‘allowables’) during the attainment year.” SCAQMD’s reference to the baseline established by EPA’s PSD regulations is also valid because EPA’s Baseline Guidance recommended the PSD 2-in-10 concept as an acceptable approach for states seeking to implement an alternative baseline in their section 185 fee programs. As explained in EPA’s Baseline Guidance, EPA’s rationale for the PSD 2-in-10 concept was that it would allow a source “to consider a full business cycle in setting a baseline emissions rate that represents normal operation of the source for that time period.” Lastly, we note that the commenter has not recommended, and we are not aware of, a superior alternative to basing the approach on EPA’s PSD regulations.

*d. Comment:* Earthjustice commented that the District’s analysis is not based on an assessment of the source itself and the nature of its operations, but on the broader impacts of the recession in the region. The commenter stated that the District’s approach of raising the baseline from the atypical low production year is counter to the purpose of section 185’s baseline requirement, which is to use the lowest level of emissions, whether actual or allowable. The commenter’s reasoning is that if emissions at these levels are not low enough to attain the standard, the fee should be imposed to incentivize an additional 20 percent reduction. The commenter contended that Rule 317 undermines this objective—by raising the baseline level of emissions, a 20 percent reduction is less likely to result in attainment.

*Response:* EPA disagrees with the comment to the extent that it implies that the District inappropriately considered recessionary impacts on emissions when considering the appropriate baseline for Rule 317 or that the District acted inappropriately by not using the attainment year, 2010, as the baseline because it was an “atypical low production year.” Section 185 explicitly acknowledges the possibility that a fee program might need to adjust the baseline for emissions that are “irregular, cyclical, or otherwise vary significantly from year to year.”

EPA also disagrees with the comment’s implication that Rule 317 undermines section 185’s objectives because it does not establish a baseline based on the lowest level of emissions and thus will not result in the same

level of emissions reductions. Again, the comment fails to acknowledge that Congress explicitly authorized use of an alternative baseline based on emissions over a period of more than one year in cases where there are variations in emissions levels. It is reasonable to assume that Congress’s objectives in establishing the section 185 program were to allow for some discretion on the part of the regulatory agencies to account for practical realities that could arise during program implementation, even if the result might affect fees owed.

Moreover, we believe that SCAQMD’s alternative baseline will result in emission reductions that are at least as significant as those that could be achieved under a source-by-source approach using EPA’s Baseline Guidance. As explained in our proposed action, SCAQMD had the reasonable expectation that since virtually all sources had significant variability, most if not all sources would request a different baseline than the attainment year. Instead of allowing each source to select its own alternative two-year baseline period (as would be allowed under EPA’s Baseline Guidance), Rule 317 calculates the fee obligation based on each source’s emissions during Fiscal years 2005–2006 and Fiscal years 2006–2007. SCAQMD’s analysis showed that its alternative baseline should be expected to result in more emission reductions than a fee program that used EPA’s Baseline Guidance because under the approach allowed by the Guidance, each individual source would likely choose the two-year period in which it had its highest emissions, thereby resulting in a higher threshold for triggering the assessment of section 185 fees. Given the assumption that a source would pick the two consecutive years with the highest emissions, SCAQMD calculated such baselines from the historic data. SCAQMD’s analysis showed that the SCAQMD method resulted in aggregate baseline emissions that were 7,081 tons lower than that allowed under the EPA’s Baseline Guidance. (See SCAQMD letter dated December 21, 2011, Exhibit D). SCAQMD’s decision to establish an alternative baseline period for all sources is reasonable given that SCAQMD’s approach is more stringent than that allowed under EPA’s Baseline Guidance. Finally, we note that the commenter did not challenge EPA’s Baseline Guidance.

<sup>3</sup> SCAQMD’s formula for “V” (Variation in Emissions (or Irregularity)) = (Range of Emissions) ÷ (Median Emissions Value). SCAQMD calculated “V” for each of the 112 sources based on 10 years of actual emissions data.

*B. EPA's Authority To Approve Alternative Fee Rules That Differ From CAA Section 185*

1. Authority Under CAA and Case Law

a. *Comment:* Earthjustice commented that nothing in the plain language of the Act, the “principles” behind that language, or *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006) gives EPA the power to rewrite the terms of section 185. The commenter stated that EPA’s argument that it can invent alternatives that fail to comply with the plain language of section 185 has no statutory basis. Other commenters stated that section 172(e) provides authority for EPA to approve Rule 317 and alternative fee programs generally.

*Response:* In a 2004 rulemaking governing implementation of the 1997 8-hour ozone standard, EPA revoked the 1-hour ozone standard effective June 15, 2005. See **Federal Register** at 69 FR 23858, April 30, 2004 and 69 FR 23951, April 30, 2004 (“2004 Rule”); see also, 40 CFR 50.9(b). EPA’s revocation of the 1-hour standard was upheld by the Court of Appeals for the District of Columbia Circuit. *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006) reh’g denied, 489 F.3d 1245 (D.C. Cir.) 2007) (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review)(“*South Coast*”). Thus, the 1-hour ozone standard that the District failed to attain by its attainment date no longer exists and a different standard now applies.

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

As stated above, section 172(e) requires State Implementation Plans to

contain “controls” that are “not less stringent” than the controls that applied to the area before the NAAQS revision. EPA’s 2004 Rule defined the term “controls” in section 172(e) to exclude section 185. See 2004 Rule, 69 FR at 24000. The D.C. Circuit ruled that EPA’s exclusion of section 185 from the list of “controls” for Severe and Extreme non-attainment areas was improper and remanded that part of the rule back to EPA. See *South Coast*, 472 F.3d at 902–03. The court did not, however, address the specific issue of whether the principles of section 172(e) required section 185 itself or any other controls not less stringent, and section 172(e) clearly on its face allows such equivalent programs. Further, the court in *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. 2011), specifically noted with respect to equivalent alternative programs that, “neither the statute nor our case law obviously precludes [the equivalent program alternative.]” 643 F.3d at 321. In this rulemaking approving SCAQMD Rule 317, EPA is fully recognizing section 185 as a “control” that must be implemented through the application of the principles of section 172(e). As explained above, the D.C. Circuit stated that EPA must apply the principles of section 172(e) to non-attainment requirements such as section 185. Thus, we are following the D.C. Circuit’s holding that the principles of section 172(e) apply in full to implement 185 obligations.

2. Applicability of Section 172(e)

a. *Comment:* Earthjustice commented that CAA section 172(e) does not apply to this situation because EPA has adopted a more health protective ozone standard. According to the commenter, EPA acknowledges that section 172(e) by its terms does not authorize EPA’s action because the newer 8-hour ozone standard is not a relaxation of the prior 1-hour ozone standard. The commenter asserted that EPA claims that its authority to permit States to avoid the express requirements of section 185 derives from the “principles” of section 172(e), but the commenter contended that there is no principle in the CAA that Congress intended to give EPA authority to rewrite the specific requirements of section 185 when EPA finds that the health impacts related to ozone exposure are even more dangerous than Congress believed when it adopted the detailed requirements in the 1990 Clean Air Act Amendments. Other commenters stated that section 172(e) provides authority for EPA to approve Rule 317 and alternative fee programs generally.

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

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

a. *Comment:* Earthjustice commented that the Supreme Court in *Whitman v. Am. Trucking Assns*, interpreted the CAA as showing Congressional intent to limit EPA’s discretion. The commenter claimed that the D.C. Circuit in SCAQMD also held that EPA’s statutory interpretation maximizing agency discretion was contrary to the clear intent of Congress in enacting the 1990 amendments. The commenter stated that EPA’s purported approach [with respect to 185] would allow EPA to immediately void the specific statutory scheme Congress intended to govern for decades. The commenter argued that where EPA has found that elevated 1-hour ozone exposures remain a serious concern, EPA cannot reasonably claim that Congress meant to give EPA the discretion to revise the carefully prescribed statutory requirements like section 185 that Congress intended to address such exposures. The commenter stated that EPA proposed to accept a program other than that provided by Congress in section 185. The commenter concluded that given that Congress provided a specific program, EPA has no discretion to approve an alternative. Other commenters stated that the Act provides EPA with discretion to approve Rule 317 and alternative fee programs generally.

*Response:* While one holding in *Whitman v. Am. Trucking Assns*, 531 U.S. 457 (2001) stands for the general proposition that Congress intended to set forth prescriptive requirements for EPA and states, particularly the requirements contained in Subpart 2, the D.C. Circuit has noted that the Court did not consider the issue of how to implement Subpart 2 for the 1-hour standard after revocation. See, *South Coast*, 472 F.3d at 893 (“when the Supreme Court assessed the 1997 Rule, it thought that the one- and eight-hour

standards were to coexist.”). Thus, the Court did not consider how section 172(e)’s anti-backsliding requirements might be applied in the current context of a revoked NAAQS.

We also believe that the commenter’s reliance on *South Coast* to argue that it precludes EPA’s use of section 172(e) principles to implement section 185 is similarly misplaced. The holding cited by the commenter relates to an entirely different issue than EPA’s discretion and authority under section 172(e)—whether EPA had properly allowed certain eight-hour ozone non-attainment areas to comply with Subpart 1 in lieu of Subpart 2. In fact, the *South Coast* court not only upheld EPA’s authority under section 109(d) to revise the NAAQS by revoking the 1-hour standard, it recognized its discretion and authority to then implement section 172(e):

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

*South Coast*, 472 F.3d at 888.

Further, as noted above, EPA believes that *South Coast* supports our reliance on section 172(e) principles to approve Rule 317 as fulfilling section 185 requirements for the revoked 1-hour standard. As the court stated, “EPA was not, as the Environmental petitioners contend, arbitrary and capricious in withdrawing the one-hour requirements, having found in 1997 that the eight-hour standard was ‘generally even more effective in limiting 1-hour exposures of concern than is the current 1-hour standard.’ \* \* \* The only remaining requirements as to the one-hour NAAQS are the anti-backsliding limitations.” *Id.* (citation omitted).

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

#### 1. Statutory Analysis for Alternatives to a Section 185 Program

a. *Comment:* Earthjustice commented that EPA’s different and inconsistent tests for determining “not less stringent” undermine the reasonableness of these options as valid interpretations of the Act. The commenter stated that EPA’s

interpretation means that a program that achieves the same emission reductions as section 185 and a program that achieves fewer emission reductions than section 185 can both be considered “not less stringent.” However, stringency is either a measure of the emission reductions achieved or it is not. The commenter concluded that if it is, then a program that does not achieve equivalent reductions cannot pass the test. The commenter contended that EPA did not actually interpret the term “stringent” and that it offers no basis for claiming that Congress intended this term to have different meanings and allow for different metrics for guarding against backsliding. Other commenters stated that EPA’s criteria for equivalency were reasonable and supported EPA’s proposal with respect to the concept of alternative section 185 fee programs.

*Response:* We believe that the three alternatives we identified in our proposed action (i.e., same emission reductions; same amount of revenue to be used to pay for emission reductions to further improve ozone air quality; a combination of the two) are reasonable and consistent with Congress’ intent. First, we note that Congress did not define the phrase “not less stringent” or the term “stringent” in the Act. EPA, therefore, may use its discretion and expertise to reasonably interpret section 172(e). Furthermore, we note that the D.C. Circuit, in *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. 2011), while finding that EPA’s guidance document providing our initial presentation of various alternatives to section 185<sup>4</sup> should have been promulgated through notice-and-comment rulemaking, declined to rule on whether the types of alternative programs we considered in connection with our proposed action on Rule 317 were illegal, stating, “neither the statute nor our case law obviously precludes [the program alternative].” *Id.* at 321.

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

anticipated that section 185 might lead to emissions reductions that would improve air quality, and ultimately facilitate attainment of the 1-hour ozone standard.<sup>5</sup> Thus, EPA believes it is reasonable to assess stringency of alternative programs on the basis of either the monetary or emissions-reduction aspects of section 185 or on the combination of both.

Lastly, as discussed in our proposal, SCAQMD has demonstrated that Rule 317 will result in a federally enforceable requirement to obtain funding for and make expenditures on air pollution reduction projects in amounts at least equal to the amounts that would otherwise be collected under section 185. In addition, it is reasonable to expect that in one respect SCAQMD’s alternative program will achieve more emission reductions than direct implementation of section 185 because the funding that results from the District’s alternative program must be used on programs intended to reduce emissions, while section 185 has no such direct requirement. The comment suggests that EPA’s logic, if unreasonably extended, might theoretically lead it to approve a program that achieves fewer emission reductions than a program directly implemented under section 185. We are not doing that in this action, deciding whether to approve Rule 317 as it has been submitted to us. We also have no intention of doing so in the future.

#### 2. “Not Less Stringent” and Target of Fees

a. *Comment:* Earthjustice commented that to be “not less stringent,” a control must be no less rigorous, strict, or severe and claimed that none of EPA’s alternatives meets this definition. The commenter stated that EPA’s description of the alternatives does not focus on “stringency” but on “equivalency.” The commenter contended that Section 172(e) does not allow for “equivalent” controls; it requires controls to be “not less stringent.”

*Response:* EPA interprets the criterion set forth in section 172(e), “not less stringent,” to mean that, in the context of the revoked 1-hour ozone NAAQS, an alternative control that is as stringent as a previously applicable control should be considered approvable. An alternative control that is equivalent to the applicable control still meets section

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

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

172(e)'s criterion, "not less stringent" because it is as stringent, and therefore not less stringent, than the applicable control.

b. *Comment:* Earthjustice commented that Congress made deliberate choices as to which sources would be subject to penalties, the magnitude of those penalties and the duration of those penalties. The commenter stated that the purpose of Rule 317 is to avoid the stringent requirements of section 185 and dilute the severity of the 185 penalty on major industrial sources. The commenter averred that it is not possible to claim that Rule 317 is "not less stringent" than section 185 when that is the very purpose of the rule. Other commenters stated that Rule 317's focus on mobile sources rather than stationary sources is appropriate and more likely to lead to emission reductions and attainment with the one-hour ozone standard.

*Response:* We agree that section 185 requires major stationary sources to pay fees whereas Rule 317 does not; however, today's action is to approve SCAQMD Rule 317 in the context of the revoked 1-hour ozone NAAQS, consistent with the principles of section 172(e). By their very nature, the environmental outcomes that will be achieved by incentive-based programs (such as the fee programs envisioned by section 185) are difficult to predict with any precision, making the relative stringency of incentive-based programs difficult to evaluate. Thus, EPA's review focuses on whether the District provided a reasonable comparison of relative stringency. In particular, it is difficult to assess the relative stringency of section 185 and Rule 317 based on a comparison of where or how the funds associated with the 185 and the alternative program come from. We acknowledge as reasonable the District's decision, in developing an alternative fee program, to focus on mobile sources rather than stationary sources because emissions from mobile sources constitute approximately 90 percent of NO<sub>x</sub> emissions in SCAQMD.<sup>6</sup>

Moreover, it is clear that Rule 317, through the creation of a fee equivalency account that will be used to offset fees required under section 185, and a requirement to annually demonstrate and report equivalency, will result in a federally enforceable requirement to obtain funding for and make expenditures on air pollution reduction projects. Rule 317 contains

provisions that ensure that the fee equivalency account will reflect expenditures that are at least equal to the amount that would otherwise be collected under section 185 and that ensure that the funds will be used to reduce ozone pollution. By one measure, Rule 317, which requires the expenditure of funds on projects that reduce ozone nonattainment, will be more effective than a section 185 fee program, which is not required to contain an enforceable requirement to spend funds to reduce air pollution, in producing actual air quality benefits.

### 3. "Not Less Stringent" and Equivalent Funding

a. *Comment:* Earthjustice commented that a program that raises an equivalent amount of money is not supported by section 185's structure and legislative history. The commenter stated that section 185 was not intended as a revenue generating provision. The commenter concluded that nothing in the legislative history indicates that Congress' intent was to collect a certain amount of money.

*Response:* Section 185 explicitly mandates a specific fee, requires that the fee be indexed for inflation, establishes a baseline for measuring such fees, and authorizes an alternative baseline for use in calculating that fee. For those reasons, and the additional reasons discussed above, we believe that section 185 has both monetary and emissions-related aspects and that it is reasonable for EPA to assess the stringency of alternative programs on the basis of either aspect of section 185 or on the combination of both.

Rule 317 will result in a federally enforceable requirement to obtain funding and to spend those funds on ozone pollution reduction projects. In addition, we note that the District's focus on alternative funding from programs that relate to mobile sources is reasonable in light of the fact that approximately 90 percent of NO<sub>x</sub> emissions in the District are attributable to mobile sources.<sup>7</sup> Thus, only 10 percent of NO<sub>x</sub> emissions are caused by stationary sources, most of which are already subject to either best available retrofit control technology or best available control technology or lowest achievable emission rate requirements.<sup>8</sup> Thus, Rule 317 by ensuring the expenditure of these funds on the primary causes of ozone nonattainment is likely to be more effective in

producing real reductions in ozone pollution than a 185 fee program.

### 4. "Not Less Stringent" and Equivalent Emission Reductions

a. *Comment:* Earthjustice commented that the measure of equivalency should be section 185's emission reduction incentive. The commenter contended that penalties end if an area is redesignated to attainment or a source reduces its emissions by 20 percent. The commenter pointed out that the D.C. Circuit noted, "[T]hese penalties are designed to constrain ozone pollution." The commenter stated EPA should assess how Rule 317 will create incentives for major stationary sources to reduce emissions. Many commenters stated that most stationary sources have already installed air pollution controls such as best available control technology or best available retrofit technology. As a result, installation of additional controls would not be feasible. According to these commenters, to avoid fees, sources would curtail production, which would be harmful to the economy. In addition, curtailing production is not a realistic option for sources such as hospitals and providers of essential services.

*Response:* Earthjustice correctly states that section 185 requires that fees must be paid until an area is redesignated to attainment for ozone and that section 185 does not require fees from sources that reduce emissions by 20 percent (compared to emissions during the baseline period). Thus, one consequence of a section 185 fee program may be a reduction in VOC and/or NO<sub>x</sub> emissions. However, EPA does not agree with Earthjustice's comment to the extent it is saying that emission reductions are inevitable or must be the sole basis for determining whether an alternative program is "not less stringent" than a section 185 program. As we stated above, we believe the prospective stringency of an alternative program may be evaluated by comparing either the assessed fees (which are in turn used here to pay for emissions reductions) or emission reductions projected to be achieved from the proposed alternative program to the fees or emissions reductions directly attributable to application of section 185 (or by comparing a combination of fees and reductions).

In addition, Earthjustice's comment does not acknowledge that section 185 allows major sources to pay fees and not reduce emissions; consequently, the actual impact of the "incentive" underlying section 185 is uncertain, and must be acknowledged in any comparison to the effect of Rule 317.

<sup>6</sup> California Air Resources Board's *California Emissions Projection Analysis Model (CEPAM): 2009 Almanac* found at: <http://www.arb.ca.gov/app/emsinv/fcemssumcat2009.php>.

<sup>7</sup> *Ibid.*

<sup>8</sup> SCAQMD Rule 317 Final Staff Report; page 317-1.

Nevertheless, we note that Rule 317 creates an incentive for the District to ensure that it obtains funding in an amount at least equal to the amount of fees that would be collected under section 185 and to use those funds to reduce ozone pollution, in order to annually demonstrate equivalency of the program.

In response to the comments in support of our approval of Rule 317, we acknowledge that Rule 317 avoids possibly substantial burdens on major stationary sources within the District, some of which may be small businesses because of the 10 tons/year threshold for major stationary sources in the South Coast Air Basin.

b. *Comment:* Section 185 is a market-based policy device to internalize the external costs of pollution and thereby incentivize emission reductions at major stationary sources. The commenter argued that EPA must assess how the incentives in Rule 317 compare to the incentives in section 185. The commenter stated that this analysis would look at how a pollution tax might drive sources to improve controls.

*Response:* We do not agree that the comparison of “incentives” or a pollution tax proposed by the commenter is the only approach to evaluating the relative stringency of an alternative program, as explained above. In addition, we note SCAQMD’s observation that many of the sources subject to the section 185 fee are not necessarily able to internalize the costs of the fees. These sources, which the District identified as refineries, utilities and sewage treatment plants, “are likely to have an inelastic response to fees \* \* \* [and] are more likely to pass through any increased fee dollars to the consumer rather than curtail emissions.”<sup>9</sup> Moreover, we anticipate that Rule 317 will reduce ozone pollution in the District because it creates a federally enforceable requirement to demonstrate on an annual basis that it has obtained funding and made expenditures on projects related to improving ozone air quality.

c. *Comment:* Earthjustice commented that Rule 317 severs the link between the fee and pollution levels by, for example, pre-funding the District’s fee equivalency account with government subsidies. The commenter stated that using taxpayer dollars creates no incentive to reduce pollution. Other commenters stated that Rule 317 appropriately focuses on programs that will reduce emissions from mobile sources because they are primarily

responsible for ozone pollution in the District.

*Response:* As stated above, it is difficult to quantitatively compare any incentives created by section 185 or Rule 317. Section 185 explicitly requires fees from major stationary sources in Severe and Extreme ozone nonattainment areas as a penalty for failure to reach attainment by their attainment deadlines, but does not directly mandate emissions reductions. Rule 317 replaces the uncertain effect of the fee incentive with a direct obligation for the District to annually invest fee-equivalent funding in projects designed to improve ozone levels. In the event the District fails to make this investment, Rule 317 includes a backstop provision requiring the District to adopt a rule to address any shortfall. In this context, we have determined that Rule 317 provides a “not less stringent” program structure.

#### 5. “Not Less Stringent” and Process for Revenues To Be Spent on Air Quality Programs”

a. *Comment:* Earthjustice commented that EPA does not demonstrate that Rule 317 establishes a process for revenues to be used to improve ozone air quality. The commenter concluded that Rule 317 on its face includes no such process, and provides no detail or mechanism for assuring that the fees will result in actual emission reductions that will improve ozone air quality. The commenter stated that EPA has previously refused to give emission reduction credit for vague incentive programs and it is arbitrary for EPA to assume that Rule 317 will improve air quality without providing a basis for reaching a different conclusion.

*Response:* EPA disagrees with the comment based on our determination that Rule 317 contains adequate provisions to ensure that the alternative funding will be used on programs that will improve ozone air quality. Rule 317(c)(3) and (5) require the District to make an annual demonstration of equivalency and file an annual report with CARB and EPA that includes, among other things, a list of all facilities subject to section 185 and their fee obligations, and a listing of all programs and associated expenditures that were credited into the section 172(e) equivalency account. The listing of expenditures that were credited to the equivalency account must show the programs and program descriptions, a description of the funding, a certification of eligibility for each program and the expenditures themselves. In addition, Rule 317 contains provisions to ensure the integrity of the demonstration process.

For example, Rule 317(c)(1)(A) specifies various criteria for the types of programs that are eligible for credit, including requirements that the projects be “surplus to the SIP,” designed to reduce VOC or NO<sub>x</sub> emissions, as well as a requirement that “only monies actually expended from qualified programs during a calendar year shall be credited.”

In addition, the District’s Staff Report for Rule 317, at Attachment A, contains a listing of programs that the District has already identified as appropriate for use as credits in the section 172(e) equivalency account. These programs include school bus retrofits and replacements, liquefied natural gas truck replacements, and funding under AB2766, a state law that authorizes the collection of an additional \$4 per motor vehicle registration to be used for programs to reduce motor vehicle pollution.

Our basis for approving Rule 317 is that it is not less stringent than the requirements of section 185 because it will result in funds equal to the fees that would be collected under section 185. Additionally, we believe that SCAQMD’s alternative program will result in improvements in air quality since the funds will be used on projects that will reduce NO<sub>x</sub> and VOC emissions in the District. This finding is consistent with our actions referenced in the comment regarding other incentive programs. In those cases, we acknowledged that incentive programs would result in some emission reductions but noted that the air district had not adequately demonstrated a specific amount of reductions. Similarly, SCAQMD has not demonstrated a specific amount of emission reductions from the use of funds identified in Rule 317, but there is no reason to expect that it would be less than the reductions that might result from direct implementation of section 185, which does not require sources to reduce emissions and does not require that collected fees be directed towards emission reductions.

Section 185 creates an incentive to reduce emissions but in some cases it may not work and may be punitive. In addition, section 185 does not require that the state use the funds collected for any particular purpose, making it unlikely that the funds will be used directly to reduce ozone formation. Rule 317 will result in a federally enforceable requirement to obtain funding for and make expenditures on air pollution reduction projects in amounts at least equal to the amounts that would otherwise be collected under section 185. In addition, it is reasonable to

<sup>9</sup>Ibid. pp. 5–6.

expect that in one respect SCAQMD's alternative program will achieve more emission reductions than direct implementation of section 185 because the funding that results from the District's alternative program must be used on programs intended to reduce emissions, while section 185 has no such direct requirement.

## 6. Surplus Reductions

a. *Comment:* Earthjustice commented that EPA's analysis that Rule 317 will improve air quality because the fees are "surplus" does not make sense. The commenter claimed that the District's 1-hour ozone SIP failed to result in attainment of the standard and the 9th Circuit Court of Appeals has held that EPA should have disapproved the plan. Further, the commenter claimed the District does not have a meaningful plan for attaining the 1-hour ozone standard and all existing sources of funding have failed to provide "surplus" reductions that are not required for attainment. The commenter stated that the District has collected those fees and yet sources continue to emit at levels that have not provided for attainment. The commenter concluded that "Equivalent fees" credited to the District's accounts do not improve air quality. One commenter stated that the programs that are surplus to the SIP are an appropriate part of an alternative fee program.

*Response:* As explained in our proposal, Rule 317 specifies that expenditures used to offset section 185 fee obligations via the Section 172(e) Fee Equivalency Account must be "surplus" to the 1-hour ozone SIP and must be used on programs intended to reduce ozone formation. We explained that "surplus" reductions are those that are not relied upon nor assumed by the SIP to provide for reasonable further progress (RFP) or attainment.<sup>10</sup> Our proposal also explained that we had reviewed the various funding sources identified by the District as "surplus" and confirmed that they were in fact surplus to the approved 1-hour ozone SIPs for the South Coast Air Basin (the 1997/1999 Air Quality Management Plan) and the Southeast Desert Air Quality Management Area (1994 Air Quality Management Plan).

We do not agree with the commenter's characterization of the court's holding in *Assoc'n of Irrigated Residents v. EPA*. In particular, we disagree with the commenter's statement that, "the Ninth Circuit Court of Appeals has held that

EPA should have disapproved the plan's flawed attainment demonstration." In fact, the court's ruling concerned EPA's disapproval in 2009 of an attainment demonstration adopted by the District in 2003 as an update to the approved 1997/1999 SIP for the South Coast Air Basin. Because the District's 2003 attainment demonstration indicated that the 1997/1999 SIP was inadequate, the court held that EPA should take additional action to evaluate the adequacy of the 1997/1999 SIP. The court also stated that EPA's authority to evaluate the adequacy of the plan could arise either under CAA provisions for a Federal Implementation Plan or for a SIP call.<sup>11</sup> The court, however, did not state that EPA should have disapproved the 1997/1999 SIP or any part of it, nor did the court's ruling invalidate or affect the legal status of the 1997/1999 SIP. Therefore, the 1997/1999 SIP remains in place as the approved 1-hour SIP for the South Coast Air Basin.

We also disagree with the commenter's conclusion that the 1997/1999 SIP cannot be a basis to determine "surplus" reductions because the 1997/1999 SIP failed to result in attainment of the 1-hour standard. By extension, this argument would mean that a nonattainment area that fails to reach attainment by the applicable deadline would have no emissions that could ever be considered "surplus." The loss of "surplus" emissions would result in potentially drastic consequences, such as the inability to issue or obtain offset credits and thus a virtual cessation of permitting activity for large industrial sources in nonattainment areas with missed attainment deadlines.<sup>12</sup> If Congress had intended such a significant consequence for failure to reach attainment by an applicable deadline, Congress could have explicitly provided for such a result.<sup>13 14</sup> Because

Congress did not provide for the loss of all surplus emissions upon a state's failure to attain a standard by an applicable attainment deadline, we believe that the 1997/1999 SIP, as the currently approved SIP, is a valid basis for determinations of "surplus" for purposes of the 1-hour ozone standard in the South Coast Air Basin.

Nevertheless, EPA recognizes that the 1997/1999 SIP did not result in attainment of the 1-hour ozone standard in the South Coast Air Basin.<sup>15</sup> Following the holding in *Assoc'n of Irrigated Residents v. EPA* that EPA must review the adequacy of the 1997/1999 SIP, EPA initiated the SIP call process with a proposed finding of substantial inadequacy, as published at 77 FR 58072, September 19, 2012.<sup>16</sup> If finalized as proposed, the SIP call will require the District to submit, within 12 months, a plan providing for attainment of the 1-hour ozone standard ("1-hour ozone attainment plan"). Upon approval by EPA, the new 1-hour ozone attainment plan will become the new basis for determining what reductions are "surplus."

EPA believes that Rule 317 is drafted with sufficient flexibility that the District will be able to continue to implement the rule by making determinations of surplus based on the new 1-hour ozone attainment plan. Specifically, Rule 317(c)(1)(i) specifies that the Section 172(e) Fee Equivalency Account can offset section 185 fee obligations with expenditures from qualified programs that are "surplus to the State Implementation Program for the federal 1-hour ozone standard. \* \* \*" Thus, Rule 317's requirements for crediting expenditures from qualified programs in the Section 172(e) Fee Equivalency Account, as well as the requirements for the annual demonstration and reporting of

for the one-hour ozone standard under section 179(c) and (d). See e.g., note 15 infra, and 76 FR 82138–82139.

<sup>15</sup> On December 30, 2011, EPA published in the *Federal Register* its "Determinations of Failure to Attain the One-Hour Standard," for both the Los Angeles—South Coast Air Basin and the Southeast Desert Modified Air Quality Maintenance Area. 76 FR 82133. In this action, which also pertains to the San Joaquin Valley Area, we explained that our determination of failure to attain the revoked one-hour ozone standard does not trigger a requirement for a new attainment demonstration for the one-hour ozone standard under section 179(c) and (d). Rather, we explained that we made these determinations under our authority in sections 301(a) and 181(b)(2) to ensure implementation of measures we had previously identified as one-hour ozone anti-backsliding requirements, including contingency measures and section 185 fees. See e.g., 76 FR 82138–82139.

<sup>16</sup> EPA's proposed SIP call explains in greater detail the legal basis for requiring the District to submit a new 1-hour ozone attainment plan.

<sup>11</sup> As the court held, "Specifically, EPA has an affirmative duty to ensure that California demonstrate attainment with the NAAQS, see 42 U.S.C. 7410(a)(2)(A), 7502(c)(6), either by promulgating a FIP or evaluating the necessity of a SIP call." *Assoc'n of Irrigated Residents v. EPA*, 686 F.3d 668, 677 (9th Cir. 2012).

<sup>12</sup> Offsets are required by section 173(c) for the permitting of new and modified major stationary sources in nonattainment areas.

<sup>13</sup> We note that Congress did include specific provisions to address a state's failure to reach attainment by the applicable deadline, such as sections 172(c) (requiring contingency measures) and 179(d) (requiring plan revisions that include "additional measures as the Administrator may reasonably prescribe, including all measures that that can be feasibly implemented in the area in light of technological achievability, costs, and any nonair quality and other air quality-related health and environmental impacts.")

<sup>14</sup> EPA has explained that the failure to attain the revoked one-hour ozone standard does not trigger a requirement for a new attainment demonstration

<sup>10</sup> See, "Improving Air Quality with Economic Incentive Programs," January 2001 (EPA-452/R-01-001), available at: <http://www.epa.gov/ttn/oarpg/t1/memoranda/eipfin.pdf>.

equivalency, would accommodate a future 1-hour ozone attainment plan and the District will be able to continue to implement the equivalency program.

#### D. Miscellaneous Comments

a. *Comment:* One commenter recommended that EPA allow sources to apply the calculated section 185 fees to a number of projects at the major stationary source or at other sources in either the nonattainment area or upwind areas. The commenter suggested ten examples of eligible projects including installing emissions control technology, enhancing existing pollution control equipment, energy efficiency and renewable energy measures, lower emitting fuels, retirement or repowering of a higher emitting facility, mobile source retrofit program, clean vehicle fleets, and increasing mass transit ridership.

*Response:* EPA is acting on SCAQMD's Rule 317, which does not include these program features. If these program features are included in a specific SIP submittal for another alternative program, EPA would evaluate them at that time.

b. *Comment:* Numerous commenters expressed concerns that if fees were assessed in a direct application of section 185, the fees would have a devastating effect on small businesses, jobs, and the economy in Southern California. Consequently, they supported SCAQMD's approach in Rule 317 and urged EPA to approve the rule.

*Response:* We acknowledge the comments and the public's interest in this issue. No response needed to these comments that support our proposed action.

### III. EPA Action

EPA is finalizing approval of Rule 317, "Clean Air Act Non-Attainment Fee," as a revision to SCAQMD's portion of the California SIP, and as a "not less stringent" alternative to the program required by section 185 of the Act for anti-backsliding purposes with respect to the revoked 1-hour ozone standard.

The comments submitted do not fundamentally change our assessment that Rule 317 complies with the relevant CAA requirements and associated EPA rules. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving Rule 317 into the California SIP as an equivalent alternative program, consistent with the principles of section 172(e) of the Act. Final approval of Rule 317 satisfies California's obligation under sections 182(d)(3), (e) and (f) to develop and submit a SIP revision for the South

Coast Air Basin and the Riverside County portion of the Salton Sea Air Basin<sup>17</sup> 1-hour ozone nonattainment areas to meet the requirements for a program not less stringent than that of section 185. Final approval of Rule 317 also permanently terminates all sanctions and Federal Implementation Plan (FIP) implications associated with section 185 for the 1-hour ozone NAAQS and previous action (75 FR 232, January 5, 2010) regarding the South Coast Air Basin and the Riverside County portion of the Salton Sea Air Basin.

### 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);

<sup>17</sup> See EPA's TSD dated January 4, 2012, which clarifies that the Riverside County portion of Salton Sea is the same geographic area as the Coachella Valley portion of the Southeast Desert Modified Air Quality Maintenance Area.

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 12, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

#### List of Subjects in 40 CFR Part 52

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

Dated: September 20, 2012.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

Therefore, 40 CFR chapter I 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 and reserving paragraph (c)(417) and adding paragraph (c)(418) to read as follows:

#### **§ 52.220 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(417) [Reserved]

(418) New and amended regulation for the following APCD was submitted on April 22, 2011, by the Governor's Designee.

(i) Incorporation by Reference

(A) South Coast Air Quality Management District

(1) Rule 317, "Clean Air Act Non-Attainment Fees," amended on February 4, 2011.

[FR Doc. 2012-29385 Filed 12-13-12; 8:45 am]

**BILLING CODE 6560-50-P**

#### **ENVIRONMENTAL PROTECTION AGENCY**

#### **40 CFR Part 82**

[EPA-HQ-OAR-2011-0111; FRL-9757-5]

RIN 2060-AQ84

#### **Protection of Stratospheric Ozone: Listing of Substitutes for Ozone Depleting Substances—Fire Suppression and Explosion Protection**

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

**ACTION:** Withdrawal in part of direct final rule.

**SUMMARY:** On September 19, 2012, the **Federal Register** published a direct final rule and a companion proposed rule issuing listings for three fire suppressants under EPA's Significant New Alternatives Policy program. Because EPA received adverse comment concerning C7 Fluoroketone, we are withdrawing that part of the direct final rule that listed C7 Fluoroketone acceptable subject to narrowed use limits as a substitute for halon 1211. Other listings in that direct final rule will take effect on December 18, 2012.

**DATES:** Effective December 14, 2012, EPA withdraws the entire entry for "Streaming: C7 Fluoroketone as a substitute for Halon 1211" in Appendix S to Subpart G of Part 82 in the direct final rule published at 77 FR 58035, September 19, 2012.

#### **FOR FURTHER INFORMATION CONTACT:**

Bella Maranion, Stratospheric Protection Division, Office of Atmospheric Programs; Environmental Protection Agency, Mail Code 6205J, 1200 Pennsylvania Avenue NW., Washington DC 20460; telephone number (202) 343-9749, fax number, (202) 343-2338; email address at [maranion.bella@epa.gov](mailto:maranion.bella@epa.gov). The published versions of notices and rulemakings under the SNAP program are available on EPA's Stratospheric Ozone Web site at <http://www.epa.gov/ozone/snap/regs>.

**SUPPLEMENTARY INFORMATION:** On September 19, 2012, the **Federal Register** published a direct final rule and a companion proposed rule issuing listings for three fire suppressants under EPA's Significant New Alternatives Policy program (77 FR 58035). Because EPA received adverse comment concerning C7 Fluoroketone, we are withdrawing that part of the direct final rule that listed C7 Fluoroketone.

The listing would have found C7 Fluoroketone acceptable subject to narrowed use limits, as a substitute for halon 1211 for use as a streaming agent in portable fire extinguishers in nonresidential applications. We stated in that direct final rule that if we received adverse comment by October 19, 2012, that we would publish a timely withdrawal in the **Federal Register**. We subsequently received one adverse comment on that part of the direct final rule, but no comments on the other listings in the direct final rule. The other listings in that direct final rule, finding Powdered Aerosol F and Powdered Aerosol G acceptable subject to use conditions as substitutes for halon 1301 for use as a total flooding agent in normally unoccupied areas, will take effect on December 18, 2012. EPA intends to address the adverse comment concerning C7 Fluoroketone in a subsequent final action, which will be based on the parallel proposed rule published on September 19, 2012 (77 FR 58081). As stated in the direct final rule and the parallel proposed rule, we will not institute a second comment period on this action.

Dated: December 5, 2012.

**Gina McCarthy,**

*Assistant Administrator, Office of Air and Radiation.*

Accordingly, the entire entry for "Streaming: C7 Fluoroketone as a

substitute for Halon 1211" in Appendix S to Subpart G of Part 82 in the direct final rule published on September 19, 2012 (77 FR 58035) is withdrawn as of December 14, 2012.

[FR Doc. 2012-29984 Filed 12-13-12; 8:45 am]

**BILLING CODE 6560-50-P**

#### **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

#### **Centers for Medicare & Medicaid Services**

#### **42 CFR Parts 438, 441, and 447**

[CMS-2370-CN]

RIN 0938-AQ63

#### **Medicaid Program; Payments for Services Furnished by Certain Primary Care Physicians and Charges for Vaccine Administration Under the Vaccines for Children Program; Correction**

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule; correction.

**SUMMARY:** This document corrects technical errors that appeared in the final rule published in the November 6, 2012 **Federal Register** entitled "Medicaid Program; Payments for Services Furnished by Certain Primary Care Physicians and Charges for Vaccine Administration under the Vaccines for Children Program."

**DATES:** *Effective Date:* The provisions of this final rule are effective on January 1, 2013.

**FOR FURTHER INFORMATION CONTACT:** Mary Cieslicki, (410) 786-4576, or Linda Tavener, (410) 786-3838, for issues related to payments for primary care physicians.

Mary Beth Hance, (410) 786-4299, for issues related to charges for the administration of pediatric vaccines.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

In FR Doc. 2012-26507 of November 6, 2012 (77 FR 66670), there were a number of technical errors that are identified and corrected in the Correction of Errors section below. The provisions in this correction document are effective as if they had been included in the document published November 6, 2012. Accordingly, the corrections are effective January 1, 2013.

##### **II. Summary of Errors**

In the November 6, 2012 final rule (77 FR 66670), we inadvertently published