List of Subjects in 40 CFR Part 52

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

Dated: February 24, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ 40 CFR part 52 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 SS—Texas

■ 2. The table in § 52.2270(c) entitled "EPA Approved Regulations in the Texas SIP" is amended by revising the entry for Section 116.114 under Chapter 116—Control of Air Pollution by Permits for New Construction or Modification, Subchapter B—New Source Review Permits, Division 1—Permit Application, to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/Subject	State approval/ submittal date	EPA approval date	Explanation
*	*	*	*	* * *
Chapter 116—Control of Air Pollution by Permits for New Construction or Modification				
*	*	*	*	* * *
Subchapter B—New Source Review Permits Division 1—Permit Application				
*	*	*	*	* * *
Section 116.114	Application Review Schedule.	12/19/07	03/08/10 [Insert *FR* page number where document begins].	Subsections (a), (a)(1), (a)(2), (b), and (b)(1) in the SIP are as adopted 6/17/98 and approved by EPA 9/18/02, 67 FR 58697. Subsection (b)(2) and subsections (a)(3) and (a)(4) are as adopted 8/20/03 and 12/19/07, respectively, and approved by EPA on 03/08/10 [Insert *FR* page number where document begins].
*	*	*	*	* * *

[FR Doc. 2010–4833 Filed 3–5–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0693; FRL–9108–4]

Approval and Promulgation of Implementation Plans: 1-Hour Ozone Extreme Area Plan for San Joaquin Valley, CA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving state implementation plan (SIP) revisions submitted by the State of California to meet the Clean Air Act (CAA) requirements applicable to the San Joaquin Valley, California extreme 1-hour ozone standard nonattainment area (SJV area). EPA is approving the SIP revisions for the SJV area as meeting applicable CAA and EPA regulatory requirements for the attainment and rate-of-progress demonstrations and their related contingency measures, reasonably available control measures, and other control requirements. In addition, EPA is approving the SJV Air Pollution Control District's Rule 9310, "School Bus Fleets."

DATES: *Effective Date:* This rule is effective on April 7, 2010.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2008–0693 for this action. The index to the docket is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Frances Wicher, EPA Region IX, (415) 942–3957, *wicher.frances@epa.gov.*

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

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I. Summary of Proposed Actions

On July 14, 2009 at 74 FR 33933, EPA proposed to approve in part and disapprove in part the state implementation plan (SIP) revisions

submitted to EPA by the State of California. California made these submittals to meet the Clean Air Act (CAA) requirements applicable to the San Joaquin Valley, California ozone nonattainment area (SJV area). The SJV area became subject to these requirements following its 2004 reclassification to extreme for the 1-hour ozone national ambient air quality standard (1-hour ozone standard). 69 FR 20550 (April 15, 2004). Although we established a new 8-hour ozone standard in 1997 [1] and subsequently revoked the 1-hour ozone standard in 2005, the SJV area continues to remain subject to certain CAA requirements for the 1-hour standard through the anti-backsliding provisions in EPA's rule implementing the 8-hour ozone standard. *See* 40 CFR 51.905(a)(1)(i) and 900(f).

The SIP submittals that are the subject of our July 14, 2009 proposal are, first, the "Extreme Ozone Attainment Demonstration Plan" (2004 SIP) adopted by the San Joaquin Valley Air Pollution Control District (SJVAPCD or the District) in 2004 and amended in 2005. The 2004 SIP addresses CAA requirements for extreme 1-hour ozone areas including reasonably available control measures (RACM), rate-of-progress (ROP) and attainment demonstrations, and contingency measures.

The second SIP submittal is "Clarifications Regarding the 2004 Extreme Ozone Attainment Demonstration Plan" (2008 Clarifications) adopted by the SJVAPCD in 2008. The 2008 Clarifications provide updates to the 2004 SIP related to reasonably available control technology (RACT) measures adopted by the SJVAPCD, the ROP demonstrations, and contingency measures.

The third SIP submittal addressed in our proposal is the "2003 State and Federal Strategy for the California State Implementation Plan," (2003 State Strategy) adopted by the California Air Resources Board (ARB) in October, 2003. This strategy document, as modified by ARB's resolution adopting it, identifies ARB's regulatory agenda to reduce ozone and particulate matter in California, including specific commitments to reduce emissions in the SJV area. The 2004 SIP relies in part on the 2003 State Strategy for the reductions needed to demonstrate attainment and ROP for the 1-hour ozone standard in the SJV area.

[1] *See* 62 FR 38856 (July 18, 1997). In 2008 we lowered the 8-hour ozone standard to 0.075 ppm. *See* 73 FR 16436 (March 27, 2008). The references in this final rule to the 8-hour standard are to the 1997 standard as codified at 40 CFR 50.10.

We refer to these three submittals collectively as the 2004 SJV 1-hour ozone plan or 2004 1-hour ozone plan.

EPA proposed to approve 2004 SJV 1-hour ozone plan as meeting the applicable CAA and EPA requirements for an attainment demonstration,[2] ROP demonstrations, ROP contingency measures, RACM, clean fuel/clean technology for boilers, and the provision for transportation control measures sufficient to offset any growth in emissions from growth in VMT or the number of vehicle trips. We also proposed to approve a commitment by ARB to reduce volatile organic compounds (VOC) emissions in the SJV by 15 tons per day (tpd) and nitrogen oxides (NO_X) by 20 tpd and to approve SJVAPCD's Rule 9310, School Bus Fleets.

In the same action, we proposed to disapprove, as failing to meet the requirements of section 172(c)(9), the contingency measures in the 2004 SIP and the 2008 Clarifications that would take effect if the area failed to attain the 1-hour ozone standard by the applicable attainment date because the State had not demonstrated that its contingency measures provided sufficient emission reductions to meet EPA guidance.

On August 28, 2009, ARB provided additional information showing that existing, creditable measures provided a sufficient level of emission reduction needed for attainment contingency measures. Based on this additional information, on October 2, 2009, we proposed to approve the attainment contingency measures and withdraw our proposed disapproval at 74 FR 50936.

A more detailed discussion of each of the California's SIP submittals for the SJV area, the CAA and EPA requirements applicable to them, and our evaluation and proposed actions on them can be found in the July 14, 2009 and October 2, 2009 proposals.

II. Summary of Public Comments Received on the Proposals and EPA Responses

We received eight comment letters, listed below, in response to our July 14, 2009 proposal and October 2, 2009 supplemental proposal. Several of these letters were submitted in conjunction with separate EPA proposed actions on individual SJVAPCD rules. We respond to the comments in these letters in this final rule and TSD insofar as they are relevant to this action and respond to the remainder in our final rules for the individual rule actions.

[2] The proposed approval of the attainment demonstration was predicated in part on emission reductions from a number of State and District rules that we had proposed to approve in separate actions. We have now completed SIP approval of all these rules. *See* Table 1 at the end of this preamble.

We received four comment letters from the Center on Race, Poverty & the Environment representing various organizations. We refer to these comments collectively as from CRPE or the Center throughout this final rule and TSD:

1. Brent Newell, CRPE, August 31, 2009, on the behalf of 14 San Joaquin Valley environmental and community organizations and the Natural Resource Defense Council.

2. Johannes Epke, CRPE, August 31, 2009, on behalf of the Center and 12 San Joaquin Valley environmental and community organizations. This comment letter was in conjunction with our proposed limited approval/limited disapproval of SJVAPCD's Rule 4570, Confined Animal Facilities at 74 FR 33948 (July 14, 2009).

3. Johannes Epke, CRPE, August 31, 2009, on behalf of the Center and 11 San Joaquin Valley environmental and community organizations. This comment letter was in conjunction with our proposed approval of ARB's reformulated gasoline and diesel fuel regulations at 74 FR 38838 (July 27, 2009).

4. Brent Newell, Center on Race, Poverty & the Environment, November 2, 2009, on the behalf of 14 San Joaquin Valley environmental and community organizations and the Natural Resource Defense Council.

We received two comment letters from Earthjustice representing various organizations. We refer to these comments collectively as from Earthjustice throughout this final rule and TSD:

5. Paul Cort and Sarah Jackson, Earthjustice, August 31, 2009, on behalf of Medical Advocates for Healthy Air, Fresno Metro Ministries, and the Coalition for Clean Air (collectively, Earthjustice).

6. Paul Cort and Sarah Jackson, Earthjustice, November 2, 2009, on behalf of Fresno Metro Ministries.

7. Seyed Sadredin, SJVAPCD, August 27, 2009.

8. James N. Goldstene, Executive Officer, ARB, August 28, 2009.

We summarize our responses to the most significant comments in this final rule. Our full responses to all comments received can be found in the "Response to Comments" section of the Technical

Support Document (TSD) for this rulemaking.[3]

A. Emissions Inventory

Comment: Earthjustice comments on the importance of emission inventories, noting that CAA section 172(c)(3) requires that nonattainment plans "shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area." It also comments that ARB submitted to EPA new emissions inventories for ozone precursors in the San Joaquin Valley as part of the 2007 Ozone Plan[4] for the 8-hour ozone standard and that these updated inventories are "significantly different" than the inventories in the 2004 SIP as a result of being based on the State's revised on-road mobile source model, EMFAC. It then argues that the improvements to EMFAC, and therefore, to the SJV emissions inventory overall, make the 2007 Ozone Plan inventory the most comprehensive, accurate, current inventory of actual emissions from all sources affecting the Valley's air quality. It concludes that EPA cannot approve the 2004 SIP based on inventories that are no longer current or accurate.

Response: EPA does not dispute the importance of emission inventories. We evaluated the emission inventories in the 2004 SIP to determine if they are consistent with EPA guidance (General Preamble at 13502[5]) and adequate to support that plan's rate-of-progress (ROP) and attainment demonstrations. We determined that the plan's 2000 base year emission inventory was comprehensive, accurate, and current at the time it was submitted on November 15, 2004 and that this inventory, as well as the 2008 and 2010 projected inventories used in the ROP and attainment demonstrations, were prepared in a manner consistent with EPA guidance. Accordingly, we proposed to find that these inventories provide an appropriate basis for the ROP and attainment demonstrations in the 2004 SIP. See 74 FR at 33940.

ARB used its mobile source emissions model EMFAC2002 to generate the on-road mobile source inventory in the 2004 SJV 1-hour ozone plan. ARB released EMFAC2002 in October 2002 and EPA approved it for use in SIPs and conformity determinations on April 1, 2003 (62 FR 15720). At the time the 2004 SIP was being developed (2003–2004) and when it was subsequently adopted by SJVAPCD and submitted by ARB to EPA, EMFAC2002 was the most current mobile source model available for inventory purposes. 74 FR at 33940.

It has been EPA's consistent policy that States must use the most current mobile source model available at the time it is developing its SIP. *See* General Preamble at 13503 (requiring the use of MOBILE4.1[6] for November, 1992 submittal of base year inventories); Office of Mobile Sources, EPA, "Procedures for Emissions Inventory Preparation, Volume IV: Mobile Source," June, 1992, page 5 (allowing states to use MOBILE4.1 for the base year inventories due November 1992, but requiring MOBILE5, then scheduled for release in December 1992, for the ROP and attainment demonstrations due November 1993); *Memorandum,* Philip A. Lorang, Director, Assessment and Modeling Division, Office of Mobile Sources, "Release of MOBILE5a Emission Factor Model," March 29, 1993 (allowing the use of MOBILE5 in updated base year inventories but requiring the use of MOBILE5a, released March 1993, for the ROP and attainment demonstrations due November 1993); and *Memorandum,* John Seitz, Office of Air Quality Planning and Standards (OAQPS) and Margo Oge, Office of Transportation and Air Quality, "Policy Guidance on the Use of MOBILE6 for SIP Development and Transportation Conformity," January 18, 2002 (Seitz Memo).[7]

The Seitz Memo specifically addresses the issue of how the release of the new model, MOBILE6, would affect SIPs that were already submitted and/or approved or SIPs that were then under development. Citing CAA section 172(c)(3) and 40 CFR 51.112(a)(1), EPA stated in the Seitz Memo that, "while [i]n general, EPA believes that MOBILE6 should be used in SIP development as expeditiously as possible * * * [t]he Clean Air Act requires that SIP inventories and control measures be based on the most current information and applicable models that are available when a SIP is developed. As a result, the release of MOBILE6 in most areas would not require a SIP revision based on the new model." The Seitz Memo further states that:

> EPA believes that the Clean Air Act would not require states that have already submitted SIPs or will submit SIPs shortly after MOBILE6's release to revise these SIPs simply because a new motor vehicle emissions model is now available. EPA believes that this is supported by existing EPA policies and case law [*Delaney* v. *EPA,* 898 F.2d 687 (9th Cir. 1990)] * * *. EPA does not believe that the State's use of MOBILE5 should be an obstacle to EPA approval for reasonable further progress, attainment, or maintenance SIPs that have been or will soon be submitted based on MOBILE5, assuming that such SIPs are otherwise approvable and significant SIP work has already occurred (e.g., attainment modeling for an attainment SIP has already been completed with MOBILE5). It would be unreasonable to require the States to revise these SIPs with MOBILE6 since significant work has already occurred, and EPA intends to act on these SIPs in a timely manner.

EPA has also consistently applied this policy in approving SIPs. *See,* for example, 67 FR 30574, 30582 (May 7, 2002), approval of 1-hour ozone standard attainment demonstration for Atlanta, Georgia and 68 FR 19106, 19118 and 19120 (April 17, 2003), approval of the Washington, DC area's severe area 1-hour attainment demonstration. The latter action was upheld in *Sierra Club* v. *EPA,* 356 F.3d 296 (DC Cir. 2004). In *Sierra Club* at 308, the court cites the Seitz Memo and concludes that "[t]o require states to revise completed plans every time a new model is announced would lead to significant costs and potentially endless delays in the approval processes. EPA's decision to reject that course, and to accept the use of MOBILE5 in this case, was neither arbitrary nor capricious."

Comment: Earthjustice comments that an outdated inventory adversely affects the 2004 1-hour ozone plan's rate of progress (ROP) and attainment demonstrations and its demonstration related to offsetting growth in emissions from growth in vehicle miles traveled (as required by CAA section 182(d)(1)(A)) as well as results in the underestimation of the emission reductions needed to satisfy the contingency measure requirement. Earthjustice argues that EPA must reevaluate whether the 2004 SIP satisfies these CAA requirements based on the revised inventories.

Response: As discussed above, EPA's long-established and consistent policy does not require states to revise their already-submitted SIPs when a new mobile source emission model is released. This policy also means that

[3] "Final Technical Support Document for the Approval of the San Joaquin Valley Extreme 1-Hour Ozone Standard Plan and San Joaquin Portion of the 2003 State Strategy," December 11, 2009, U.S. EPA, Region 9. The TSD can be found in the docket for this rulemaking.

[4] SJVAPCD, "2007 Ozone Plan," April 30, 2007.

[5] The General Preamble is the "General Preamble for Implementation of Title I of the Clean Air Act Amendments of 1990." 57 FR 13498 (April 16, 1992).

[6] MOBILE is EPA's model for estimating pollution from highway vehicles in all states except California where EMFAC is used.

[7] In keeping with this policy, ARB and the District used the most current version of EMFAC, EMFAC2007, to prepare the most recent ozone plan for the Valley, the 2007 Ozone Plan. *See* 2007 Ozone Plan at p. B–1. EMFAC2007 was released in November 2006 and approved by EPA for use in SIPs in January 2008. 68 FR 3464, 3467 (January 18, 2008).

EPA will not evaluate these SIPs based on the new model. We note that EMFAC2007 was released in November 2006 and was not approved by EPA until January 2008 two years after the SIP was submitted. 68 FR 3464 (January 18, 2008).

In its comments, Earthjustice consistently attempts to conflate the 2004 1-hour ozone standard and 2007 8-hour ozone standard plans. Following Earthjustice's logic would effectively result in the 1-hour ozone plan being completely revised to become the 8-hour ozone plan. This is because an evaluation of the effect of emissions inventory changes on the plan could not be limited to just those changes resulting from the move to EMFAC2007. All factors, from revised growth projections and changes to other emissions inventory categories to the impact of new controls, would need to be taken into account before we could determine whether the plan is or is not approvable. In other words, an entire new plan would need to be developed. The District and State have already prepared a new plan that addresses the applicable 8-hour ozone standard and that is based on EMFAC2007 as well as other updated information. EPA will evaluate the revised inventories in connection with its action on that plan.

Comment: CRPE comments that because the 2004 SIP includes reductions from California mobile source rules that are subject to CAA section 209 waivers ("waiver measures") that occurred before 2000 as part of the 2000 base year inventory, EPA's proposed action on the inventory violates CAA sections 172(c)(3) and 182(a)(1) because EPA has failed to find that the reductions from the waiver measures have occurred, are enforceable, or are otherwise consistent with the Act, EPA's implementing regulations, and the General Preamble.

Response: We evaluated the emission inventories in the 2004 SIP to determine if they were consistent with EPA guidance (General Preamble at 13502) and adequate to support that plan's ROP and attainment demonstrations. 74 FR at 33940. Based on this evaluation, we proposed to find that the base year inventory (and the projected baseline inventories derived from it) provided an appropriate basis for the ROP and attainment demonstrations in the 2004 SIP. 74 FR 33933, 33940.

We also reviewed the District and State rules that were relied on for emissions reductions in the 2004 SIPs base year and baseline inventories. We determined that all these rules were creditable under the CAA and our policies. See Sections III and IV of the TSD. For the reasons given in the proposal at 33938–33939 and discussed in our responses to comments on waiver measures below, we believe that California's mobile source measures are fully creditable for SIP purposes.

As to emission reductions from waiver measures actually occurring, we assume that sources comply with applicable emission limitations and the agencies responsible for ensuring compliance with them are exercising appropriate oversight, absent information to the contrary. The commenter provides no information indicating either of these is not happening.

B. Reasonably Available Control Measures (RACM) and Reasonably Available Control Technology (RACT)

Comment: Earthjustice asserts that deferring action on the RACT demonstration is illegal and arbitrary. It further asserts that EPA cannot find that the plan as submitted will provide for attainment "as expeditiously as practicable" without first demonstrating that all of the required controls, such as RACT, will be implemented. Finally, Earthjustice comments that EPA cannot treat RACM and RACT as discrete requirements that can be acted on separately because the statute clearly states that RACM includes RACT. It also comments that EPA cannot determine that all reasonable measures are in place in the Valley without first evaluating RACT for all SJV area sources.

Response: We described the RACM analysis in the 2004 1-hour ozone plan in the proposal at 74 FR at 33935. We also discussed the section 182(b)(2) RACT provision in the 2004 SIP, stating that the State had formally withdrawn it and that we had subsequently made a finding of failure to submit the RACT demonstration for the 1-hour ozone standard and initiated sanction and federal implementation plan (FIP) clocks under CAA sections 179(a) and 110(c). *See* 74 FR at 33935 and 74 FR 3442 (January 21, 2009). Finally, we noted that California had recently submitted the District's revised 8-hour ozone standard RACT plan (adopted April 16, 2009) (8-hour RACT SIP), that the plan is intended in part to correct the failure to submit finding for the 1-hour ozone standard RACT requirement as well, and that we are currently reviewing the revised RACT plan for action in a subsequent rulemaking. *See* 74 FR at 33935.

Contrary to the commenter's assertions, we did not defer action under CAA section 110(k) on the RACT demonstration in the 2004 SIP because, as a result of the State's withdrawal of this component of the plan, there was no such demonstration on which the Agency could act. Instead, we took the appropriate action under the CAA which was, as stated above, to make a finding of failure to submit a required plan element which started sanctions and FIP clocks. 74 FR 3442.

For 30 years, EPA has consistently interpreted the Act's RACM provision in section 172(c)(1) to require only those feasible measures necessary for expeditious attainment.[8] Under EPA's interpretation, if an otherwise feasible measure, alone or in combination with other measures, cannot expedite attainment then it is not considered to be reasonably available. Thus, to show that it had implemented RACM, a state needs to show that it considered a wide range of potential measures and found none that were feasible for the area and that would, alone or in combination with other feasible measures, advance attainment. See 1999 RACM Guidance. Based on the form of the 1-hour ozone standard and the Act's specific language on RACM, the appropriate standard for advancing attainment is, at a minimum, one year from the predicted attainment date in the attainment plan.[9]

We have determined that the 2004 SIP contains all reasonably available measures needed for expeditious attainment. While any evaluation of a RACM demonstration needs to consider the potential effect of CAA section 182(b)(2) RACT on expeditious attainment, it does not require that there first be an approved RACT demonstration. For this action, we

[8] We initially stated our interpretation of the RACM requirement in our 1979 nonattainment area plan guidance where we indicated that if a measure which might be available for implementation could not be implemented on a schedule that would advance the date for attainment in the area, we would not consider it reasonably available. *See* 44 FR 20372, 20375 (April 4, 1979). We affirmed this interpretation in the 1992 General Preamble at 13560; in *Memorandum,* John Seitz, Director, OAQPS, "Guidance on the Reasonably Available Control Measure Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas," November 30, 1999 (1999 RACM Guidance); in the 2005 8-hour implementation rule (70 FR 71612, 71659 (November 29, 2005) and § 51.912(d)); and in the 2007 PM2.5 implementation rule (72 FR 20586, 20612 (April 25, 2007) and § 51.1010.

[9] Attainment of the 1-hour standard is based on the average of the most recent three calendar years of data: "The [1-hour ozone] standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million [ ] is equal to or less than 1." 40 CFR 50.9(a). Because of this, attainment of the 1-hour ozone standard can only be advanced by intervals of one full year. Section 172(c)(1) requires RACM sufficient to provide for expeditious attainment; thus, what constitutes RACM for the 1-hour ozone standard must be determined based on what reductions are needed to advance attainment by one year.

evaluated the potential effect of applying RACT to those sources in the SJV area for which we had not already approved a RACT rule. We provide this evaluation in Section V of the TSD. This evaluation shows that there were no outstanding RACT measures that, either individually or in combination with other potential measures, would advance attainment of the 1-hour ozone standard in the SJV area. *See* TSD Section V and 74 FR at 33938.

We agree that SJVAPCD must adopt and implement the specific section 182 control requirements of the Act, but we do not agree that the withdrawal of the RACT demonstration in the 2004 SIP precludes us from approving the plan's RACM and attainment demonstrations when it has been shown that the RACT measures would not contribute to more expeditious attainment.

Comment: Earthjustice argues that EPA's test of whether implementation of additional measures would advance attainment from 2010 to 2009 is arbitrary and "absurd" given that it believes the area will fail to attain by 2010. It further argues that it is "disingenuous for EPA to use this impossible test" to justify the missing RACT analysis and approve the plan as meeting the RACM requirement and EPA should instead require a new plan based on current, accurate information and a new attainment date and then evaluate whether RACM has been met.

Response: We have not used the "advance attainment test" to justify the missing RACT analysis. As stated previously, we took the appropriate statutory course of action for dealing with the withdrawn RACT demonstration: A finding of failure to submit and the starting of sanctions and FIP clocks. 74 FR 3442. We also described the process that we used to determine if the 2004 SJV 1-hour ozone plan provided for the implementation of all RACM needed for expeditious attainment in the proposal at 74 FR 33938. This process included evaluating the potential impact of RACT on source categories for which we have not previously approved a RACT rule. *See* TSD, Section V. We determined that there were no outstanding measures, including potential RACT measures, that could provide for more expeditious attainment of the 1-hour ozone standard in the SJV area.

As we discuss below in the Attainment Demonstration section, we disagree with the commenter that the plan does not demonstrate attainment of the revoked 1-hour ozone standard by the 2010 attainment date.

C. Treatment of Waiver Measures

Comment: Earthjustice and CRPE object to our proposal to grant emissions reduction credit to California's mobile source control measures that have received a waiver of preemption under CAA section 209 without first approving them into the SIP. Both commenters argue that our reliance for this proposal on the general savings clause in CAA section 193 is inappropriate for several reasons.

First, the commenters assert that CAA section 193 only saves those "formal rules, notices, or guidance documents" that are not inconsistent with the CAA. They argue that both the CAA and EPA's long-standing policies and regulations require SIPs to contain the state and local emission limitations and control measures that are necessary for attainment and RFP and to meet other CAA requirements. They assert that our position on the treatment of California's waived measures is inconsistent with this requirement. Earthjustice also argues that only SIP approval provides for the CAA's enforcement oversight (CAA sections 179 and 304) and anti-backsliding (CAA section 110(l) and 193) safeguards.

Second, the commenters argue that we cannot claim that our position was ratified by Congress because section 193 saves only regulations, standards, rules notices, orders and guidance "promulgated or issued" by the Administrator and we have not identified documents promulgated or issued by EPA that establish our position here. Earthjustice further asserts that our interpretation has not been expressed through any affirmative statements and the only statements of relevant statutory interpretations are contrary to our position on California's waived measures.

Third, Earthjustice argues that there is no automatic presumption that Congress is aware of an agency's interpretations and we have not provided any evidence that Congress was aware of our interpretation regarding the SIP treatment of California's mobile source control measures. Similarly, CRPE argues that our positions that Congress must expressly disapprove of EPA's long-standing interpretation and Congressional silence equates to a ratification of EPA's interpretation are incorrect.

Finally, Earthjustice argues EPA's position is inconsistent because we do require other state measures, e.g., the consumer products rules and fuel standards, to be submitted and approved into SIPs before their emission reductions can be credited.

Response: We continue to believe that credit for emissions reductions from implementation of California mobile source rules that are subject to CAA section 209 waivers ("waiver measures") is appropriate notwithstanding the fact that such rules are not approved as part of the California SIP. In our July 14, 2009 proposed rule, we explained why we believe such credit is appropriate. See pages 33938 and 33939 of the proposed rule. Historically, EPA has granted credit for the waiver measures because of special Congressional recognition, in establishing the waiver process in the first place, of the pioneering California motor vehicle control program and because amendments to the CAA (in 1977) expanded the flexibility granted to California in order "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare," (H.R. Rep. No. 294, 95th Congr., 1st Sess. 301–2 (1977)). In allowing California to take credit for the waiver measures notwithstanding the fact that the underlying rules are not part of the California SIP, EPA treated the waiver measures similarly to the Federal motor vehicle control requirements, which EPA has always allowed States to credit in their SIPs without submitting the program as a SIP revision.

EPA's historical practice has been to give SIP credit for waiver measures by allowing California to include motor vehicle emissions estimates made by using California's EMFAC motor vehicle emissions factor model as part of the baseline emissions inventory. EMFAC was also used to prepare baseline inventory projections into the future, and thus the plans typically showed a decrease in motor vehicle emissions due to the gradual replacement of more polluting vehicles with vehicles manufactured to meet newer, more stringent California vehicle standards. The EMFAC model is based on the motor vehicle emissions standards for which California has received waivers from EPA but accounts for vehicle deterioration and many other factors. The motor vehicle emissions estimates themselves combine EMFAC results with vehicle activity estimates, among other considerations. *See* the 1982 Bay Area Air Quality Plan, and the related EPA rulemakings approving the plan (see 48 FR 5074 (February 3, 1983) for the proposed rule and 48 FR 57130 (December 28, 1983) for the final rule) as an example of how the waiver

measures have been treated historically by EPA in California SIP actions.[10]

In our proposed rule, we indicated that we believe that section 193 of the CAA, the general savings clause added by Congress in 1990, effectively ratified our long-standing practice of granting credit for the California waiver rules because Congress did not insert any language into the statute rendering EPA's treatment of California's motor vehicle standards inconsistent with the Act. Rather, Congress extended the California waiver provisions to most types of nonroad vehicles and engines, once again reflecting Congressional intent to provide California with the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare. Requiring the waiver measures to undergo SIP review in addition to the statutory waiver process is not consistent with providing California with the broadest possible discretion as to on-road and nonroad vehicle and engine standards, but rather, would add to the regulatory burden California faces in establishing and modifying such standards, and thus would not be consistent with Congressional intent. In short, we believe that Congress intended California's mobile source rules to undergo only one EPA review process (i.e., the waiver process), not two.

EPA's waiver review and approval process is analogous to the SIP approval process. First, CARB adopts its emissions standards following notice and comment procedures at the state level, and then submits the rules to EPA as part of its waiver request. When EPA receives new waiver requests from CARB, EPA publishes a notice of opportunity for public hearing and comment and then publishes a decision in the **Federal Register** following the public comment period. Once again, in substance, the process is similar to that for SIP approval and supports the argument that one hurdle (the waiver process) is all Congress intended for California standards, not two (waiver process plus SIP approval process). Moreover, just as SIP revisions are not effective until approved by EPA, changes to CARB's rules (for which a waiver has been granted) are not effective until EPA grants a new waiver, unless the changes are "within the scope" of a prior waiver and no new waiver is needed.

Moreover, to maintain a waiver, CARB's rules can be relaxed only to a level of aggregate equivalence to the Federal Motor Vehicle Control Program (FMVCP) [*see* section 209(b)(1)]. In this respect, the FMVCP acts as a partial backstop to California's on-road waiver measures (i.e., absent a waiver, the FMVCP would apply in California). Likewise, Federal nonroad vehicle and engine standards act as a backstop where there is a corresponding California nonroad waiver measure. The constraints of the waiver process thus serve to limit the extent to which CARB can relax the waiver measures for which there are corresponding EPA standards, and thereby serve an anti-backsliding function similar in substance to those established for SIP revisions in CAA sections 110(l) and 193. Meanwhile, the growing convergence between California and EPA mobile source standards diminishes the difference in the emissions reductions reasonably attributed to the two programs and strengthens the role of the Federal program in serving as an effective backstop to the State program. In other words, with the harmonization of EPA mobile source standards with the corresponding State standards, the Federal program is becoming essentially a full backstop to the California program.

In addition, the commenters' concerns over the potential for relaxation by the State of the waiver measures because the underlying regulations are not subject to EPA review and approval as a SIP revision are not a practical concern for this particular plan given that the plan's horizon is very short term (next couple of years), and the on-road and nonroad vehicles that in part will determine whether the area attains the standard are already in operation or in dealer showrooms. There is no practical means for the State to relax the standards of vehicles already manufactured, even if the State wanted to relax the standards.

As to the concerns raised by the commenters on enforceability, we note that CARB has as long a history of enforcement of vehicle/engine emissions standards as EPA, and CARB's enforcement program is equally as rigorous as the corresponding EPA program. The history and rigor of CARB's enforcement program lends assurance to California SIP revisions that rely on the emissions reductions from CARB's rules in the same manner as EPA's mobile source enforcement program lends assurance to other State's SIPs in their reliance on emissions reductions from the FMVCP.

In summary, we disagree that our interpretation of CAA section 193 is fundamentally flawed. EPA has historically given SIP credit for waiver measures in our approval of attainment demonstrations and other planning requirements such as reasonable further progress and contingency measures submitted by California. We continue to believe that section 193 ratifies our long-standing practice of allowing credit for California's waiver measures notwithstanding the fact they are not approved into the SIP, and correctly reflects Congressional intent to provide California with the broadest possible discretion in the development and promulgation of on-road and nonroad vehicle and engine standards.[11]

D. ARB Commitments

Comment: Earthjustice asserts that ARB's commitments to reduce emissions in the SJV area by 15 tpd VOC and 20 tpd NO_X by 2010 do not satisfy the first factor in EPA's three-factor test for the approval of enforceable commitments. The commenter argues that the commitments do not meet the first factor, that commitments provide only a limited portion of the needed reductions, for several reasons. The first reason is that the commitment is not for 6.3 percent of the needed NO_X reductions and 11.6 percent of the

[10] EPA's historical practice in allowing California credit for waiver measures notwithstanding the absence of the underlying rules in the SIP is further documented by reference to EPA's review and approval of a May 1979 revision to the California SIP entitled, "Chapter 4, California Air Quality Control Strategies." In our proposed approval of the 1979 revision (44 FR 60758, October 22, 1979), we describe the SIP revision as outlining California's overall control strategy, which the State had divided into "vehicular sources" and "non-vehicular (stationary source) controls." As to the former, the SIP revision discusses vehicular control measures as including "technical control measures" and "transportation control measures." The former refers to the types of measures we refer to herein as waiver measures, as well as fuel content limitations, and a vehicle inspection and maintenance program. The 1979 SIP revision included several appendices, including appendix 4–E, which refers to "ARB vehicle emission controls included in title 13, California Administrative Code, chapter 3 * * *," including the types of vehicle emission standards we refer to herein as waiver measures; however, California did not submit the related portions of the California Administrative Code (CAC) to EPA as part of the 1979 SIP revision submittal. With respect to the CAC, the 1979 SIP revision states: "The following appendices are portions of the California Administrative Code. Persons interested in these appendices should refer directly to the code." Thus, the State was clearly signaling its intention to rely on the California motor vehicle control program but not to submit the underlying rules to EPA as part of the SIP. In 1980, we finalized our approval as proposed. *See* 45 FR 63843 (September 28, 1980).

[11] In this regard, we disagree that we are treating the waiver measures inconsistently with other California control measures, such as consumer products and fuels rules, for the simple reason that, unlike the waiver measures, there is no history of past practice or legislative history supporting treatment of other California measures, such as consumer products rules and fuels rules, in any manner differently than is required as a general rule under CAA section 110(a)(2)(A), i.e., state and local measures that are relied upon for SIP purposes must be approved into the SIP.

needed VOC reductions, the numbers EPA gave in the proposal, but rather 19.2 percent for NO_X (41.1 tpd) and 37.7 percent for VOC (48.7 tpd) because these were the emissions reductions in commitment form at the time the 2004 SIP was submitted. The second reason is that the 11.6 percent commitment level for VOC is not minimal. The final reason is that the commitments now constitute 100 percent of the remaining emission reductions needed. The commenter concludes that these levels are not the limited or minimal role of commitments envisioned in the decision in *BCCA Appeal Group* v. *EPA,* 355 F.3d 817 (5th Cir. 2003).

Response: We did not propose to approve commitments of 41.1 tpd NO_X and 48.7 tpd VOC, rather we proposed to approve and are taking final action to approve commitments of 20 tpd NO_X and 15 tpd VOC. Because the District has adopted and submitted and EPA has approved rules achieving reductions of 21.1 tpd NO_X and 33.3 tpd VOC, the portion of the original commitments relating to those reductions are now obsolete and approving them would serve no purpose.

The State of Texas' enforceable commitment for the Houston/Galveston area, the approval of which was upheld by the 5th Circuit in *BCCA,* represented 6 percent of the reductions needed for attainment in the area. We note that the court in BCCA did not conclude that any amount greater than 6 percent of the reductions needed would be unreasonable. We believe that the 6.3 percent reduction of NO_X and the 11.6 percent reduction of VOC, as stated in our proposal, also fit within the parameters of a "limited" amount of the reductions needed for attainment and nothing in the *BCCA* decision contravenes that.

The commenter's final point merely describes the nature of all emissions reductions commitments submitted in support of an attainment demonstration, i.e., that they are intended to fill the gap between the level of reductions achieved from adopted rules and the level of reductions needed for attainment. In other words, their purpose is to provide 100 percent of the remaining reductions needed for attainment.

Comment: Earthjustice also argues that ARB's commitments to reduce emissions in the SJV area by 15 tpd VOC and 20 tpd NO_X by 2010 do not satisfy EPA's second factor for the approval of enforceable commitments, that the State is capable of meeting its commitment. It first notes that the Goldstene letter [12] shows that rules adopted through 2007 have achieved all of the remaining NO_X reductions needed for attainment and 3.3 tpd of the remaining 15 tpd of needed VOC reductions. The commenter then states, based on its review of the measures listed by EPA in its proposed approval as potential sources of VOC emission reductions (e.g., the pesticide emission limits adopted by the California Department of Pesticide Regulations) and ARB's 2009 rulemaking schedule, that there are no State measures that can be adopted and implemented in time to provide the remaining 11.7 tpd in VOC reductions by 2010.

Response: In the Goldstene letter, ARB submitted a summary of the emissions reductions expected from a number of adopted State rules in the SJV area by 2010. This summary is preliminary and is not intended to be a final statement of ARB's compliance with its emissions reductions commitments. As a preliminary analysis, it cannot be used to determine whether the State has not or will not meet its commitments.

The commenter assumes that the only path now open to the State to fulfill its commitments is the adoption of new measures. We disagree. The list of measures provided by ARB in the Goldstene letter represents a fraction of the rules and programs adopted and implemented by the State. See TSD, Table 9. ARB has not provided, nor has it been required to provide, an evaluation of the effectiveness of its entire control program in reducing emissions in the SJV area. Given that the State has preliminarily demonstrated, based on a limited set of measures, that all NO_X reductions and 90 percent of the VOC reductions needed for attainment of the revoked 1-hour standard in the SJV area have been achieved, we believe it is reasonable to assume that the balance of the reductions can also be achieved by the beginning of the 2010 ozone season.

Comment: Earthjustice argues that ARB's commitments to reduce emissions in the SJV area by 15 tpd VOC and 20 tpd NO_X by 2010 do not satisfy EPA's third and final factor for the approval of enforceable commitments, that the commitment is for a reasonable and appropriate period of time. It asserts that the State has less than a year to adopt and make effective controls to achieve 13.3 tpd VOC by 2010 and it is not reasonable to assume that it will able to achieve these reductions.

Response: ARB's commitments, made in 2004, are to reduce emissions in the SJV area by 20 tpd NO_X and 15 tpd VOC within 6 years, i.e., by 2010. It is not, as the commenter asserts, to reduce VOC emissions by 13.3 tpd between 2009 and 2010. The commenter's argument again rests on the assumption that the only path now open to the State to meet its VOC commitment is to adopt new measures. As we discuss above, we do not believe this assumption is accurate. See also 74 FR at 39940.

Comment: Earthjustice comments that EPA's recitation of its three-factor test to assess whether an enforceable commitment is approvable skips over the initial determination of whether the commitments are in fact enforceable. In this regard, Earthjustice cites *Bayview Hunters Point Community Advocates* v. *Metropolitan Transportation Commission,* 366 F.3d 692 (9th Cir. 2004) and *Citizens for a Better Environment* v. *Metropolitan Transportation Commission,* 746 F.Supp. 746, 701 (N.D. Cal. 1990), [known as CBE II], to support its contention that ARB's commitment is an unenforceable "aspirational goal." In addition, Earthjustice singles out *El Comite Para El Bienestar de Earlimart* v. *Warmerdam,* 539 F.3d 1062 (9th Cir. 2008), stating that in *El Comite* the court explained that because an inventory in a SIP is not a "standard or limitation" as defined by the CAA, it was not an independently enforceable aspect of the SIP. Thus, Earthjustice reasons, in order to be enforceable, not only must a state's commitment to adopt additional measures to attain emission standards be specific and announced in plain language, but any data or rubric that will be used to determine when and how the state will adopt those measures must be enforceable. Earthjustice further claims that EPA's approval here allows for the same unenforceable situation that occurred in Ventura where the State can claim, even erroneously, that changes to the inventory can substitute for its commitment to reduce emissions, and EPA and the public would be powerless to object.

Similarly, CRPE characterizes the 2003 State Strategy's commitments to achieve aggregate emission reductions by the attainment year as "global tonnage" commitments that could be interpreted as goals unenforceable by citizens under Ninth Circuit precedent, citing *Bayview.*

Response: Under CAA section 110(a)(2)(A), SIPs must include enforceable emission limitations and other control measures, means or

[12] Letter, James Goldstene, Executive Officer, ARB, to Laura Yoshii, Acting Regional Administrator, EPA, June 29, 2009 ("Goldstene letter").

techniques necessary to meet the requirements of the Act, as well as timetables for compliance. Similarly, section 172(c)(6) provides that nonattainment area SIPs must include enforceable emission limitations and such other control measures, means or techniques "as may be necessary or appropriate to provide for attainment" of the NAAQS by the applicable attainment date.

Control measures, including commitments in SIPs, are enforced through CAA section 304(a) which provides for citizen suits to be brought against any person who is alleged "to be in violation of * * * an emission standard or limitation* * *." "Emission standard or limitation" is defined in subsection (f) of section 304.[13] As observed in *Conservation Law Foundation, Inc.* v. *James Busey et al.,* 79 F.3d 1250, 1258 (1st Cir. 1996):

> Courts interpreting citizen suit jurisdiction have largely focused on whether the particular standard or requirement plaintiffs sought to enforce was sufficiently specific. Thus, interpreting citizen suit jurisdiction as limited to claims "for violations of specific provisions of the act or specific provisions of an applicable implementation plan," the Second Circuit held that suits can be brought to enforce specific measures, strategies, or commitments designed to ensure compliance with the NAAQS, but not to enforce the NAAQS directly. *See,* e.g., *Wilder,* 854 F.2d at 613–14. Courts have repeatedly applied this test as the linchpin of citizen suit jurisdiction. See, e.g., *Coalition Against Columbus Ctr.* v. *City of New York,* 967 F.2d 764, 769–71 (2d Cir. 1992); *Cate* v. *Transcontinental Gas Pipe Line Corp.,* 904 F. Supp. 526, 530–32 (W.D. Va. 1995); *Citizens for a Better Env't* v. *Deukmejian,* 731 F. Supp. 1448, 1454–59 (N.D. Cal.), modified, 746 F. Supp. 976 (1990).

Thus courts have found that the citizen suit provision cannot be used to enforce the aspirational goal of attaining the NAAQS, but can be used to enforce specific strategies to achieve that goal.

We describe ARB's commitments in the 2004 SIP and the 2003 State Strategy in detail in the proposal (74 FR at 33938). In short, the State commits to achieve 20 tpd NO_X and 15 tpd VOC in the SJV area by the 2010 ozone season. While the State identifies possible control measures that it might adopt to achieve these emission reductions, it does not commit to adopt any specific measures. The language used in the 2004 SIP and the 2003 State Strategy to describe ARB's commitments is consistently mandatory and unequivocal in nature, e.g.:

> ARB *commits to adopt and implement measures to achieve, at a minimum, 15 tpd ROG and 20 tpd NO_X emission reductions* in the San Joaquin Valley Air Basin by the 2010 ozone season. ARB *will adopt measures* to achieve these reductions between 2002–2009. ARB may meet this commitment by adopting one or more of the control measures in Table 4–3, by adopting one or more alternative control measures, or by implementing incentive program(s), *so long as the aggregate emission reduction commitment is achieved.*

(Emphasis added). 2004 SIP at section 4.7.3. *See* also ARB Staff Report at 29; ARB Resolution 04–29 at 5 ("The State's contribution includes * * * a previously approved commitment for 10 tpd new NO_X emissions as part of the Valley 2003 particulate matter SIP, and new commitments for additional reductions of 15 tpd VOC and 10 tpd NO_X from new defined State measures in the Valley in 2010"); and 2003 State Strategy at I–16, Table I–10 ("Total Emission Reduction Commitment from New State Measures" listed in the table as 10 tpd NO_X with action dates 2002–2008). Thus, ARB's commitments are clearly distinguishable from the aspirational goals, i.e., the SIP's overall objectives, identified by the *Bayview* court and cited by the commenter. ARB's commitments here are to adopt and implement measures that will achieve specific reductions of NO_X and VOC emissions. As such, as will be seen below, they are specific strategies designed to achieve the SIP's overall objectives.

Both Earthjustice and CRPE cite *Bayview* as support for their contention that ARB's commitments are unenforceable aspirational goals. *Bayview* does not, however, provide any such support. That case involved a provision of the 1982 Bay Area 1-hour ozone SIP, known as TCM 2, which states in pertinent part:

> Support post-1983 improvements identified in transit operator's 5-year plans, after consultation with the operators adopt ridership increase target for 1983–1987. EMISSION REDUCTION ESTIMATES: These emission reduction estimates are predicated on a 15% ridership increase. The actual target would be determined after consultation with the transit operators.

Following a table listing these estimates, TCM 2 provided that "[r]idership increases would come from productivity improvements * * *."

Ultimately the 15 percent ridership estimate was adopted by the Metropolitan Transportation Commission (MTC), the implementing agency, as the actual target. Plaintiffs subsequently attempted to enforce the 15 percent ridership increase. The court found that the 15 percent ridership increase was an unenforceable estimate or goal. In reaching that conclusion, the court considered multiple factors, including the plain language of TCM 2 (e.g., "[a]greeing to establish a ridership 'target' is simply not the same as promising to attain that target," *Bayview* at 698); the logic of TCM 2, i.e., the drafters of TCM 2 were careful not to characterize any given increase as an obligation because the TCM was contingent on a number of factors beyond MTC's control, *id.* at 699; and the fact that TCM 2 was an extension of TCM 1 that had as an enforceable strategy the improvement of transit services, specifically through productivity improvements in transit operators' five-year plans, *id.* at 701. As a result of all of these factors, the Ninth Circuit found that TCM 2 clearly designated the productivity improvements as the only enforceable strategy. *id.* at 703.

The commitments in the 2004 SIP and 2003 State Strategy are in stark contrast to the ridership target that was deemed unenforceable in *Bayview.* The language in ARB's commitments, as stated multiple times in multiple documents, is specific and unequivocal; the intent of the commitments is clear; and the strategy of adopting measures to achieve the required reductions is completely within ARB's control. Furthermore, as stated previously, ARB identifies specific emission reductions that it will achieve and specifies that this will be done through the adoption and implementation of measures and also specifies the time by which these reductions will be achieved, i.e., the beginning of the 2010 ozone season.

Earthjustice also cites *CBE II* at 701 for the proposition that courts can only enforce "express" or "specific" strategies. However, as discussed below, there is nothing in the CBE cases that supports the commenter's view that ARB commitments are neither express nor specific. In fact, these cases support our interpretation of ARB's commitments.

Citizens for a Better Environment v. *Deukmejian,* 731 F.Supp.1448 (N.D. Cal. 1990), known as CBE I, concerned in part contingency measures for the transportation sector in the 1982 Bay Area 1-hour ozone SIP. The provision states: "If a determination is made that RFP is not being met for the transportation sector, MTC will adopt additional TCMs within 6 months of the determination. These TCMs will be designed to bring the region back within the RFP line." The court found that "[o]n its face, this language is both specific and mandatory." *Id.* at 1458. In *CBE I,* ARB and MTC argued that TCM 2 could not constitute an enforceable strategy because the provision fails to specify exactly what TCMs must be adopted.

[13] EPA can also enforce SIP commitments pursuant to CAA section 113.

The court rejected this argument, finding that "[w]e discern no principled basis, consistent with the Clean Air Act, for disregarding this unequivocal commitment simply because the particulars of the contingency measures are not provided. Thus we hold that that the basic commitment to adopt and implement additional measures, should the identified conditions occur, constitutes a specific strategy, fully enforceable in a citizens action, although the exact contours of those measures are not spelled out." *Id.* at 1457.[14] In concluding that the transportation and stationary source contingency provisions were enforceable, the court stated: "Thus, while this Court is not empowered to enforce the Plan's overall objectives [footnote omitted; attainment of the NAAQS]—or NAAQS—directly, it can and indeed, must, enforce specific strategies committed to in the Plan." *Id.* at 1454.

Earthjustice's reliance on *CBE II* is misplaced. It also involves in part the contingency measures in the 1982 Bay Area Plan. In *CBE II,* defendants argued that RFP and the NAAQS are coincident because, had the plan's projections been accurate, then achieving RFP would have resulted in attainment of the NAAQS. The court rejected this argument, stating that:

> the Court would be enforcing the *contingency plan,* an express strategy for attaining NAAQS. Although enforcement of this strategy might possibly result in attainment, it is distinct from simply ordering that NAAQS be achieved without anchoring that order on any specified strategy. Plainly, the fact that a specified strategy might be successful and lead to attainment does not render that strategy unenforceable.

(Emphasis in original). *CBE II* at 980.

ARB's commitments here are analogous to the terms of the contingency measures in the *CBE* cases. ARB commits to adopt measures, which are not specifically identified, to achieve a specific tonnage of emission reductions. Thus, the commitment to a specific tonnage reduction is comparable to a commitment to achieve RFP. Similarly, a commitment to achieve a specific amount of emission reductions through adoption and implementation of unidentified measures is comparable to the commitments to adopt unspecified TCMs and stationary source measures. The key is that commitment must be clear in terms of what is required, e.g., a specified amount of emission reductions or the achievement of a specified amount of progress (i.e., RFP). ARB's commitments are thus clearly a specific enforceable strategy rather than an unenforceable aspirational goal.

Earthjustice's reliance on *El Comite* is also misplaced. The plaintiffs in the district court attempted to enforce a provision of the 1994 California 1-hour ozone SIP known as the Pesticide Element. The Pesticide Element relied on an inventory of pesticide VOC emissions to provide the basis to determine whether additional regulatory measures would be needed to meet the SIP's pesticides emissions target. To this end, the Pesticide Element provided that "ARB will develop a baseline inventory of estimated 1990 pesticidal VOC emissions based on 1991 pesticide use data * * *." *El Comite Para El Bienestar de Earlimart* v. *Helliker,* 416 F. Supp. 2d 912, 925 (E.D. Cal. 2006). ARB subsequently employed a different methodology which it deemed more accurate to calculate the baseline inventory. The plaintiffs sought to enforce the commitment to use the original methodology, claiming that the calculation of the baseline inventory constitutes an "emission standard or limitation." The district court disagreed:

> By its own terms, the baseline identifies emission sources and then quantifies the amount of emissions attributed to those sources. As defendants argue, once the sources of air pollution are identified, control strategies can then be formulated to control emissions entering the air from those sources. From all the above, I must conclude that the baseline is not an emission "standard" or "limitation" within the meaning of 42 U.S.C. 7604 (f)(1)–(4).

Id. at 928. In its opinion, the court distinguished *Bayview* and *CBE I,* pointing out that in those cases "the measures at issue were designed to reduce emissions." *Id.*

On appeal, the plaintiffs shifted their argument to claim that the baseline inventory and the calculation methodology were necessary elements of the overall enforceable commitment to reduce emissions in nonattainment areas. The Ninth Circuit agreed with the district court's conclusion that the baseline inventory was not an emission standard or limitation and rejected plaintiffs' arguments attempting "to transform the baseline inventory into an enforceable emission standard or limitation by bootstrapping it to the commitment to decide to adopt regulations, if necessary." *Id.* at 1073.

While Earthjustice cites the Ninth Circuit's *El Comite* opinion, its utility in analyzing ARB's commitments here is limited to that court's agreement with the district court's conclusion that neither the baseline nor the methodology qualifies as an independently enforceable aspect of the SIP. Rather, it is the district court's opinion, in distinguishing the commitments in *CBE* and *Bayview,* that provides insight into the situation at issue in our action. As the court recognized, a baseline inventory or the methodology used to calculate it, is not a measure to reduce emissions. It instead "identifies emission sources and then quantifies the amount of emissions attributed to those sources." In contrast, as stated previously, in the 2004 SIP and 2003 State Strategy, ARB commits to adopt and implement measures sufficient to achieve specified emission reductions by a date certain. As described above, a number of courts have found commitments substantially similar to ARB's here to be enforceable under CAA section 304(a).

Finally, EPA is not responding to Earthjustice's comment regarding Ventura because the comment is without sufficient specificity for us to know to what the comment refers. Nevertheless, we note that nothing precludes the State from submitting a SIP revision to alter the commitments approved by EPA, just as the State may choose to submit a revision to any provision of an approved SIP. If the State does so, commenters would have an opportunity to object to such a revision at the State and local levels during the notice-and-hearing processes for SIP adoption and would again have an opportunity to raise concerns during EPA's review process. However, unless and until such time as the State submits and EPA approves a revision to the commitments approved in this action, those commitments remain enforceable.

Comment: Earthjustice states that the 2004 SIP suggests that the State "may meet its commitment by adopting one or more of the control measures in Table 4–3 * * * one or more alternative measures, or * * * incentive programs, so long as the aggregate emission reduction commitment is achieved." 2004 Plan at 4–55. Earthjustice claims that these commitments are so vague that they cannot possibly be enforced against the State; because there is no requirement that the State take any specific actions, its commitments cannot be considered enforceable under Ninth Circuit case law. This is because

[14] In this passage, the court was referring specifically to the stationary source contingency measures in the Bay Area plan which contained a commitment to adopt such measures if emission targets were not met. The Plan identified a number of potential stationary sources but did not commit to any particular one. In discussing the transportation contingency measures, the court applied this same reasoning. *Id.* at 1456–1457.

they are not specific strategies based on emissions standards or limitations.

Response: We disagree. As stated in responses to previous comments, EPA believes that ARB's commitments to adopt and implement control measures to achieve the specified aggregate tonnage by the beginning of the 2010 ozone season are enforceable as an emission standard or limitation under CAA section 304. The fact that the State may meet its SIP obligation by adopting measures that are not specifically identified in the SIP, or through one of several available techniques, does not render the requirement to achieve the aggregate emission reductions unenforceable.

Comment: Earthjustice states CAA sections 110(a) and 172(c)(6) require SIPs to contain "enforceable emission limitations * * * as may be necessary or appropriate" to achieve attainment. Earthjustice further states that, while CAA section 110(k)(4) allows EPA to grant "conditional approval" of a SIP lacking certain statutory elements "based on a commitment of the state to adopt specific enforceable measures" by a date certain, the statute provides that the conditional approval automatically becomes a disapproval if the state fails to comply with the commitment within one year. Earthjustice then claims that EPA here appears to be trying to avoid this limitation by treating open-ended promises of the State to reduce emissions as enforceable commitments even though the State has never specified exactly what it commits to do. Earthjustice states that courts have rejected similar attempts to circumvent the statute's limitations on conditional approvals. To support this contention, Earthjustice cites *Sierra Club* v. *EPA,* 356 F.3d 295, 298 (DC Cir. 2004) as overturning EPA's conditional approval of SIPs based in part on the fact that the commitments identified no specific measures that the state would implement.

Response: As pertinent to the comment, *Sierra Club* involved EPA's conditional approval under section 110(k)(4) of SIPs lacking in their entirety RACM and ROP demonstrations and contingency measures based on letters submitted by states that committed to cure these deficiencies. The court rejected EPA's construction of section 110(k)(4) as contrary to the unambiguous statutory language requiring the state to commit to adopt *specific* enforceable measures. *Sierra Club* at 302. The court found that EPA's construction turned the section 110(k)(4) conditional approval into a means of circumventing SIP deadlines. *Id.* at 303.

EPA does not dispute the holding of *Sierra Club.* However that case is not germane to EPA's approval of ARB's commitments here because the Agency is not approving those commitments under section 110(k)(4). The relevant precedent is instead *BCCA.* The facts in *BCCA* were very similar to those presented here. In *BCCA,* EPA approved an enforceable commitment in the Houston ozone SIP to adopt and implement unspecified NO_x controls on a fixed schedule to achieve aggregate emission reductions. Petitioners claimed that EPA lacked authority under the CAA to approve a SIP containing an enforceable commitment to adopt unspecified control measures in the future. The court disagreed and found that section 110(k)(4) conditional approvals do not supplant EPA's practice of fully approving enforceable commitments:

> Nothing in the CAA speaks directly to enforceable commitments. The CAA does, however, provide EPA with great flexibility in approving SIPs. A SIP may contain "enforceable emission limitations and other control measures, means, or techniques * * * as well as schedules and timetables for compliance, as may be necessary or appropriate" to meet the CAA's requirements * * *. Thus, according to the plain language of the statute, SIPs may contain "means," "techniques" and/or "schedules and timetables for compliance" that the EPA considers "appropriate" for attainment so long as they are "enforceable."" *See Id.* § 7410(a)(2)(A). "Schedules and timetables" is broadly defined as "a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, prohibition or standard." 42 U.S.C. 7602(p). The remaining terms are not defined by the Act. Because the statute is silent on the issue of whether enforceable commitments are appropriate means, techniques, or schedules for attainment, EPA's interpretation allowing limited use of an enforceable commitment in the Houston SIP must be upheld if reasonable.

BCCA at 839–840. The court upheld EPA's approval of the commitment, finding that "EPA reasonably concluded that an enforceable commitment to adopt additional control measures on a fixed schedule was an 'appropriate' means, technique, or schedule or timetable for compliance" under sections 110(a)(2)(A) and 172(c)(6). *Id.* at 841. Thus the court recognized that sections 110(a)(2)(A) and 172(c)(6) provide a basis for EPA to approve enforceable commitments as distinct from the commitments contemplated by section 110(k)(4). See also *Environmental Defense* v. *EPA,* 369 F.3d 193, 209–210 (2nd Cir. 2004). As a result, contrary to Earthjustice's contention, section 110(k)(4) is not a bar to EPA's approval of ARB's enforceable commitments and that approval under section 110(k)(3) is permissible as an appropriate means, technique or schedule or timetable for compliance under sections 110(a)(2)(A) and 172(c)(6).

Comment: CRPE contends that the State's aggregate tonnage commitment is unenforceable as a practical matter. CRPE then states that enforcement of such a global commitment to adopt unidentified measures (e.g., State Strategy at II–A–13, 15, 16 and II–B–15, 23) to be implemented in the Valley by 2010 is extremely difficult given the open-ended commitment to adopt unspecified strategies. CRPE states that citizens cannot enforce vague control measures that do not commit ARB to any particular regulations by 2008 and citizens are left with enforcing the global tonnage amounts after 2010.

Response: CRPE does not explain why it believes that ARB's commitments are unenforceable. CRPE implies that it would be easier and/or more convenient for citizens to enforce a different type of commitment. Even assuming CRPE is correct, this does not equate to unenforceablity. Moreover, as seen above, the commitment in TCM 2, which the court found to be enforceable in *Bayview,* is directly analogous to ARB's commitments in the 2004 SIP and 2003 State Strategy. Thus, we do not agree that the commitments are unenforceable.

Comment: CRPE claims that all of the commitments in the 2003 State Strategy are unenforceable because they include promises by ARB staff to bring an unidentified measure to the ARB Board (State Strategy at II–A–13, 15, 16 and II–B–15, 23) and there is no commitment by the Board itself to adopt a particular strategy to achieve specific reductions by a specific implementation date. CRPE believes that the act of proposing a strategy to the Board is not a commitment to adopt a strategy and, citing 74 FR at 33938, that EPA recognizes this fundamental defect.

Response: The enforceable commitments in the 2004 SIP and the 2003 Strategy at issue here, as described above and in the proposal at 33938, do not refer to action by ARB staff to take certain measures to the Board. Rather, as described in detail above, the enforceable commitments at issue refer to "ARB" and/or "the State" and require it to adopt and implement measures to achieve specific reductions in NO_X and VOC emissions by the beginning of the 2010 ozone season. By adopting both the 2004 Plan and 2003 State Strategy, the Board endorsed the content of these

documents and committed the Board to take the actions mandated in them.

Comment: Earthjustice claims that the 2004 Plan simply states that ARB "estimates" that measures in the 2003 State Strategy will achieve 15 tpd VOC and 20 tpd NO_X reductions, noting that the Strategy was adopted before the Plan and therefore doesn't mention the quantitative commitments (State Strategy at ES–12, 1–7 through 1–9, 1–23 through 1–26). Earthjustice concludes that this estimate was clearly wrong, as the State admits it is coming up short.

Response: The 2004 Plan at section 4.7.1 states that "ARB staff estimates that the near-term measures in the Statewide Strategy will provide 15 tpd ROG and 20 tpd NO_X in the San Joaquin Valley in 2010." The near-term measures in the 2003 State Strategy are reproduced as Table 4–3 in the 2004 Plan. Because the State's enforceable commitments are to achieve, independent of any estimates in the plan, aggregate emission reductions from one or more of the control measures in Table 4–3, by adopting one or more alternative control measures, or by implementing incentive programs, it was not necessary for the State to quantify the measures in Table 4–3.

To the extent that Earthjustice in this comment intends to argue that the 5 tpd VOC and 20 tpd NO_X in ARB's commitments are merely estimates and therefore do not constitute enforceable obligations, we disagree for the reasons stated in our responses to comments above.

E. Rate of Progress Demonstration

Comment: Earthjustice asserts that the method used in the 2004 SIP to demonstrate ROP is not allowed by CAA section 182(c)(2)(B) because the plan allows for the averaging of reductions over more than 3 years while the CAA allows averaging over 3-year periods only. It also argues that the State's demonstration relies on carrying forward excess emissions reductions from previous milestone years and that this is also inconsistent with the CAA because it again allows emissions reductions to be averaged over longer periods than the 3-year period expressly allowed. Finally, Earthjustice claims that without carrying forward the excess emissions reductions from previous milestones, it does not appear that the District has continued to make the required reasonable further progress in reducing VOC emissions.

Response: The post-1996 ROP requirement in CAA section 182(c)(2)(B), while simple in concept, is among the most complex of the Act's nonattainment area plan requirements to apply in practice. *See,* for example, the General Preamble's discussion at 13516 on how to calculate a post-1996 ROP target. To respond to these comments, several points need to be understood about the ROP demonstration requirement:

1. A state demonstrates that it meets the required ROP by showing that total emissions in its area will be at or below a target level of emissions for a specified year.[15] This target level of emissions, referred to as the ROP milestone, is calculated for each of the area's milestone dates (e.g., 1996, 1999, 2002, etc.) according to CAA requirements and the procedures in the General Preamble. Each successive milestone reflects the accumulated ROP from the preceding milestone periods (e.g., 1990–1996, 1997–1999, etc.). States often convert this target level of emissions into the emissions reductions needed to show ROP by subtracting it from its baseline inventory for that milestone year.

Plotted on a graph where the x-axis is the milestone years between 1990 and an area's attainment date and the y-axis is the milestone target level, the ROP milestones would produce a slightly concave downward line. This line establishes the maximum level of allowable emissions for the area to meet the ROP requirement. The CAA's "averaged over three years" requirement means that the total emissions level in the area can rise above the line during that 3-year period between milestone dates provided it is below the line by the milestone date. An example of an ROP graph can be found at 66 FR 42480, 42843 (August 13, 2001), proposed approval of New York's 2002, 2005, and 2007 ROP plans.

EPA has consistently treated ROP milestones as target levels of emissions. *See* for example, 61 FR 10921 (March 18, 1996), proposed approval of California's ROP and attainment plans for 7 nonattainment areas; 62 FR 37175, 37177 (July 11, 1997), proposed approval of Texas's 15 percent ROP plans for Dallas, El Paso and Houston; 65 FR 11525, 11530 (March 3, 2000), proposed approval of Illinois' post-1996 ROP plan for Chicago; and 70 FR 2085, 2088 (January 12, 2005), proposed approval of the Washington, DC area's post-96 and post-99 ROP plans. Thus, understood as an emissions level target, it is clear that so long as a state can demonstrate that total emissions levels in its area are below each ROP milestone, it does not need to show an actual 9 percent emission reduction in each 3-year period. Therefore, the comment that the manner in which California demonstrated ROP is not in compliance with the Act is unfounded.

2. The commenter is incorrect that the CAA forbids carrying forward of excess emissions reductions. In fact, section 182(c)(2)(C) specifically provides that emission reductions beyond the 15 percent required under section 182(b)(1) for the period 1990–1996 are creditable toward the ROP requirement in section 182(c)(2): "The reductions creditable for the period beginning 6 years after November 15, 1996 *shall* include reductions that occurred before such period, computed in accordance with [section 182(b)(1)], that exceed the 15 percent amount of reductions required under [section 182 subsection (b)(1)]). (Emphasis added.) While this sentence refers explicitly only to carrying forward excess reductions into the 1997–1999 period, we do not believe that Congress intended to prohibit carrying forward of excess emissions reductions into other ROP periods. Congress was interested in both expediting emissions reductions and reducing the costs of air pollution controls. The first would be served by rewarding States for early implementation by allowing the carryover of credit and the latter by not ignoring otherwise creditable emissions reductions that had already occurred. *See Ass'n of Irritated Residents* v. *EPA,* 423 F.3d 989, 996 (In the context of allowing credit for past emission reductions under CAA section 189(d) for PM–10 plans: "[b]y allowing such crediting, the EPA provides a material incentive for implementing the most effective measures as quickly as possible.").

3. States are allowed to substitute NO_X reductions for VOC reductions in any post-1996 ROP demonstration (*see* CAA section 182(c)(2)(C)) and may use NO_X reductions exclusively for post-1996 ROP demonstrations. *See* 70 FR 25688, 25697 (May 13, 2005); approval of the Washington, DC area's 1-hour ozone attainment demonstration; and 68 FR 7476, 7486 (February 14, 2003), approval of Rhode Island's 1-hour ozone attainment demonstration. SJV has an approved 15 percent ROP demonstration and thus has already met its minimum VOC ROP obligation. See 62 FR at 1172. It may, therefore, rely exclusively on NO_X reductions to meet its 2008 and 2010 ROP requirements

[15] From the General Preamble at 13508: "Once the 1996 target level of emissions is calculated, States must develop whatever control strategies are needed to meet that target. * * * The assessment of whether an area has met the RFP requirement in 1996 will be based on whether the area is at or below the 1996 target level of emissions and not whether the area has achieved a certain actual reduction relative to having maintained the current control strategy."

and the commenter's contention that the District has not met its required VOC ROP requirement is baseless.

Comment: CRPE argues that the CAA requires that states only take credit for reductions from SIP-approved measures in ROP demonstrations, citing CAA section 182(b)(1)(D). CRPE also argues that EPA's longstanding interpretation of the ROP provision also limits credit to SIP-approved measures, citing our proposed approval of the ROP demonstration in the 1999 amendment to the 1997 1-hour ozone standard plan for the South Coast Air Basin (SCAB) (65 FR 6091, 6098 (February 8, 2000)) which cites the General Preamble at 13517.

Response: CAA section 182(b)(1)(C) does not limit emissions reductions creditable in ROP demonstrations to just those reductions from SIP-approved rules, it also allows credit from rules promulgated by the Administrator (e.g., FMVCP), and CAA title V federal operating permits. Neither federal measures nor title V permits are in the SIP.

EPA has approved numerous ROP demonstrations that rely on reductions from Federal measures. See, for example, 61 FR 11735 (March 22, 1996), approval of Wisconsin's 15 percent ROP plan and contingency measures; 66 FR 586 (January 3, 2001) approval of the Washington, DC area's attainment and post-96 ROP plans; and 66 FR 54143 (October 26, 2001), approval of Pennsylvania's post-96 ROP plan for the Philadelphia area. As discussed in the proposal, we have historically treated California's waiver measures similarly to the Federal motor vehicle control requirements. 74 FR at 33939.

In the February 2000 proposed rule cited by the commenter, EPA proposed to approve the ROP demonstration for the SCAB. This demonstration relied explicitly on reductions from SIP-approved District rules and SIP-approved commitments from the District and State; therefore, we limited our description of the ROP requirement to those ROP provisions that were applicable to our action. By doing so, we did not rewrite the Act or the General Preamble to limit creditable reductions in ROP demonstrations to SIP-approved measures only. We note that although the ROP demonstration in the South Coast plan relied explicitly only on reductions from SIP-approved rules and commitments, it relied implicitly on ARB's adopted and implemented mobile source program, reductions from which are incorporated into the South Coast plan's baseline inventory, to generate the majority of emissions reductions needed for ROP.

F. Attainment Demonstration

Comment: Earthjustice comments that SJV will not attain the 1-hour ozone standard by 2010 because there have been too many exceedances of the standard in 2008 and 2009 and that these exceedances show that the attainment demonstration is not working and is not approvable. It also comments that EPA has made clear that attainment by the deadline requires that the three years leading up to that deadline must be clean. In support of its position, the commenter cites EPA's PM2.5 implementation rule at 40 CFR § 51.1000; the preamble to the $PM_{2.5}$ implementation rule at 72 FR 20586, 20600 (April 25, 2007); and EPA's "Response to Comments Document, Finalizing Approval of the PM–10 State Implementation Plan for the Clark County Serious PM–10 Nonattainment Area Annual and 24-Hour PM–10 Standards" at page 41 (April 23, 2004).

Response: Consistent with the CAA and EPA regulations and policy, the 2004 SJV 1-hour ozone plan demonstrates that the emissions reductions needed to prevent future violations of the 1-hour ozone standard would be in place by the beginning of the 2010 ozone season rather than by the beginning of the 2008 ozone season. See 2004 SIP, p. 5–5.

The three cites in the commenter's letter are all to descriptions of attainment *determinations.* The determination of attainment required by CAA section 181(b)(2), which is made by reviewing ambient air quality monitoring data after the attainment date, is distinctly different from the demonstration of attainment required by CAA section 182(c)(2), which is based on projections of future air quality levels and submitted before the attainment date. For the 1-hour ozone standard, an attainment determination is based on monitored air quality levels in the three years preceding the attainment date. General Preamble at 13506. In acting on the 2004 SJV 1-hour ozone plan under CAA section 110(k), we are not making an attainment determination.

An attainment demonstration is based on air quality modeling showing that projected emissions in the attainment year will be at or below the level needed to prevent violations of the relevant ambient air quality standard. For ozone, the attainment year is defined as the calendar year that includes the last full ozone season prior to the statutory attainment date. 40 CFR 51.900(g). More simply, ozone attainment demonstrations show that the air quality will be at or below the level of the standard no later than the beginning of the ozone season immediately prior to the attainment date. EPA has never interpreted the Act to require that the demonstration show that air quality levels will be at or below the level of the standard for each of the three ozone seasons prior to the attainment date.

Following this interpretation, the 2004 SIP does not demonstrate that there would be no violations of the revoked 1-hour ozone standard in 2008 or 2009. Rather it demonstrates that clean air would *begin* with the 2010 ozone season. Because we are still months away from the start of the 2010 ozone season and air quality trends show decreasing number of days over the standard, we believe it is premature to say the 2004 1-hour ozone plan will not result in attainment by the SJV area's ultimate applicable attainment date.

Our policy on attainment demonstrations is consistent with the ozone attainment provisions in subpart 2 of title 1, part D of the CAA. The program Congress crafted here for ozone attainment does not require that all measures needed to attain the standard be implemented three years prior to the area's attainment date. For example, moderate areas were required by section 182(b)(1) to provide for VOC emissions reductions of 15 percent reduction by November 15, 1996 which was also the attainment date for these areas. For areas classified serious and above, CAA section 182(c)(2)(B) requires that ROP of 3 percent per year averaged over 3 years "until the attainment date" (a total of 9 percent reduction in emissions in the 3 years leading up to an area's attainment date). EPA does not believe that Congress intended these mandatory reductions to be in excess of what is needed to attain.

This position is also consistent with the attainment date extension provisions in CAA section 181(a)(5). Under this section, an area that does not have three-years of data meeting the ozone standard by its attainment date but has complied with all requirements and commitments pertaining to the area in the applicable implementation plan and has no more than one exceedance of the standard in the attainment year, may receive a one-year extension of its attainment date. Assuming these conditions are again met the following year, the area may receive an additional one-year extension. If the area has no more than one exceedance in this final extension year, then it will have three years of data indicating that it has attained the ozone standard.

EPA has consistently taken this position in guidance and in our

approval of 1-hour ozone attainment demonstrations. Our ozone modeling guidance, which was issued less than a year after the 1990 Amendments were enacted, requires States to model the ozone season before the attainment date and not the third ozone season before the attainment date. *See* Chapter 6 "Attainment Demonstrations," *Guideline for Regulatory Application of the Urban Air Shed Model* (July 1991, OAQPS, EPA).

The ozone attainment demonstrations that EPA has approved since the CAA Amendments of 1990 have been based on this modeling guidance and demonstrate attainment only for the attainment year. *See*, for example, 61 FR 10921 (March 18, 1996) and 62 FR 1150 (January 8, 1997), proposed and final approval of California's attainment plans for 7 nonattainment areas; 66 FR 54143 (October 25, 2001), approval of Pennsylvania's 1-hour ozone attainment plan for the Philadelphia area; and 67 FR 30574 (May 7, 2002), approval of Georgia's 1-hour ozone attainment plan for Atlanta.

G. Contingency Measures

Comment: Earthjustice states that the purpose of contingency measures following an area's failure to attain is to provide extra emissions reductions that are needed to attain. It then asserts that EPA's approach of allowing areas to credit emissions reductions from measures that are already in place that are not needed for attainment is arbitrary and illegal because, if the area does fail to attain, the reductions from these measures are not surplus and more are needed. It argues further that EPA's policy allows plans to be approved without the "safety net that Congress envisioned," so that when the SJV area fails to attain in 2010 there is nothing in the plan that can take immediate effect without further action by the State or the District to address such a failure.

Response: We did not propose to credit "extra" or "surplus" reductions in the attainment demonstration as contingency measures in our proposed approval of the attainment contingency provisions in the 2004 SJV 1-hour ozone plan.[16] In our July 14, 2009 proposal and again in our October 2, 2009 supplementary proposal, we made it clear that there were no excess emissions reductions from adopted measures in the attainment demonstration. *See* 74 FR at 33944 and 74 FR 50936, 50937. Nevertheless, the commenter seems to believe that the reductions the State credits as its attainment contingency measures will already be in place by the SJV area's attainment year, 2010, and thus will already be contributing to reduced ozone levels in that year. This is not the case here.

The measures relied on for attainment contingency measures in the 2004 SJV 1-hour ozone plan are existing State and federal on- and off-road new engine standards.[17] Emissions reductions from these types of measures accumulate as the engine fleet turns over, resulting in increasing benefits over time. All of the reductions from these measures that are used by the State to show compliance with the attainment contingency measures requirement occur in 2011, the year after the SJV area's attainment date. It is this additional benefit, i.e., an additional 15.7 tpd NO_X and 8.6 tpd VOC in reductions beyond the reductions from these measures in 2010, to be realized in the SJV area in 2011, that the State uses to meet the contingency measures requirement. 74 FR 50936, 50938 (Table 1). Thus these reductions will not be reflected in 2010 ambient air quality levels but will provide air quality benefits in 2011. In this respect, the emission reductions from the State and federal on- and off-road new engine standards that serve as contingency measures in the SJV area are virtually identical in operation to the type of contingency measure that the commenter appears to advocate, e.g., a control measure adopted by the State or District that would remain unimplemented, and thus yielding no emission reductions until triggered by a failure of the area to attain the standard.

In *LEAN* v. *EPA*, 382 F.3d 575 (5th Cir. 2004), the court upheld EPA's approval of contingency measures that relied on reductions that occurred one year prior to the Baton Rouge area's failure to attain but that continued on an annual basis thereafter and were, among other things, surplus. *Id.* at 583. In other words, as the court framed it, "the effects continue to manifest an effect after the plan fails." *Id.* The court found that "[t]he setting aside of a continuing, surplus emissions reduction fits neatly within the CAA's requirement that a necessary element of a contingency measure is that it must 'take effect without further action by the State or [EPA]'" *Id.* at 584. In *LEAN,* in contrast to the situation here, the air quality benefits from the contingency measures occurred prior to a potential plan failure and the emission reductions from these measures did not increase thereafter, but continued at the same rate. Thus the contingency measures in the 2004 SJV 1-hour ozone plan, to a greater extent than in *LEAN,* fulfill the purpose of such measures "to provide a cushion while the plan is being revised to meet the missed milestone." 72 FR 20586, 20642.

Comment: Earthjustice notes that EPA's proposal to approve the updated contingency measure demonstration rests on crediting emissions reductions from State programs that are not enforceable components of the plan. It asserts that the CAA requires that all State and local control measures relied upon to satisfy the planning requirements of the Act be included in the implementation plan, citing the language in CAA sections 172(c)(9) and 182(c)(9) and that it is not sufficient to simply identify measures because they could be revised or revoked without EPA approval under section 110(l), or would be unenforceable under the CAA if the State were to decide not to implement them.

Response: In this particular case, all measures credited as contingency measures are State and federal on- or off-road mobile source controls adopted prior to September 2002. These controls include waiver measures which EPA believes may be used to meet the CAA's contingency measures requirement. In our response to comments on the treatment of waiver measures above, we address at length our view that such measures can be relied on to meet the CAA's planning requirements without being approved by EPA into the SIP. We also address in that section the commenter's concerns regarding enforceability and antibacksliding.

We note further that since the State has been implementing these emission standards since 2002, the likelihood that the State will, at this late date, suddenly decide to stop implementing them is negligible. Moreover, engines complying with these standards are already being sold and therefore the technology required to meet them has been demonstrated, making it even less likely that the State would stop implementing

[16] By "surplus" and "extra" emissions reductions, the commenter is referring to emissions reductions that are realized in the attainment year that are more than the emissions reductions needed to demonstrate attainment. We refer to these additional reductions as "excess reductions in the attainment demonstration."

[17] EPA has long allowed states to use already implemented measures to meet the CAA sections 172(c)(9) and 182(c)(9) contingency measures requirement, provided that the reductions from these measures were not also relied on for attainment and/or ROP, i.e., in excess to the attainment demonstration or ROP. *See* 62 FR 15844 (April 3, 1997); 62 FR 66279 (December 18, 1997); 66 FR 30811 (June 8, 2001); 66 FR 586 and 66 FR 634 (January 3, 2001). In these rulemakings, however, unlike the situation here, the reductions used for contingency measures were realized in the attainment year, i.e., they were excess reductions in the attainment demonstration, and continued without increasing into following years.

them. However, in the unlikely event that the State should relax or revoke a measure that is relied on for contingency, EPA has mechanisms other than section 110(l) to assure adequate contingency measures, including finding the SIP inadequate under section 110(k)(5).

We note also that since 2002, in part to fulfill its emissions reductions commitment, the State has adopted other control measures that reduce emissions from on- and off-road vehicles which are not considered in calculating the post-2010 emissions reductions for contingency measures. See Goldstene letter. We also note that the State and District have submitted the 2007 8-hour ozone plan that includes additional post-2010 emissions reductions.

Comment: Earthjustice claims that our proposal on the appropriate treatment of emissions reductions from waiver measures makes no mention of contingency measures or the specific statutory language in sections 172(c)(9) or 182(c)(9) which provide that "[s]uch measures shall be included in the plan revision * * *." It then asserts that the extension of our policy on waiver measures to contingency measures ignores the plain language of sections 172(c)(9) and 182(c)(9) and that EPA has not shown that it has allowed the use of measures that are not in the SIP for contingency measures. Finally, the commenter states that EPA cannot claim that Congress in the 1990 Amendments ratified the practice of allowing waiver measures as contingency measures because EPA has never before adopted it.

Response: Our discussion in the proposal regarding the SIP crediting of emissions reductions from waiver measures does not address the SIP purposes for which these reductions would be used. Our discussion presumed that waiver measures could be credited for any SIP purpose for which similar federal measures can be used: "EPA treated [the waiver] rules similarly to the federal motor vehicle control requirements, which EPA has always allowed states to credit in their SIPs without submitting the program as a SIP revision." 74 FR at 33939. While there was no explicit statutory requirement for contingency measures prior to the 1990 CAA Amendments, there is no reason to believe that Congress would make a distinction between measures creditable in attainment and ROP demonstrations and those creditable for contingency measures.

EPA has long allowed States to use federal measures as contingency measures. *See* 62 FR 15844, 15847 (April 3, 1997), approval of Indiana's 15 percent ROP plan for the Chicago-Gary-Lake County 1-hour ozone nonattainment area; 62 FR 66279 (December 18, 1997), approval of Illinois' 15 percent ROP plans for the Chicago-Gary-Lake County 1-hour ozone nonattainment area and East St. Louis 1-hour ozone nonattainment area; 66 FR 30811 (June 8, 2001), approval of Rhode Island's post-96 ROP plan; 55 FR 33996, 33999 (June 26, 2001), approval of St. Louis's 1-hour ozone attainment plan; 66 FR 40802, 40824 (August 3, 2001) finalized at 66 FR 56944 (November 13, 2001), approval of Indiana's attainment and ROP demonstrations and related contingency measures for the Chicago-Gary-Lake County 1-hour ozone nonattainment area; 66 FR 56904, 56905 (November 13, 2001) approval of Illinois's attainment and ROP demonstrations and related contingency measures for the Chicago-Gary-Lake County 1-hour ozone nonattainment area.

H. VMT Offset Requirement

Comments: CRPE alleges that the 2004 SIP fails to include transportation control measures (TCM) as required by CAA section 182(d)(1)(A), asserting that the plain language, legislative history, and the structure of the CAA require TCMs when vehicle miles traveled (VMT) increase in a region. In support of its position, the Center quotes a statement from the legislative history of the 1990 CAA Amendments: "[t]he baseline for determining whether there has been growth in emissions due to increased VMT is the level of vehicle emissions that would occur if VMT held constant in the area." 2 S. Comm. on Environment & Public Works, 103rd Cong., A Legislative History of the Clean Air Act Amendments of 1990 (Comm. Print 1993) at 3266 (H.R. Rep. No. 101–490 (1990)).

Response: CAA section 182(d)(1)(A) requires a state to submit a SIP revision, for severe and extreme nonattainment areas such as the SJV area, that identifies and adopts specific enforceable transportation control strategies and TCMs to offset any growth in emissions from growth in VMT or numbers of vehicle trips in such areas. Since the statutory language plainly requires that growth in emissions be offset, we interpret this provision to require TCMs only when there is growth in emissions due to growth in VMT or vehicle trips and not when there is simply growth in VMT or vehicle trips without a consequential growth in emissions. Because the 2004 1-hour ozone plan shows that through the attainment year there will be no increase in motor vehicle emissions caused by increased VMT or numbers of vehicle trips, the statutory duty to adopt and submit TCMs to offset emissions growth has not been triggered. See 2008 Clarifications, page 9, (Table 3) and 74 FR at 33945 (Table 6).

We discuss CAA section 182(d)(1)(A), as well as the excerpt from the legislative history of the 1990 CAA Amendments cited by the commenter, in the General Preamble at 13522–13523.

We have consistently applied this interpretation in our previous approvals of SIPs implementing the provision. See, for example, 60 FR 48896 (September 21, 1995) approval of Illinois' vehicle miles traveled plan for the Chicago area; 62 FR 23410 (Apr. 30, 1997) and 62 FR 35100 (Jun. 30, 1997), proposed and final approval of New Jersey's 15 percent ROP plan and other provisions for the New York-New Jersey-Connecticut ozone nonattainment area; 66 FR 23849 (May 10, 2001), approval of New York's attainment demonstration and related provisions for the New York-New Jersey-Connecticut ozone nonattainment area; 66 FR 57247 (November 14, 2001), approval of the VMT offset plan for the Houston-Galveston ozone nonattainment area; 70 FR 25688 (May 13, 2005), approval of the Washington, DC area's 1-hour attainment demonstration and related provisions; 70 FR 34358 (June 14, 2005), approval of Atlanta's VMT plan; and 74 FR 10176, 10179 (March 10, 2009), approval/disapproval of the 2004 1-hour ozone plan for the South Coast (California) Air Basin.

Comments: CRPE asserts that VMT has increased within the San Joaquin Valley and that vehicle emissions are higher than they would be if VMT held constant in the area, so EPA's failure to require TCMs violates the Act.

Response: For the reasons discussed in response to the previous comment, we believe that section 182(d)(1)(A) only requires the offset of any growth in emissions due to VMT growth and not the offset of any growth in VMT in the absence of consequential growth of motor vehicle emissions. Consistent with our guidance in the General Preamble, the 2004 1-hour ozone plan demonstrates that there is no year-to-year growth in motor vehicle emissions due to VMT growth over the life of the plan. See 2008 Clarifications, p. 9. Therefore, no additional TCMs are required, and EPA may approve the 2004 SIP as meeting the CAA section 182(d)(1)(A). See discussion at 74 FR at 33944.

H. Clean Fuels/Technology for Boilers

Comment: Earthjustice notes EPA's statements that the District's two rules governing gas- and liquid-fired boilers, Rules 4306 and 4307, require advanced NO_X controls and have been approved as RACT and that the District's rule covering solid-fuel-fired boilers, Rule 4352, also requires advanced NO_X control. It then asserts that EPA has no rational basis for these claims and EPA has not identified what kinds of advanced controls are in place at sources covered by these rules. The commenter included several permits for solid-fuel boilers that operate in the SJV, asserting that permits do not require catalytic control technology or comparably effective methods to reduce NO_X emissions.

Response: Section 182(e)(3) of the Act requires that SIPs for extreme ozone nonattainment areas contain provisions requiring that each new, modified, and existing electric utility and industrial and commercial boiler that emits more than 25 tpy of NO_X either: (1) Burn as its primary fuel a clean fuel (natural gas, methanol, or ethanol, or a comparably low-polluting fuel), or (2) use advanced control technology (such as catalytic control technology) or other comparably effective control "catalytic control technology" was intended generally to refer to selective catalytic reduction (SCR).

SJVAPCD Rule 4306—Boilers, Steam Generators and Process Heaters—Phase 3; Rule 4307—Boilers, Steam Generators, and Process Heaters—2.0 MMBtu/hr To 5.0 MMBtu/hr; and Rule 4309—Boilers, Steam Generators, and Process Heaters—0.075 MMBtu/hr To 2.0 MMBtu/hr apply to gas- and liquid-fueled boilers. Because of the fuel-input rate limits (5.0 MMBtu/hr and 2.0 MMBTU/hr) in Rules 4307 and 4308, as approved in the SIP, boilers subject to these rules are too small to be subject to CAA section 182(e)(3) (i.e., these boilers do not emit greater than 25 tpy of NO_X). We discussed in the proposal that boilers subject to Rule 4306 could only comply with the limits in that rule through the use of advanced control technologies. See 74 FR at 33945. SJVAPCD Rule 4352—Solid Fuel Fired Boilers, Steam Generators, and Process Heater (amended May 18, 2006) applies to boilers that burn a variety of solid fuels. We discuss Rule 4352 further below.

The State submitted the 2004 SIP on November 15, 2004. As of that date, the last full year of inventory data available to the District to determine if boilers in the SJV area met the section 182(e)(3) requirement was 2003. Inventory data available from ARB's emissions inventory database (*http://www.arb.ca.gov/ei/emissiondata.htm*) show that, in 2003, all boilers that emitted 25 tpy NO_X were either fired on natural gas or solid fuel. This list is provided in the TSD.

SJVAPCD Rule 4352—Solid Fuel Fired Boilers, Steam Generators, and Process Heater (amended May 18, 2006) applies to commercial and industrial boilers (in addition to other types of emission units) at facilities that potentially emit 10 tpy or more of NO_X, which includes all boilers at such facilities that emit more than 25 tpy of NO_X. All of the NO_X emission limits in the current rule effectively require operation of Selective Noncatalytic Reduction (SNCR) control systems. As discussed below, we believe SNCR is "comparably effective" to SCR for the affected sources, and thus fulfills CAA section 182(e)(3) requirements for these affected sources. SNCR also appears to achieve NO_X emissions reductions comparable to combustion of clean fuels at these types of boilers.[18]

According to information in EPA's RACT/BACT/LAER Clearinghouse (*http://cfpub.epa.gov/rblc/htm/bl02.cfm*), recent Prevention of Significant Deterioration (PSD) permits contain emission limits for coal-fired boilers ranging from 0.067 lbs/million Btu (MMBtu) (for large coal-fired boilers with SCR and low-NO_X burner technology) to 0.1 lbs/MMBtu (for medium-sized coal-fired boilers with SNCR). These limits reflect Best Available Control Technology (BACT) determinations under the PSD program. See RACT/BACT/LAER Clearinghouse. According to the 1994 ACT for industrial/commercial/institutional boilers (Table 2–6), wood-fired watertube boilers with SCR can achieve NO_X emissions of 0.22 lb/MMBtu. The 1994 ACT does not contain emission levels for wood-fired fluid bed combustion boilers with SCR but states that this type of unit with SNCR can achieve NO_X emission limits ranging from 0.03 to 0.20 lb/MMBtu.

Our review of these emission ranges indicates that although emission rates can vary according to fuel type and boiler size, generally SNCR controls are comparably effective to SCR for boilers firing wood (biomass), municipal solid waste, and many other types of solid fuels. As a general matter, SNCR is also comparably effective to SCR control for circulating fluidized bed coal-fired boilers of less than 50 MW electric generation capacity. For coal-fired boilers, we have focused our review on circulating fluidized bed boilers of less than 50 MW electric generation capacity because all existing coal-fired boilers in the SJV are of this type and below this size. See SJVAPCD, "District Permitted Solid Fuel Boilers," found in the docket for this rulemaking. The emission levels achieved by SNCR control systems are also generally comparable to the uncontrolled NO_X emissions from boilers firing clean fuels such as natural gas, which may range from 0.07 to 0.45 lb/MMBtu (Table 2–2 in the 1994 ACT for ICI boilers). SNCR control systems consistently achieve up to 80 percent NO_X emissions reductions and are compatible with almost all solid fuel-fired boiler operations, while other controls may in some cases be sensitive to catalyst poisoning and other technical constraints.

As to boilers that emit above 25 tpy of NO_X, we note that, as a practical matter, only existing boilers in the SJV are likely to be constrained by the NO_X emission limits in Rule 4352, as all new boilers that potentially emit above 25 tpy and all major modifications at existing boilers will also be subject to the more stringent control technology requirements of the Nonattainment New Source Review (NSR) or PSD permit programs. The requirements of Rule 4352 are generally applicable to this source category and do not supplant any more stringent control requirements that apply on a case-by-case basis under the NSR or PSD permit programs.

Additionally, according to a list of permitted facilities in the SJV provided by the District, all permitted units subject to Rule 4352 are equipped with SNCR. This list may be found in the docket for this rule. The permits attached by the commenter all state that the units involved have ammonia injection, another name for SNCR.

K. Other Comments

Comment: CRPE provided extensive comments on the alleged unenforceability of the pesticide element in the 2003 State Strategy and argued that EPA should disapprove it.

Response: CRPE's comments on the pesticide element are not germane to the action we are taking here and we will not address their specifics. EPA proposed no action on the pesticide element in the 2003 State Strategy as part of its action on the 2004 SJV 1-hour ozone plan. As we noted in the proposal

[18] We proposed to approve Rule 4352 as meeting the CAA section 182(b)(1) RACT requirement on May 30, 2007 at 72 FR 29901. Concurrent with this May 30, 2007 proposal, we also approved Rule 4352 in a direct final action. See 72 FR 29887. Because we received adverse comments on this direct final action, we withdrew it on July 30, 2007 (72 FR 41450). On December 9, 2009 we reproposed to approve Rule 4352 into the SIP but to disapprove the District's demonstration that the rule met the RACT requirement. *See* 74 FR 65042.

and acknowledged by the commenter, the plan does not rely on emissions reductions from the pesticide element to demonstrate attainment or ROP. *See* 74 FR at 39936, ftn. 7.

Comment: CRPE comments that EPA should not allow emissions reduction credit for SJVAPCD Rule 4570 because we have proposed to disapprove the rule for not meeting the CAA's requirement for RACT.

Response: On July 14, 2009, EPA proposed a limited approval/limited disapproval of Rule 4570, Confined Animal Facilities. First we proposed to approve the rule into the California SIP under CAA section 110(k) as a SIP strengthening. Second, we proposed to disapprove the District's demonstration that the rule meets the RACT provisions of CAA section 182(b)(2). *See* 74 FR 33948. The limited approval means that the rule is an enforceable part of the SIP. The limited disapproval requires the District to provide additional documentation and/or rule revisions to assure that the rule is RACT in order to avoid the imposition of sanctions under CAA section 179 and the promulgation of a FIP under CAA section 110(c). We are finalizing our action on Rule 4570 concurrent with this action on the SJV 1-hour ozone plan. Because Rule 4570 is now approved into the SIP, emissions reductions from it can be credited in the plan's attainment and ROP demonstrations and for other CAA requirements.

Comment: CRPE comments that allowing emissions reduction credit for compliance with menu option A.1 in Rule 4570 (feed according to National Research Council (NRC) Guidelines) for dairy, beef feedlot, and other cattle facilities is arbitrary and capricious and an abuse of discretion because these reductions are already reflected in the baseline emissions factor used to calculate total emissions from dairies and other cattle related operations. It then claims that if the 10 percent emissions reduction credit for option A.1. was eliminated, then emissions reductions from Rule 4570 would drop from 7,563 tons per year (21 tons per day) to 5,632 tons per year (15.5 tons per day). The Center included a number of documents in support of its comments on the emissions reductions.

Response: In the 2004 SIP, reductions from the Rule 4570 are estimated to be 17.7 tpd or 28 percent of the baseline inventory for confined animal facilities. *See* 2008 Clarifications at 7 and 74 FR at 33937 (Table 2). In determining the emissions reductions from the rule, SJVAPCD conservatively estimated that compliance with menu option A.1. would reduce emissions by 10 percent over the baseline.

The District initially adopted Rule 4570 in June 2006 after conducting public workshops and providing a public review and comment period on both the draft rule and its estimate of the Rule's potential emissions reductions. *See* Final Draft Staff Report for Rule 4570, p. 50.[19] During this public process, the Center submitted comments similar to the ones it makes here. In response to these comments, the District noted that its emissions reductions estimate was based on a number of research studies showing that changes in animals' diets would result in VOC emissions reductions and that the 10 percent reduction it was using was at the low end of the range of effectiveness seen in this research. It also noted that the information available in the studies used to establish the baseline emission factor were not conclusive on whether the animals in those studies were fed according to the NRC guidelines and thus the baseline did not necessarily include reductions associated with a NRC diet. See Final Draft Staff Report for Rule 4570, Appendix A, p. 12.

The District based its estimated emissions reductions for Rule 4570 on a careful consideration of the information then available and used conservative (i.e., low) estimates of the potential emissions reductions. We have reviewed the District's analysis and find it reasonable. Final Draft Staff Report for Rule 4570, p. 24. More specifically, we do not believe that it overestimates the reductions from menu option A.1. as alleged by the commenter.

We note that the Center raised this specific issue in State court litigation on Rule 4570. The courts found for the District on this issue. *See Association of Irritated Residents* v. *SJVAPCD* (2008), 168 Cal. App. 4th 535, 553–554.

Comment: CRPE argues that Rule 4570 codifies existing practices and, therefore, will not generate emissions reductions. Citing the District's Staff Report for Rule 4570, it claims that the District admits that many of the control measures are currently being implemented and that the District defends its rule as an anti-backsliding measure that will ensure that current voluntary practices are not abandoned. CRPE then asserts that the approach that the District has taken violates the statutory requirement that rules must reduce emissions.

[19] SJVAPCD, "Final Draft Staff Report Proposed Rule 4570 (Confined Animal Facilities)," June 15, 2006.

Response: The District believes and we concur that Rule 4570 will generate significant emission reductions. Simply because a practice is an existing industry practice does not mean that every facility uses it or uses it consistently.

The commenter does not cite the provision in the CAA that it believes requires, as condition of approval, that SIP rules must reduce emissions. EPA finds nothing in the CAA that requires that rules approved into the SIP by EPA result in direct and quantifiable emission reductions. We frequently approve rules and rule revisions that merely clarify existing requirements and are not expected to reduce emissions demonstratively.

A similar argument was raised in response to our 2005 proposal to approve SJVAPCD Rule 4550, Conservation Management Practices (CMP) for agricultural sources of PM–10. The commenter in that instance claimed that the emission reductions estimated to be achieved by the rule were inaccurate and inflated because the estimate double-counted emission reductions already being achieved from practices already in common use by growers. In our response to this argument we stated that "it was understood that some agricultural sites may have been employing practices not required by regulation at that time, and that these existing practices may not have been accounted for in the emission inventory. Rule 4550 makes these practices mandatory and federally enforceable, allowing the District to take credit for the emission reductions * * *." 71 FR 7683 (February 14, 2006)

Comment: CRPE claims that the District guessed or applied a default emissions reduction estimate to come up with a 36 percent reduction of VOC emissions from dairy operations for Rule 4570. It then asserts that approval of the rule with "fictitious" reductions based on commonly-used industry practices would be arbitrary and capricious because the majority of controls have no factual support whatsoever.

Response: The District used the best information available at the time it adopted Rule 4570 and applied that information reasonably to determine the emissions reductions estimates for the rule. *See* Rule 4570 Staff Report, p. 22. As noted above, simply because a practice is commonly used in an industry does not mean that it is used by every facility or used consistently by every facility in that industry. We note that the Center also raised this specific issue in State court litigation on Rule 4570. The courts found for the District

on this issue. See *Association of Irritated Residents* v. *SJVAPC*D (2008), 168 Cal. App. 4th 535, 553–554.

III. Approval Status of Rules

The demonstration of attainment in the 2004 SIP and 2008 Clarifications relied on emission reductions from a number of District and State rules. EPA has now taken final action to approve each of these rules into the California 1-hour ozone SIP as shown in Table 1 below for the District rules and discussed below for the State rules.

TABLE 1—APPROVAL STATUS OF SAN JOAQUIN VALLEY AIR POLLUTION CONTROL DISTRICT RULES RELIED ON IN THE 1-HOUR OZONE STANDARD ATTAINMENT DEMONSTRATION

NO_X controls		
Rule #, description and commitment ID from 2004 SIP	Achieved emission reductions (2010-tpd)	Approval cite/date
9310 Fleet School buses (C)	0.6	NFR signed 12/11/2009.
4307 Small Boilers (2–5 MMBTU) (E)	5.1	72 FR 29887 (5/30/07).
4702 Stat. IC engines (H)	16.8	73 FR 1819 (1/10/08).
4309 Commercial Dryers (I)	0.7	72 FR 29887 (5/30/07).
4308 Water Heaters 0.075 (N)	0.8	72 FR 29887 (5/30/07).
4103 Open Burning (Q)	1.7	74 FR 57907(11/10/09).
4703 Sta. Gas Turbines (S)	1.9	74 FR 53888 (10/21/09).
NO_X Totals	27.6	
VOC controls		
Rule # and description	Achieved emission reductions (2010-tpd)	Approval cite/date
4409 Oil & Gas Fug. (A)	5.1	71 FR 14653 (3/23/06).
4455 Ref. & Chem. Fug. (B)	0.3	71 FR 14653 (3/23/06).
4612 Automotive Coating (incorporates Rule 4602)(K)	1.0	Final signed 12/3/09.
4570 CAFO Rule (L)	17.7	NFR signed 12/11/09.
4662 Org. Solvent Degreasing (M)	.....	74 FR 37948 (7/30/09).
	.....	74 FR 37948 (7/30/09).
4663 Org. Sol. Cleaning (M)	.....	Final signed 12/3/09.
4603 Metal Parts/Products (M)	.....	Final signed 12/3/09.
4604 Can and Coil Coating (M)	.....	Final signed 12/11/09.
4605 Aerospace Coating (M)	.....	74 FR 52894 (10/15/09).
4606 Wood Products Coating (M)	.....	74 FR 52894 (10/15/09).
4607 Graphic Arts (M)	.....	Final signed 12/3/09.
4612 Automotive Coating (M)	3.1	74 FR 52894 (10/15/09).
4653 Adhesives (M)	.....	Final signed 12/11/09.
4684 Polyester Resin Operations (M).		
4401 Steam-Enhanced Oil-well (O)	0.3	Final signed 12/11/09.
4651 Soil Decontamination (P)	0.0	74 FR 33397 (7/13/09).
4103 Open Burning (Q)	3.9	74 FR 57907 (11/10/09).
4621 & 4624 Gasoline storage & trans. (T & U)	1.9	74 FR 33397 (7/13/09).
VOC Totals	33.3	

The ROP and attainment demonstrations in the 2004 SIP and 2008 Clarifications also relied in part on ARB's consumer product regulations (final approval published at 74 FR 57074 (November 4, 2009)), ARB's reformulated gasoline and diesel fuel regulations (final approval signed December 11, 2009), and State's SmogCheck vehicle inspection and maintenance program (final approval signed December 11, 2009).

IV. Final Actions

For the reasons given in our proposed approvals at 74 FR 33933 and 74 FR 50936, EPA is taking the following actions.

1. EPA is approving pursuant to CAA section 110(k)(3), the following elements of the 2004 SIP and the 2008 Clarifications:

a. The rate of progress demonstration as meeting the requirements of CAA sections 172(c)(2) and 182(c)(2) and 40 CFR 51.905(a)(1)(i) and 51.900(f)(4);

b. the rate-of-progress contingency measures as meeting the requirements of CAA section 172(c)(9) and 182(c)(9);

c. the attainment demonstration as meeting the requirements of 182(c)(2)(A) and 181(a) and 40 CFR 51.905(a)(1)(ii); and

d. the attainment contingency measures as meeting the requirements of CAA section 172(c)(9);

2. EPA is finding pursuant to CAA section 110(k)(3) that the 2004 SIP and the 2008 Clarifications meet the requirements of:

a. CAA section 182(e)(3) and 40 CFR 51.905(a)(1)(i) and 51.900(f)(7) for clean fuel/clean technology for boilers; and

b. CAA section 182(d)(1)(A) and 40 CFR 51.905(a)(1)(i) and 51.900(f)(11) for TCMs sufficient to offset any growth in emissions from growth in VMT or the number of vehicle trips.

3. EPA is approving pursuant to CAA section 110(k)(3) section 4.7 in the 2004 SIP and the provisions of the 2003 State

Strategy and ARB Board Resolution 04–29 that relate to aggregate emission reductions in the San Joaquin Valley Air Basin as meeting the requirements of CAA sections 110(a)(2)(A) and 172(c)(6).

4. EPA is approving pursuant to CAA section 110(k)(3), the 2004 SIP, the 2003 State Strategy and the 2008 Clarifications as meeting the RACM (exclusive of RACT) requirements of CAA section 172(c) and 40 CFR 51.905(a)(1)(ii).

5. EPA is approving pursuant to CAA section 110(k)(3), SJVAPCD Rule 9310 School Bus Fleets (adopted September 21, 2006) into the San Joaquin Valley portion of the California SIP.

V. 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 and plans as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

The Congressional Review Act, 5 U.S.C. 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 May 7, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: December 11, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

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

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(317)(i)(B), (c)(339)(i)(B), (c)(339)(ii)(C), (c)(348)(i)(A)(2), (c)(369), (c)(370), and (c)(371) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(317) * * *

(i) * * *

(B) State of California Air Resources Board.

(*1*) Executive Order G–125–304 "Adoption and Submittal of New State Commitments for the San Joaquin Valley" with Appendix A. Commitment to achieve additional emissions reductions in the San Joaquin Valley Air Basin of 10 tons per day (tpd) of nitrogen oxides and 0.5 tpd of direct PM10 by 2010 as given on page 4 of Executive Order G–125–304, executed August 19, 2003, and on page 5 of Appendix A ("State of California Air Resources Board, Resolution No. 03–14, June 26, 2003") to E.O. G–125–304.

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(339) * * *

(i) * * *

(B) State of California Air Resources Board.

(*1*) "Revised Proposed 2003 State and Federal Strategy for the California State Implementation Plan," (release date August 25, 2003), section I.D.2. "2003 San Joaquin Valley Particulate Matter State Implementation Plan" (pp. I–23 through I–25) which was adopted without revision to section I.D.2. on October 23, 2003 by ARB Resolution No. 03–22.

(ii) * * *

(C) State of California Air Resources Board.

(*1*) "Revised Proposed 2003 State and Federal Strategy for the California State Implementation Plan," (release date August 25, 2003) as revised by ARB Resolution No. 03–22 (October 23, 2003) excluding for section I.D.2.

(2) ARB Resolution No. 03–22 (October 23, 2003).

* * * * *

(348) * * *

(i) * * *

(A) * * *

(*2*) Rule 9310, "School Bus Fleets," adopted on September 21, 2006.

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(369) New and amended plans were submitted on November 15, 2004 by the Governor's designee.

(i) Incorporation by reference.

(A) State of California Air Resources Board.

(*1*) ARB Resolution No. 04–29. Commitment to achieve additional emission reductions in the San Joaquin Valley Air Basin of 10 tons per day (tpd) of nitrogen oxides and 15 tpd of volatile organic compounds by 2010 as described on page 5 of Resolution No. 04–29 October 28, 2004 and page 29 of "Staff Report, Proposed 2004 State Implementation Plan for Ozone in the San Joaquin Valley, release date September 28, 2004."

(ii) Additional Material.

(A) San Joaquin Valley Air Pollution Control District.

(*1*) Extreme Ozone Attainment Demonstration Plan, as adopted by the SJVAPCD on October 8, 2004 and by the California Air Resource Board on October 28, 2005.

(370) An amended plan was submitted on March 6, 2006 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) San Joaquin Valley Air Pollution Control District.

(*1*) Amendments to the 2004 Extreme Ozone Attainment Demonstration Plan adopted by the SJVAPCD on October 20, 2005 and by CARB on March 3, 2006.

(B) State of California Air Resources Board.

(*1*) Executive Order G–126–336, dated March 3, 2005 (year is correctly 2006).

(371) An amended plan was submitted on September 8, 2008 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) San Joaquin Valley Air Pollution Control District.

(*1*) "Clarifications Regarding the 2004 Extreme Ozone Attainment Demonstration Plan for the Revoked Federal 1-hr Ozone Standard" adopted by the SJVAPCD on August 31, 2008 and by CARB on September 5, 2008.

(B) State of California Air Resources Board.

(*1*) Executive Order S–08–012, "Approval and Submittal of Amendments to the 2004 San Joaquin Valley 1-hour Ozone Attainment Plan," dated September 5, 2008.

[FR Doc. 2010–4752 Filed 3–5–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 450

[EPA–HQ–OW–2008–0465; FRL–9118–7]

RIN 2040–AE91

Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category; Correction

AGENCY: Environmental Protection Agency.

ACTION: Correcting amendments.

SUMMARY: The Environmental Protection Agency (EPA) is correcting a date in a final rule that appeared in the **Federal Register** on December 1, 2009, 74 FR 62995, due to a date calculation error. The final rule established Clean Water Act technology-based Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development point source category.

DATES: Effective on March 8, 2010.

FOR FURTHER INFORMATION CONTACT: Mr. Jesse W. Pritts at 202–566–1038 (*pritts.jesse@epa.gov*).

SUPPLEMENTARY INFORMATION:

Correction of Final Rule

The Environmental Protection Agency is correcting a final rule that appeared in the **Federal Register** on Tuesday, December 1, 2009. 74 FR 62995. The final rule established Clean Water Act technology-based Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development (C&D) point source category. The final C&D rule as signed by the Administrator on November 29, 2009 and posted, pre-publication, on *http://www.epa.gov* set an applicable date for the numeric effluent limitation and associated monitoring requirements for sites that disturb 20 or more acres of land at one time for 20 months from the publication of the rule in the **Federal Register.** That date was expressed as a calculation: "20 months after the date of publication of the final rule" or (in other places) "18 months after the effective date of the rule." The date would be the same under either calculation, because the effective date of the rule was two months after publication. That date is indicated in several locations throughout the preamble of the final rule. *See e.g.,* 74 FR 63050. A member of the public reading the preamble and regulatory text of the final rule as sent to the Office of the Federal Register (OFR) for publication and published on EPA's Web site would easily be able to calculate the date intended by this rule and would certainly understand that compliance with the numeric effluent limitation and associated monitoring requirements would be required later than 2010.

The rule was effective on February 1, 2010. Calculated correctly, this means that August 1, 2011, is the date by which discharges from construction sites that disturb 20 or more acres of land at one time must comply with the numeric effluent limitation and monitoring requirements.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary and contrary to public interest.

Related Acts of Congress, Executive Orders and Agency Initiatives

Under Executive Order 12866, 58 FR 51735 (October 4, 1993), this action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget. Because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) Public Law 104–4. In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. This rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084. 63 FR 27655 (May 10, 1998). This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. 64 FR 43255 (August 10, 1999). This rule also is not subject to Executive Order 13045, 62 FR 19885 (April 23, 1997), because it is not economically significant.