E. Executive Order 13175, Coordination With Indian Tribal Governments

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

EPA, nonetheless, specifically solicits additional comment on this proposed rule from tribal officials.

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

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

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

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

H. National Technology Transfer and Advancement Act

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, New Source Review, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: January 31, 2003.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. 03–3416 Filed 2–12–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA280–0390A ; FRL–7450–9]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the San Joaquin Valley Unified Air Pollution Control District's (SJVUAPCD or District) revised permit exemption and new source review (NSR) rules, Rules 2020 and 2201, respectively, for stationary sources. The District has revised Rules 2020 and 2201 and submitted them to EPA as a revision to the California State Implementation Plan (SIP). The revisions address deficiencies identified in our July 19, 2001 limited approval and limited disapproval of the previous version of these rules.

EPA is also publishing in today's **Federal Register** an interim final determination that the District has corrected the deficiencies noted in the limited disapproval. The interim final determination will stay the sanctions clock triggered by the July 19, 2001 limited approval/limited disapproval of the previous versions of Rules 2020 and 2201. If EPA takes final action to approve these rules, the sanctions clock for this action will be stopped.

DATES: Comments must be sent by March 17, 2003. EPA will respond to comments in a final action on this proposed approval.

ADDRESSES: Send comments to: Ed Pike, Permits Office [AIR–3], Air Division, U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, CA 94105–3901.

You can review and copy the submitted Rules 2020 and 2201, the existing SIP rules, and EPA's Technical Support Document (TSD) at EPA's Region 9 office from 8:30 am to 5 pm, Monday-Friday. A reasonable fee may be charged for copying.

Copies of the submitted Rules are also available for inspection at the following locations:

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 1001 ''I'' Street, Sacramento, CA 95814.

San Joaquin Valley Unified APCD, 1990 E. Gettysburg Avenue, Fresno, CA 93726.

FOR FURTHER INFORMATION CONTACT: Please call Ed Pike at (415) 972–3970 or send e-mail to *pike.ed@epa.gov.*

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

Table of Contents

I. What is EPA proposing to approve?
II. Background
A. History of SJVUAPCD NSR SIP revisions.
B. Deficiencies in SJVUAPCD NSR regulations and required action.
C. How has SJVUAPCD corrected these rule deficiencies?
1. Offset equivalency
a. What is the basis for allowing an annual offset equivalency demonstration?
b. What is the offset equivalency tracking system in Rule 2201 and how does it satisfy the deficiency noted in the limited disapproval?
c. Does the tracking system replace applicable NSR requirements?
d. What are the requirements for being an enforceable emission reduction?
e. What kinds of emission reductions may be creditable?
f. Are pre-1990 emission reductions creditable?
2. Agricultural exemption
a. How has the District corrected this deficiency?
b. How is EPA addressing the State exemption?
3. Lowest Achievable Emission Rate Applicability
D. Summary
III. Statutory and Executive Order Reviews
A. Executive Order 12866, Regulatory Planning and Review
B. Regulatory Flexibility Act

C. Unfunded Mandates Reform Act
D. Executive Order 13132, Federalism
E. Executive Order 13175, Coordination with Indian Tribal Governments
F. Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks
G. Executive Order 13211, Actions that Significantly Affect Energy Supply, Distribution, or Use
H. National Technology Transfer and Advancement Act

I. What Is EPA Proposing To Approve?

EPA today proposes to approve revisions to the California SIP by incorporating the submitted revised versions of District Rules 2020 and 2201 into the SIP. If EPA finalizes this proposed action after considering public comment, the submitted versions of Rules 2020 and 2201 will replace the existing versions of those rules currently in the SIP for the San Joaquin Valley Unified Air Pollution Control District, which includes the following counties: Fresno, Kern,[1] Kings, Madera, Merced, San Joaquin, Stanislaus, and Tulare.

The submitted versions of Rules 2020 and 2201 were adopted by the District on December 19, 2002, and submitted to EPA by the California Air Resources Board (CARB) on December 23, 2002. EPA found the submittal to be complete on December 30, 2002. EPA's Technical Support Document (TSD) accompanying this proposed action describes the portions of Rules 2020 and 2201 that were revised.

II. Background

A. History of SJVUAPCD NSR SIP Revisions

District Rule 2201 specifies the requirements for the review of new and modified stationary sources and outlines the requirements to be included in authorities to construct (ATCs) and permits to operate (PTOs). Rule 2020 specifies the emission units that are not required to obtain ATCs or PTOs. Together, these rules define the applicability and requirements of the District's NSR program.

On July 19, 2001, EPA finalized a limited approval and limited disapproval of previous versions of Rules 2020 and 2201.[2] 66 FR 37587. EPA's final action in July 2001 was a limited disapproval because three provisions in the previous versions of the rules did not comply with the CAA and were not approvable. Because of these three deficiencies, the rules failed to satisfy the requirements of sections 172(c)(5) and 173 of the CAA, EPA finalized a limited disapproval of the previous version of Rules 2020 and 2201 under section 110(k)(3) and part D of CAA title I. EPA's final limited disapproval in July 2001, triggered the sanctions (the ''sanctions clock'') in section 179 of the CAA.

Under section 179(a)(2), if the Administrator disapproves a submission under section 110(k)(3) for an area designated nonattainment because of the submission's failure to meet one or more of the elements required by the Act, the Administrator is required to apply one of the sanctions set forth in section 179(b) if the deficiency has not been corrected within 18 months of such disapproval. Section 179(b) provides two sanctions available to the Administrator: limitations on projects and grants for which the Department of Transportation may approve federal highway funding (''highway sanction'') and increasing the NSR offset requirements (''offset sanction''). By regulation, EPA established that we will apply the offset sanction 18 months after rule disapproval and the highway sanction 6 months after the offset sanction. 40 CFR 52.31. The CAA also provides that final disapproval under section 110(k)(3) triggers the federal implementation plan (FIP) requirement. CAA Section 110(c). The 18 month period referred to in section 179(a) and 40 CFR 52.31, began on August 20, 2001, which was the effective date of EPA's final limited disapproval, and will expire on February 20, 2003.

With the limited disapproval, the July 19, 2001 action simultaneously finalized a limited approval of Rules 2020 and 2201. EPA finalized the limited approval under section 110(k)(3) in light of EPA's authority pursuant to section 301(a) to prescribe regulations necessary to further air quality by strengthening the SIP. Because Rules 2020 and 2201 strengthened the District's NSR program despite the three cited rule deficiencies, EPA's limited approval incorporated Rules 2020 and 2201 into the SIP subject to the section 179 mandatory sanctions triggered by EPA's limited disapproval.

B. Deficiencies in SJVUAPCD NSR Regulations and Required Action

EPA's limited disapproval cited three deficiencies in the previous versions of Rules 2020 and 2201. First, EPA determined that the previous version of Rule 2201 was not approvable because its offset tracking equivalency system failed to contain a mandatory remedy. We also found the previous version of Rule 2201 deficient because it did not require all sources making modifications that result in a significant increase in emissions to meet the Lowest Achievable Emission Rate (LAER). Finally, we concluded the previous version of Rule 2020 was not approvable because section 4.5 of the rule exempted agricultural sources from permitting. For a more detailed discussion of these three rule deficiencies please see our final limited approval and limited disapproval, 66 FR 37587 (July 19, 2001), and the accompanying Technical Support Document dated August 30, 1999 (''1999 TSD'').

EPA's July 2001 limited disapproval informed the District that the following actions were required to correct the rule deficiencies:

1. The District must revise Rule 2201 to provide a mandatory, enforceable and automatic remedy to cure any annual shortfall and, in the future, prevent shortfalls in the District's New Source Review Offset Equivalency Tracking System.

2. The District must remove the agricultural exemption from District Rule 2020.

3. The District must revise Rule 2201 to ensure that all sources meet LAER[3] if they are allowed to make a significant increase in their actual emissions rate.

See 66 FR at 37590.

C. How Has SJVUAPCD Corrected These Rule Deficiencies?

1. Offset Equivalency

a. What is the basis for allowing an annual offset equivalency demonstration?

Section 173(a)(1)(A) provides that new and modified stationary sources seeking to commence operating in a nonattainment area must be required by the state permitting program to obtain sufficient offsetting emission reductions (''offsets'') such that, ''the total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources * * * so as to represent reasonable further progress * * *.'' In our July 19, 2001 final action, we explained that this statutory focus on total regional emissions supported the approval of a District offset program that

[1] For more information on the District and its jurisdiction see 64 FR 51493 (Sept. 23, 1999).

[2] The previous version of Rule 2020 acted upon in the July 19, 2001 final action was the version adopted by the District on September 17, 1998. The previous version of 2201 was the version adopted by the District on August 20, 1998.

[3] Many California Districts use the term ''Best Available Control Technology'' (BACT) with a definition equivalent to LAER. Please see the TSD for additional information on the District's definition of BACT.

ensured equivalency with the federal requirements on an annual aggregate basis. 66 FR at 37588–89.[4] Thus, we explained that an offset equivalency tracking system with a requirement for a mandatory and enforceable remedy for any shortfall would comply with the requirements of the Act. *Id.* at 37588.[5]

The goal of the District's offset equivalency tracking system, therefore, is to show that, notwithstanding certain differences between the District and federal NSR programs, the District's rules would require offsets that are, in the aggregate, equivalent to offsets required under the federal program.[6] In the 1999 TSD for the proposed limited approval/limited disapproval, 65 FR 58252 (Sept. 28, 2000), we identified areas where the District rules may require fewer offsets than the federal NSR regulations and directed the District to track these sources of potential shortfalls. *See* 1999 TSD at 15–17; *see also* 66 FR at 37588 n.3.[7] In general these differences fall into two categories: (1) Differences in the quantity of offsets required in the first instance and (2) differences in the way the value of emission reductions used to satisfy offset requirements is calculated. Thus, to demonstrate equivalency, the District's rule needs to track and report on both of these categories of differences. Likewise, if the remedy is to cure and prevent future shortfalls, the rule must be tailored to address the root cause of the shortfalls.[8]

[4] We relied on this statutory interpretation, in part, in approving the RECLAIM Trading Program in the South Coast Air Quality Management District. *See* 61 FR 64291 (Dec. 4, 1996).

[5] We have also noted the ability of States to implement accounting or tracking systems to demonstrate annual aggregate equivalency with federal requirements for surplus adjusting. *See* Memo from John S. Seitz, Dir., Office of Air Quality Planning and Standards (OAQPS) to David Howekamp, Dir., Region IX Air and Toxics Div. (Aug. 26, 1994) (''1994 Seitz Memo'').

[6] *See* 65 FR 58252, 58253 (Sept. 28, 2000) (''The District committed to demonstrate equivalency by calculating on an annual basis the quantity of offsets that would be required under federal nonattainment NSR regulations (*i.e.* the quantity of offsets that meet all Clean Air Act requirements) and the quantity of offsets required under the District program.'').

[7] For example, the District does not require sources to offset the entire quantity of emissions increases (Rule 2201, section 4.5) and, in certain situations, does not impose the minimum offset ratio required under the CAA (Rule 2201, section 4.8).

[8] In our final limited approval/limited disapproval, we noted that the District had identified different remedies to address potential shortfalls including ''using EPA requirements for calculating offset baselines and quantities'' (which could address shortfalls related to differences in the quantity of offsets required in the first instance) and ''using credits that are surplus at the time of use'' (which could address shortfalls related to differences in the valuation of emission reductions used to meet offset requirements). *See* 66 FR at 37590.

b. What is the offset equivalency tracking system in Rule 2201 and how does it satisfy the deficiency noted in the limited disapproval?

Section 7.0 of the revised District Rule 2201 (adopted Dec. 19, 2002) provides for a system to track and demonstrate the equivalency of the District's NSR offset requirements to the offset requirements of the federal NSR program. There are three basic components of the tracking system provisions. Section 7.1 outlines the parameters to be tracked by the District on an annual basis. Sections 7.2 and 7.3 describe how equivalency is to be demonstrated each year. Section 7.4 describes the remedies to take effect to cure any annual shortfall and prevent future shortfalls. While the District action required in EPA's final limited approval/limited disapproval was ''to provide a mandatory and enforceable remedy to cure any annual shortfall and, in the future prevent shortfalls,'' as noted above, the provisions for tracking and demonstrating equivalency are critical for ensuring that the remedy is applied automatically and addresses the cause for the shortfall. Thus, each of the components provided in section 7.0 is necessary to ensure the remedy provision satisfies this deficiency.

The District's tracking system requires two demonstrations to be included in the annual report. First, the District is to track and compare on an annual basis the aggregate quantity of offsets required under Rule 2201 and the quantity of offsets that would have been required under the federal NSR provisions. Rule 2201, section 7.2.1. This comparison will show whether the District rule requires as many offsets as the federal rules, regardless of the ''creditable'' value of the actual emission reduction used to meet the offset requirements. Should there be a shortfall the rule provides for two stages of remedy. The District may first retire unused emission reduction credits that meet federal requirements to make up for the shortfall. Rule 2201, section 7.4.1.1. If sufficient emission reduction credits are not available, the District must apply federal offset requirements to all permits issued after the annual demonstration deadline until the District amends its NSR provisions to require equivalent offsets. Rule 2201, section 7.4.1.2. These remedies reasonably address the source of the demonstrated shortfall and satisfy our requirement for a mandatory, enforceable and automatic remedy.

The second piece of the annual demonstration addresses whether the District's overall approach is equivalent, including the District's decision not to adjust the creditable value of emission reductions at time of use (''surplus adjusting'' or ''discounting'' at time of use). The District will determine the creditable surplus value of the emission reductions actually used each year by applying federal creditability criteria, and compare this adjusted aggregate number to the number of offsets that would have been required under the federal NSR program. The District shall provide an annual report to demonstrate that, in the aggregate, it is achieving an equivalent number of creditable emission reductions as would be achieved under the federal program. Rule 2201, section 7.2.2. If a shortfall is found in this comparison, and it is not the result of different offset requirements identified in the first piece of the demonstration described above, the cause of the shortfall must be related to differences in the way the District determines the creditable value. As a result, the remedy for such a shortfall is to apply federal creditability criteria, including discounting at time of use. In the event of a shortfall in this portion of the annual demonstration, section 7.4.2 will automatically require all ATCs issued after the annual report deadline to ensure emission reductions used to satisfy offset requirements are creditable and that the surplus value of those reductions is determined at the time of ATC issuance. EPA proposes to conclude that this remedy reasonably meets the EPA requirement for a mandatory, enforceable and automatic remedy to cure any shortfall and prevent future shortfalls.

c. Does the tracking system replace applicable NSR requirements?

The tracking system does not replace the applicable requirements of Rule 2201. It is important to clarify that while the tracking system allows EPA to approve the District NSR provisions of Rule 2201 notwithstanding specific differences between the District's rules and federal NSR requirements, nothing in section 7.0 of the rule relieves sources from the obligation to comply with the other requirements of Rule 2201. For example, sources must continue to obtain offsets in compliance with section 4.5 of Rule 2201. Emission reductions used to meet these offset requirements must continue to be ''real, enforceable, quantifiable, surplus, and permanent.'' Rule 2201, section 3.2.1. Therefore, a source could not rely on the annual aggregate demonstration to cure the use of unenforceable (or otherwise non-creditable) emission reductions to meet the District's offset requirements. Such use would be a violation of the

District's rules and may be subject to enforcement by the District or EPA even if the District is otherwise required to make up for this shortfall through the offset tracking system.

Major sources (and major modifications) should therefore ensure that the emission reductions used to satisfy offset requirements meet federal creditability criteria.[9] The one potential exception is with regard to the federal requirement to determine the surplus value of an emission reduction at time of use. Rule 2201 allows the surplus value to be determined at the time the ATC for an emission reduction or the application for an emission reduction credit (ERC) is deemed complete. Rule 2201, section 3.2.2. With our final approval of the District tracking system, EPA will allow the District to forgo the federal surplus adjusting requirement and sources will be able to rely on emission reductions EPA might otherwise not consider surplus. This flexibility, however, is only available for sources covered by the District's tracking system. The tracking system only covers permits for sources with ATC applications that were not deemed complete before August 20, 2001. *See* Rule 2201, section 7.3.1. *Sources with ATC applications deemed complete before August 20, 2001 must meet all federal creditability criteria including the requirement that the surplus value of emission reductions be discounted at time of use (i.e., at time ATC is issued).*

Because the criteria for determining the creditability of an emission reduction will continue to be important both for sources seeking permits and for the District in implementing the tracking system,[10] the following sections discuss particular creditability issues that have recently been raised by the District and others.

d. What are the requirements for being an enforceable emissions reduction?

CAA sections 173(a) and (c)(1), require emission reductions to be federally enforceable before a construction permit may be issued, and in effect and enforceable by the time a new or modified source commences operation. EPA has explained that the District can make emission reductions enforceable by modifying the permit for the source reducing emissions or by obtaining SIP approval of the rules that result in the emission reduction. EPA has also explained that while the emission reduction need not occur before the new or modified source commences operation, the specific emission reduction credits to be used by the source under review must be identified and enforceable before the authority to construct may be issued. *See* 57 FR at 13553; *see also* Memo from John S. Seitz, Dir. OAQPS to Regional Air Dirs (June 14, 1994) (''Offsets Required Prior to Permit Issuance''). Thus, even though the emissions reduction may not have occurred by the time the ATC is issued (*e.g.*, the revised permit does not call for the source to actually reduce emissions until a later date), the new or modified source must identify the source of the emissions reduction to be used to meet the offset requirements, must provide an opportunity for review of the proposed emission reduction credits and, once the ATC is issued, cannot change the emission reduction credits unless a new ATC is proposed identifying the new emission reduction credits to be relied upon.

e. What kinds of emission reductions may be creditable?

Section 7.2.2.2 of Rule 2201 allows the District to include in the annual equivalency demonstration, ''the surplus value of additional creditable emission reductions that have not been used as offsets and have been banked or have been generated as a result of permitting actions.'' These unused ''additional credits'' may include emission reductions from a number of actions. Examples of such additional credits include emission reductions used to meet offset requirements by non-major sources and the 10 percent Air quality Improvement Deduction applied under section 4.12 of Rule 2201 for newly banked credits.[11] This section addresses a few other issues the District has raised regarding the creditability of other actions that might be considered to generate ''additional credits.''

The central issue for determining the creditability of a particular action often will be whether the reduction is surplus. The surplus requirement derives from section 173(c)(2) of the Act, which provides, ''Emission reductions otherwise required by this Act shall not be creditable as emissions reductions for purposes of any such offset requirement.'' To be creditable, a particular emission reduction must not be required by the Act or otherwise relied upon to meet a requirement of the Act. Thus, District requirements that are more stringent than an express requirement of the Act may generate surplus credits as long as the emission reductions are not relied upon elsewhere to comply with a requirement of the Act (*e.g.*, to achieve the National Ambient Air Quality Standards (NAAQS)).[12]

The emission reductions must also be real and quantifiable—actual emissions to the air must be reduced. Paper reductions (*i.e.*, changes in a source's permitted emissions that do not require actual emissions to decrease) are not creditable. Likewise, rules that limit the increase in emissions do not generate real, quantifiable reductions in emissions. For example, the District BACT requirements for modifications to existing non-major sources may generate emission reductions where the control requirement results in actual emissions reductions as compared to pre-modification emission levels. By contrast, BACT requirements for new non-major sources cannot generate emission reduction credits because there has been no reduction in actual emissions (instead actual emissions have increased).

It is not possible for EPA to predict the various potential claims that will be made for emission reduction credits. Even for the examples described in this section and in the TSD, case-specific facts may affect the analysis on creditability. It is therefore critical for the District to raise specific questions to EPA so that these issues can be resolved on a case-by-case basis.

f. Are pre-1990 emission reductions creditable?

Pre-1990 emission reduction credits pose particular problems under each of the criteria for creditability because of the age of these credits. Information on their generation may be missing, making it difficult to verify the quantity of emission reductions and ensure their continued enforceability. These problems, however, can be overcome if

[9] The District's amendments to Rule 2201 reiterate these criteria in section 7.1.5. These criteria derive directly from the offset requirements of the CAA section 173(c). *See* 1994 Seitz Memo; *see also* 51 FR 43814 (Dec. 4, 1986) (''Emissions Trading Policy Statement''). As such, EPA will interpret the District requirement in accordance with our federal policy and guidance on creditability.

[10] Section 7.1.5 of Rule 2201 expressly notes that the creditability of a given emission reduction included in the annual demonstration may be subject to EPA review.

[11] These additional credits must of course meet the creditability criteria described herein. This is expressly required by Rule 2201, section 7.4.1.1. The 1999 TSD provides additional discussion on the availability of these additional credits.

[12] The District has asked whether implementation of District rules that are not yet in the SIP could be counted as generating an ERC. Such rules, used to generate innovative offsets, must satisfy EPA requirements for Economic Incentive Programs (*see* EPA's guidance document entitled, ''Improving Air Quality with Economic Incentive Programs'' (January 2001)). EPA would not consider as creditable, emission reductions achieved through early implementation of rules that do not meet these requirements. In addition, any credits generated through these programs must continue to meet the basic criteria for creditability (*e.g.*, permanent, surplus, quantifiable and enforceable).

detailed records are available to support the required findings on creditability. The more difficult issues are related to the requirement that emission reductions be surplus.

The basic purpose of the surplus requirement is to avoid ''double counting'' emission reductions. Double counting can occur where emission reductions are the result of, or would have been achieved by, controls expressly required by the Act or controls used to satisfy requirements of the Act. Double counting can also occur if credit for emission reductions is claimed where the State's planning actions do not recognize that the reduced emissions existed in the first place. This is especially a concern for emission reductions that occurred long ago.

To avoid potential double counting, EPA has issued guidance on how emission reductions should be discounted at the time of use and the planning assumptions an area must make to allow the use of pre-1990 credits to meet NSR offset requirements. The 1992 ''General Preamble for the Implementation of title I of the Clean Air Act Amendments of 1990'' (''General Preamble'') describes the planning requirements of the Act as amended in 1990. 57 FR 13498 (April 16, 1992). The General Preamble addresses the issue of pre-1990 (or ''pre-enactment'') emission reductions and how areas need to ensure the use of these does not conflict with planning. The two types of planning actions that need to reflect the use of pre-1990 credits are Rate of Progress (ROP) plans and attainment demonstrations. *See id.* at 13508–509 and 13552–54; *see also* 1994 Seitz Memo.

Section 172(c)(2) requires implementation plans for nonattainment areas to include provisions requiring reasonable further progress toward attainment. The 1990 Amendments added specific reduction requirements necessary to satisfy the general reasonable further progress requirement. For example, ozone areas classified as moderate nonattainment and above must achieve a 15-percent reduction in volatile organic compound (VOC) emissions from 1990 baseline levels within six years of enactment of the CAA Amendments. CAA section 182(b)(1). Ozone areas classified as serious and above must, in general, achieve an additional 3-percent reduction every three years thereafter until the attainment date. CAA section 182(c)(2)(B).

Because the baseline for measuring reasonable further progress is the level of actual emissions from anthropogenic sources in 1990, pre-1990 emission reductions generally are not included in the baseline. Thus, to avoid giving credit for reductions that the baseline already reflects, pre-1990 credits must be ''added back.'' The General Preamble explains that the required emission reductions necessary to meet reasonable further progress (*e.g.*, 15 percent from 1990 levels) must be net of growth and net of any pre-1990 emission reduction credits the area plans to allow for use as offsets. 57 FR at 13508–509. This means that the controls identified to achieve the target level of emissions (*e.g.*, 85 percent of the baseline levels) must also achieve reductions to offset growth and the addition of any pre-1990 emission reduction credits the area wishes to make available.[13]

There are different ways that areas can include pre-1990 credits in ROP plans. EPA has explained, ''A State may choose to show that the magnitude of pre-1990 ERC's (in absolute tonnage) was included in the growth factor, or the State may choose to show that it was not included in the growth factor, but in addition to anticipated growth.'' 1994 Seitz Memo. Under either approach, the quantity of pre-1990 credits added to or included in the growth factor must be distinguishable and identifiable. Id. If the addition of pre-1990 credits cannot be distinguished from general growth, EPA will not be able to determine whether the growth factor used in the plan is reasonable or to compare the actual use of pre-1990 credits to the cap assumed in the plan.[14]

Pre-1990 credits must also be accounted for in an area's attainment demonstration. 57 FR 13509 and 13553; *see also* 1994 Seitz Memo. In addition to demonstrations of reasonable further progress, the Act requires areas to submit a demonstration that the SIP, as revised, will provide for attainment of the NAAQS by the applicable attainment date (''attainment demonstration''). *See, e.g.*, CAA section 182(c)(2)(A) (attainment demonstration required for serious ozone nonattainment areas). Attainment demonstrations, in very general terms, require areas to use modeling or other approved analytical techniques to determine the level of emissions required to achieve the NAAQS and to provide projections of emissions inventories to show how the area will control sources to achieve the necessary level of emissions. Because new and modified major sources are required to offset their emissions increases by obtaining emission reductions from other sources, there should be no net effect on emissions inventories from construction or modification of a major source *if the emissions reduced are included in the inventory.* This means pre-1990 emissions reductions, which would otherwise not be included in inventories of emissions in 1990 and beyond, must be added back into the area's inventories as if these emissions were still in the air in order to be used as offsets and ensure no net effect on emission inventories. *See* 62 FR at 13509 and 13553; *see also* 1994 Seitz Memo.

There are multiple ways that these pre-1990 emissions can be included in the inventories. The simplest would be to include a line item for the emissions to be added for use as potential offsets. No matter what approach an area uses, the demonstration must clearly identify these emissions so that the reasonableness of the approach can be evaluated and the actual use of these pre-1990 credits can be compared to the assumptions in the demonstration.

To date, SJVUAPCD has failed to adequately account for the use of pre-1990 emission reduction credits in its planning activities. As a result, EPA does not consider these reductions to be surplus creditable reductions that can be used to meet federal offset requirements within the District.

The San Joaquin Valley was originally classified as moderate for the PM–10 NAAQS following enactment of the 1990 Clean Air Act Amendments. The District submitted a moderate area plan in December 1991, but this plan was never approved by EPA and, in any event, did not support the use of pre-1990 credits by including these credits in the plan's inventories as emissions in the air. On January 8, 1993, EPA reclassified the San Joaquin Valley as serious for PM–10. 58 FR 3334. The attainment deadline for serious PM

[13] For example, assume the 1990 baseline emissions level is 100 tons per year (tpy) and the area anticipates 10 percent growth and wishes to make available 5 tpy of pre-1990 credits. In order to achieve the target level of 85 tpy (*i.e.*, 15 percent reduction of baseline emissions), the ROP plan will need to identify controls that will achieve 30 tpy of reduction—15 tpy to demonstrate reasonable further progress, 10 tpy to offset growth and 5 tpy to offset the use of pre-1990 credits. This obviously is an overly simplistic example and is intended only to show how these concepts relate to one another.

[14] EPA addressed similar concerns in its 1986 Emissions Trading Policy Statement. 51 FR 43814 (Dec. 4, 1986). In that guidance, EPA described the need to distinguish between shutdowns to be used to generate credits to meet offset requirements and shutdowns built into assumptions on growth. We explained, ''In all cases where net turnover reductions have been quantified and relied on as part of attainment demonstrations, states which seek to grant shutdown credit for use in trading must be prepared to show clearly and unequivocally on the basis of SIP documents or tracking that the credit has not been double-counted or otherwise relied on for SIP planning purposes.''

nonattainment areas was December 31, 2001. CAA section 188(c)(2). The attainment demonstration, due with the serious area plan on February 8, 1997, was withdrawn by the District on February 26, 2002. On July 23, 2002, EPA issued a finding that the San Joaquin Valley failed to attain the PM–10 NAAQS by the applicable deadline. In accordance with CAA section 189(d), the State was required to submit by December 31, 2002, a new attainment demonstration for San Joaquin Valley, along with measures sufficient to achieve an annual reduction in PM–10 or PM–10 precursor emissions of not less than 5 percent. This new demonstration has not been submitted. The District, because it failed to attain the PM standard by the statutory deadline and has not submitted required progress and attainment plans, has failed to show how the use of pre-1990 emission reductions would be consistent with the need for expeditious attainment of the PM NAAQS.[15]

The San Joaquin Valley is currently designated as a severe nonattainment area for the 1-hour ozone NAAQS. 66 FR 56476 (Nov. 8, 2001). EPA approved a serious area plan (the ''1994 ozone plan'') for the District on January 8, 1997. 62 FR 1150. The plan included a demonstration that the area would attain the ozone NAAQS by 1999. The attainment demonstration in the 1994 ozone plan did not specifically identify and account for the possible use of pre-1990 emission reductions. The area failed to attain the ozone standard in 1999, and as a result EPA reclassified the area to severe on November 8, 2001. 66 FR 56476. The severe area plan was due on May 31, 2002. 66 FR at 56481. The attainment deadline for severe areas is November 15, 2005. CAA section 181(a)(1). The District failed to submit the required plan by the May 2002 deadline and is now subject to the offset sanction beginning March 18, 2004, for failure to submit the required plan. 67 FR 61784 (Oct. 2, 2002).

The 1994 ozone plan included ROP milestone provisions for 1996 and 1999. The plan, however, did not include pre-1990 credits in the ROP provisions or attainment demonstration. The District has recently prepared and adopted a ROP plan for the 2002 and 2005 milestones.[16] We will review this ROP plan to determine if the District has properly accounted for the use of pre-1990 credits and met applicable ROP requirements, but this alone will not provide the necessary demonstration that the use of these credits is consistent with the need for the area to attain the ozone NAAQS as expeditiously as possible.[17] Unless and until the area submits a new attainment demonstration that shows expeditious attainment can be achieved while still allowing the use of these credits, EPA cannot reasonably conclude that these pre-1990 reductions are surplus creditable reductions.

Based on these findings regarding the creditability of pre-1990 credits, EPA will consider the creditable value of these credits used in the District's tracking system to be zero. EPA, therefore, encourages the District and sources to avoid using these pre-1990 credits and, if problems arise, to work with EPA to explore options for other sources of emission reduction credits.

2. Agricultural Exemption

a. How has the District corrected this deficiency?

On December 19, 2002, the District adopted a version of Rule 2020 that deleted section 4.5, and thereby eliminated any exemption in its NSR rule for permitting a new or modified major stationary source of air pollutants. The District's deletion of the exemption from its NSR rule corrects the rule deficiency set out in our July 2001 limited disapproval. Because the District removed the exemption from its rule and for the reasons discussed below, EPA is proposing to find that the District has corrected the deficiency and to approve Rule 2020 as revised.

b. How is EPA addressing the State exemption?

EPA is aware, however, that California Health & Safety Code 42310(e) continues to preclude the District, as well as all other districts in California, from permitting agricultural sources under either title I or title V of the CAA. While the State is on notice of the need to remove the exemption for major sources for purposes of title V, the State must also remove the exemption for any major sources for purposes of title I. Therefore, concurrent with today's proposed approval of the District's revised version of Rule 2020 (deleting the exemption), EPA is publishing in the **Federal Register** a proposal pursuant to section 110(k)(5) of the CAA to find the California SIP is substantially inadequate for all nonattainment air pollution control districts in the State and for all attainment area districts that have an approved Prevention of Significant Deterioration (PSD) program because the State cannot provide ''necessary assurances'' that it or the districts have authority to carry out the applicable nonattainment NSR or PSD portions of the SIP.

This concurrent proposal will inform the Executive Officer of the CARB that the California SIP is and will remain inadequate until the California legislature amends Health & Safety Code section 42310(e) to the extent necessary to allow the State of California through the air districts to issue permits under title I, parts C and D, to all major sources, including those involved in agriculture. This action proposes to require the State to correct the inadequacy by November 23, 2003 to avoid a finding under section 179 of the Act which would trigger mandatory sanctions.[18]

3. Lowest Achievable Emission Rate Applicability

EPA determined that the previous version of District Rule 2201 did not always require LAER for major modifications because it did not require LAER if a modification resulted in an increase in actual emissions but not an increase in the emission unit's permitted emission rate. Therefore, EPA required the District to modify Rule 2201 to ensure that all major

[15] This conclusion is consistent with our policy regarding the use of shutdown credits as offsets. Memo from John S. Seitz, Dir., OAQPS to Regional Air Dirs (July 21, 1993). Under the policy described in the 1993 memo, we explained that the use of shutdown credits as offsets was limited to ensure that reductions came out of the area's existing emissions and thus assured reasonable further progress. Before 1990, this could only be accomplished if the area had a demonstration of attainment that made this showing. After 1990, because the deadlines for submitting attainment demonstrations had been extended by the Clean Air Act Amendments, we decided that an attainment demonstration should not be required before shutdown credits could be used. We added, however, ''This policy cannot be extended to situations where an attainment demonstration is lacking.'' Thus if any of the required planning submittals is delinquent, deemed incomplete or disapproved, shutdown credits cannot be used to meet offset requirements.

[16] The 2002 ROP Plan was adopted by the District Board on December 19, 2002, and submitted to ARB. A copy of the Plan can be found at the District's website at *http://www.valleyair.org/Air_Quality_Plans/AQ_plans_Ozone.htm#Amendment 2002 and 2005 ROP 103.*

[17] The 1994 Seitz Memo explains that pre-1990 credits to be used in an area ''must be contained in: (1) The current applicable federally-approved RFP and ROP plans as growth, and (2) all federally-required attainment demonstrations as emissions in the air.'' While an argument could be made that inclusion of these credits in the ROP and not in an attainment demonstration might be sufficient to support their use where the attainment demonstration is not yet due, this argument is not reasonable where, as here, the area has not only failed to meet the plan submission deadlines but has had to be reclassified because of the area's failure to attain by the statutory deadlines.

[18] EPA is proposing this deadline to coincide with the deadline for sanctions under title V to correct the agriculture exemption in that program. *See* CAA Section 110(k)(5) (providing EPA discretion to establish reasonable deadlines).

modifications as defined at 40 CFR 51.165(a)(1)(v) are subject to LAER.

The District has corrected this deficiency by adding a backstop in addition to the current LAER applicability requirements. This backstop requires that any major modifications, as defined at 40 CFR 51.165, must meet LAER. *See* Rule 2201, sections 3.24 and 4.1.3. Sections 4.1.1 and 4.1.2 also continue to require LAER for minor sources regardless of whether changes at those sources are defined as major modifications.

D. Summary

EPA is proposing to approve revised versions of SJVUAPCD Rules 2020 and 2201. The revisions to these rules satisfy the requirements outlined in our July 19, 2001 limited approval/limited disapproval of previous versions of these rules. EPA is simultaneously publishing an interim final determination to stay the sanctions clock started by the limited disapproval. Additional information on the amendments to Rules 2020 and 2201 is contained in the TSD for this proposal.

Concurrent with this proposal, we are also proposing to call in the State to repeal or amend Health and Safety Code Section 42310(e). Once EPA determines that the State has provided the necessary assurances required under section 110(a)(2)(E), the NSR program for the SJVUAPCD will fully meet the requirements of sections 172(c)(5), 173 and 182 of the CAA.

III. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

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

B. Regulatory Flexibility Act

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

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

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); CAA section 110(a)(2).

C. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

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

D. Executive Order 13132, Federalism

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

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

E. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. We are merely proposing to approve a state rule implementing a federal standard. EPA's action does not impose requirements on Tribes and the rules being approved do not significantly or uniquely affect Tribes. Thus, Executive Order 13175 does not apply to this rule.

EPA specifically solicits additional comment on this proposed rule from tribal officials.

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

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks and is not a significant regulatory action.

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

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

H. National Technology Transfer and Advancement Act

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

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

List of Subjects in 40 CFR Part 52

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

Note: Incorporation by reference of the State Implementation Plan for the State of California was approved by the Director of the Federal Register on July 1, 1982.

Dated: January 31, 2003.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. 03–3418 Filed 2–12–03; 8:45 am]

BILLING CODE 6560–50–P