

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX AIR DIVISION**

Technical Support Document

for

EPA's Rulemaking for the  
California State Implementation Plan  
as submitted by the California Air Resources Board

Regarding

San Joaquin Valley Unified Air Pollution Control District  
Rule 3170, "Federally Mandated Ozone Nonattainment Fee"

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## 1. RULE IDENTIFICATION

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| <b>Agency:</b>                    | San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD)  |
| <b>Subject of this TSD:</b>       | Rule 3170 “Federally Mandated Ozone Nonattainment Fee” and SJVUAPCD Alternative Equivalent 185 Program<br>Adopted: May 19, 2011<br>Submitted: June 14, 2011 |
| <b>Current SIP-Approved Rule:</b> | Adopted: May 16, 2002<br>Submitted: August 6, 2002<br>Approved <sup>1</sup> : January 13, 2010, effective February 12, 2010                                 |

## 2. BACKGROUND:

### a. Clean Air Act Section 185 Fees

Under Sections 182(d)(3), (e), (f) and 185 of the 1990 Clean Air Act Amendments (CAA or the Act), States with ozone nonattainment areas classified as severe or extreme are required to submit a SIP revision that requires major stationary sources of volatile organic compounds (VOC) or oxides of nitrogen (NO<sub>x</sub>) emissions to pay a fee. Under CAA section 185(a), the required SIP revision must provide for payment of the fees, computed in accordance with section 185(b), if the severe or extreme nonattainment area in which such sources are located has failed to attain the 1-hour ozone standard by the applicable attainment date, for each calendar year beginning after the attainment date.

Although EPA revoked the 1-hour ozone standard (effective June 15, 2005), during the transition from the 1-hour ozone to the 8-hour ozone standard, EPA required 1-hour nonattainment areas to remain subject to certain requirements pertaining to the area’s previous 1-hour classification, as ozone anti-backsliding requirements, for continued progress toward the 1997 ozone standards.

Initially, our rules to address the transition from the 1-hour to the 8-hour ozone standard did not include the section 185 fee penalty requirement as one of the measures necessary to meet Clean Air Act anti-backsliding requirements.<sup>2</sup> However, on December 23, 2006, the United States Court of Appeals for the District of Columbia Circuit upheld the revocation of the 1-hour standard but determined that EPA should not have removed from its anti-backsliding requirements the application of the section 185 fee provision for severe and extreme nonattainment areas that failed to attain the 1-hour ozone standard by their attainment date. *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006).

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<sup>1</sup> The final action was a limited approval/limited disapproval (January 13, 2010, 75 FR 1716).

<sup>2</sup> Final Rule to Implement the 8-hour Ozone National Ambient Air Quality Standard – Phase 1, 69 FR 23951 (April 30, 2004).

b. San Joaquin Valley 1-Hour Ozone Nonattainment Status

In November 1991, the San Joaquin Valley 1-hour ozone nonattainment area (SJV) was classified as a serious nonattainment area by operation of law. See 56 FR 56694 (November 6, 1991). In November 2001, EPA found that the SJV had failed to attain the 1-hour ozone standard by the attainment deadline for serious nonattainment areas (November 15, 1999) and reclassified the area as severe. See 66 FR 56476 (November 8, 2001). The State of California later requested a reclassification of the SJV from severe to extreme; EPA granted this request to reclassify the SJV to an extreme 1-hour ozone nonattainment area on April 16, 2004. See 69 FR 20550. On April 30, 2004, EPA promulgated ozone area designations for the 8-hour ozone standard, and revoked the 1-hour standard, effective, as noted above, June 15, 2005. See 69 FR 23951. As explained above, although the D.C. Circuit upheld EPA's decision to revoke the 1-hour standard, it also ruled that the requirements of section 185 continue to apply to areas that failed to meet the standard. Therefore, given the court's decision and SJV's classification as an "extreme" 1-hour ozone nonattainment area, the State of California was required to submit a SIP providing for a section 185 fee program in San Joaquin Valley. The SJV is also designated as an "extreme" area under the 1997 8-hour ozone national ambient air quality standard (NAAQS).

c. Current SIP-Approved Rule 3170 – Limited Approval/Limited Disapproval

On January 13, 2010, EPA issued a limited approval/limited disapproval of SJVUAPCD Rule 3170. EPA found that while the rule strengthened the SIP, it did not fully comply with the requirements of section 185. EPA identified the following rule deficiencies which prevented full approval: (i) an exemption for units that began operation after the attainment year; (ii) an exemption for "clean units;" (iii) the definition of the baseline period as two consecutive years; (iv) a provision to allow averaging of baseline emissions over 2-5 years); and (v) a definition of "major source" inconsistent with the CAA.

EPA's limited approval/limited disapproval started sanctions clocks under section 179 of the Act and our regulations at 40 CFR 52.31. Unless EPA approves a subsequent SIP revision which corrects the deficiencies, offset sanctions would become effective August 12, 2011, and highway sanctions would become effective February 12, 2012.

d. Legal Rationale For Alternative Program

EPA is proposing that states can meet the 1-hour ozone section 185 obligation through a SIP revision containing either the fee program prescribed in section 185 of the Act, or an equivalent alternative program. As further explained below, EPA is proposing that an alternative program may be acceptable if EPA determines, through notice-and-comment rulemaking, that it is consistent with the principles of section 172(e) of the CAA.<sup>3</sup>

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<sup>3</sup> EPA has previously set forth this reasoning in a memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Air Division Directors, "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS," January 5, 2010. On July 1, 2011, the D.C. Circuit Court of Appeals vacated this guidance, on the ground that it was final agency action for which notice-and-comment rulemaking procedures were required. *NRDC v. EPA*, No. 10-1056, 2011 WL 2601560, C.A.D.C. 2011. In today's notice, we are applying the court's directive to follow the rulemaking requirements set forth in the Administrative Procedures Act to inform our consideration of section 185 and alternative fee programs. We are

Section 172(e) is an anti-backsliding provision of the CAA that requires EPA to develop regulations to ensure that controls in a nonattainment area are “not less stringent” than those that applied to the area before EPA revised a national ambient air quality standard (NAAQS) to make it less stringent. In the Phase 1 ozone implementation rule for the 1997 ozone NAAQS published on April 30, 2004 (69 FR 23951), EPA determined that although section 172(e) does not directly apply where EPA has strengthened the NAAQS, as it did in 1997, it was reasonable to apply the same anti-backsliding principle that would apply to the relaxation of a standard for the transition from the 1-hour NAAQS to the more stringent 1997 8-hour NAAQS. As part of applying the principles in section 172(e) for purposes of the transition from the 1-hour standard to the 1997 8-hour standard, EPA can either require states to retain programs that applied for purposes of the 1-hour standard, or alternatively can allow states to adopt alternative programs, but only if such alternatives are determined through notice-and-comment rulemaking to be “not less stringent” than the mandated program.

EPA has identified three possible types of alternative programs that could satisfy the section 185 requirement: (i) those that achieve the same emissions reductions; (ii) those that raise the same amount of revenue and establishes a process where the revenues would be used to pay for emission reductions that will further improve ozone air quality; and (iii) those that would be equivalent through a combination of both emission reductions and revenues. Accordingly, we are proposing to determine through notice-and-comment rulemaking, that States can demonstrate an alternative program’s equivalency by comparing expected fees and/or emissions reductions directly attributable to application of section 185 to the expected fees and/or emissions reductions from the proposed alternative program. Under an alternative program, states might opt to shift the fee burden from a specific set of major stationary sources to non-major sources, such as owners of mobile sources that also contribute to ozone formation. EPA also believes that alternative programs, if approved as “not less stringent” than the section 185 fee program, would encourage one-hour ozone NAAQS nonattainment areas to reach attainment as effectively and expeditiously as a section 185 fee program, if not more so, and therefore satisfy the CAA’s goal of attainment and maintenance of the NAAQS.

In sum, in order for EPA to approve an alternative program as satisfying the 1-hour ozone section 185 fee program SIP revision requirement, the state must demonstrate that the alternative program is not less stringent than the otherwise applicable section 185 fee program by collecting fees equal to or exceeding the fees that would have been collected under 185.

### **3. RULE SUMMARY**

This section of the TSD primarily summarizes the provisions of Rule 3170 and SJVUAPCD’s alternative equivalent 185 program. The evaluation of Rule 3170 and the alternative equivalent 185 program against requirements, guidances, or policies is found in the Section 5 of the TSD on “EPA Evaluation.”

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therefore inviting the public to comment on whether it is appropriate for EPA to consider an alternative program and, if so, whether SJVUAPCD’s program would constitute an approvable alternative program under the CAA.

a. Overview of SJVUAPCD's Alternative Equivalent 185 Program

On June 14, 2011, the California Air Resources Board (CARB), on behalf of SJVUAPCD, submitted an alternative section 185 fee program based on a fee equivalency demonstration. SJVUAPCD's alternative equivalent program consists of three primary components. One component is the assessment of fees on certain major stationary sources as required by Rule 3170. A second component is the collection of an additional \$12 for each motor vehicle registered in the San Joaquin Valley. This fee is collected by the California Department of Motor Vehicle (DMV) and provided to SJVUAPCD for reducing emissions. Lastly, Rule 3170 requires SJVUAPCD to annually demonstrate and report to EPA that the combined fees from stationary sources and motor vehicle registration are at least equal to the amount of fees that would have been collected under a fee program as prescribed in section 185 of the Act. If SJVUAPCD fails to make that demonstration in any year, Rule 3170 requires SJVUAPCD to remedy any shortfall in fees through collecting additional fees from major stationary sources as outlined in the rule.

b. Stationary Source Fees

Rule 3170 applies to all major stationary sources of VOCs and NO<sub>x</sub>, which in the SJVUAPCD are sources that emit 10 tons per year or more of either pollutant.<sup>4</sup> Sources that fail to reduce their emissions by at least 80% of baseline emissions are required to pay fees for each ton of emissions above 80%. The rule states that a source's baseline emissions are its actual emissions during the year 2010 or during an alternative baseline period pursuant to section 3.2.2.<sup>5</sup> The fee rate is \$5,000 per ton in 1990 dollars, which must be adjusted for inflation based on the Consumer Price Index (CPI).<sup>6</sup> Based on sources' annually reported emissions, SJVUAPCD will annually assess fees.

The rule exempts from the assessment of fees "clean emissions units" which are units that have advanced emissions controls as defined in the rule (sections 3.5 and 4.0). The Air Pollution Control Officer (APCO) will determine which units are clean emissions units and exempt from fees.

Sources subject to fees must pay SJVUAPCD by June 30, 2012, and each June 30 thereafter. Late payments are subject to a penalty (section 5.6). The rule provides that assessment of fees stops when EPA determines, after notice and comment rulemaking, that the San Joaquin Air Basin has attained the 1-hour ozone standard (section 2.0).

Rule 3170 retains two provisions that EPA identified as deficiencies in our limited

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<sup>4</sup> "Major Source" is defined in Rule 3170 section 3.7, which refers to Rule 2202 (New and Modified Stationary Source Review Rule). Rule 2202 was adopted December 18, 2008 and approved into the SIP on May 11, 2010. 75 FR 26104.

<sup>5</sup> Rule 3170 section 3.2.2 says, "An alternative baseline period that reflects the average of at least two consecutive years within 2006 through 2010, if those years are determined by the APCO as more representative of normal source operation."

<sup>6</sup> The CPI adjusted rate in 2009 was \$8,755. This was described in Attachment B, Table 2 of the now vacated January 5, 2010 guidance on developing 185 programs.

approval/limited disapproval.<sup>7</sup> These provisions are: 1) a clean unit exemption which is not provided for under section 185; and 2) an allowance for an alternate baseline period of two consecutive years (2006-2010) if the APCO determines it would be more representative of normal operations.<sup>8</sup> The CAA and EPA baseline guidance allows for alternative baseline periods only if a source's emissions are irregular, cyclical, or otherwise vary significantly from year to year. However, as described below, EPA has determined that SJVUAPCD's fee-equivalency program will compensate for any shortfall in collected funds that might result from these two provisions.

c. Motor Vehicle Registration Fees

In 2008, the state legislature passed AB2522 (now codified as Health and Safety Code sections 40610 - 40613), which authorizes SJVUAPCD to increase the amount of motor vehicle registration fees by an amount not to exceed \$30 per motor vehicle per year. On October 21, 2010, SJVUAPCD approved the assessment of a new motor vehicle registration fee of \$12 per motor vehicle per year in the San Joaquin Valley (see SJVUAPCD Final Staff Report, Appendix D that included Resolution No. 10-10-14). The registration fees are to be collected by the DMV and forwarded to SJVUAPCD pursuant to California's Vehicle Code section 9250.17 and Health and Safety Code sections 40610-40613. SJVUAPCD estimates the motor vehicle registration fees will result in \$34 million per year in revenues (see page 2 of SJVUAPCD Final Staff Report). State law requires that these revenues be used to fund incentive-based programs resulting in NO<sub>x</sub> and VOC emissions reductions in the San Joaquin Valley. State law also requires that at least ten million dollars of the collected fees be used to mitigate the impacts of air pollution on public health and the environment in disproportionately impacted environmental justice communities in the San Joaquin Valley. See Cal. Health & Safety Code section 40612(b).

d. 185 Fee-Equivalency Demonstration

Rule 3170 requires SJVUAPCD to track emissions from stationary sources, fees collected from stationary sources, and fees collected from motor vehicle registration. SJVUAPCD will determine the amount of fees that would have been collected from stationary sources based on a direct implementation of section 185 (section 7.2.1.3). This direct implementation calculation would use a baseline of 2010 actual emissions, and would not exempt clean emissions units from fees. The rule also requires SJVUAPCD to prepare and submit to EPA an "Annual Fee Equivalency Demonstration Report" to demonstrate that the amount of fees in the alternative 185 fee program raises at least as much revenue as the revenue that would result under the section 185 fee program if all section 185 sources paid fees for each applicable calendar year. (section 7.2). If the demonstration does not show at least equivalent funds in the alternative section 185 program, section 7.3 requires SJVUAPCD to collect additional fees from stationary sources to make-up the shortfall in funds.

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<sup>7</sup> There were three additional deficiencies identified in the January 12, 2010 final rule that have been resolved. The exemption for new emissions units has been deleted. Rule 3170 no longer defines baseline period as a 2-year period consisting of the attainment year and the preceding year. Lastly, Rule 3170 now uses the correct threshold for major stationary sources (i.e., 10 tons per year of VOC or NO<sub>x</sub>) (see footnote 4).

<sup>8</sup> While Rule 3170 retains a provision that allows for an alternative baseline period, the methodology and criteria have changed as reflected in SJVUAPCD's revision to section 3.2.2.

#### 4. EPA REVIEW CRITERIA

EPA considered the criteria described and set forth in the following sections of the CAA and guidance documents to evaluate this rule:

- a. Enforceability - Section 110(a) of the Clean Air Act requires enforceable SIP requirements. Several EPA guidance documents are used to evaluate rule enforceability, including the “Bluebook” (*Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Clarification to Appendix D*), November 24, 1978, 52 FR 45044), and “the Little Bluebook” (*Guidance Document for Correcting Common VOC & Other Rule Deficiencies*), EPA Region 9, August 21, 2001.
- b. Rule Relaxation - EPA must evaluate whether this SIP revision would interfere with any applicable requirement concerning attainment and reasonable further progress (RFP) or any requirement of the Act (CAA 110(l)) or modify, in a nonattainment area, any SIP-approved control requirement in effect before November 15, 1990 (CAA 193).
- c. Section 182(d)(3) of the Clean Air Act requires states with severe or extreme 1-hour ozone nonattainment areas to submit a SIP which includes the provisions required under section 185. CAA section 185 requires such SIPs to provide that, if the area has failed to attain the 1-hour ozone NAAQS by the applicable attainment date, each major stationary source of VOCs must pay a fee, computed in accordance with section 185(b), for each calendar year beginning after the attainment date. Under section 185(b), the state’s SIP revision must require each major stationary source to pay a fee for each ton of VOC emitted in excess of 80% of baseline emissions. A source’s baseline emissions are its actual emissions during the required attainment year. Section 182(f) extends the requirements of section 185 to major stationary sources of NO<sub>x</sub>.

An alternative program equivalent to section 185 may be acceptable if EPA determines, through notice-and-comment rulemaking, that it is consistent with the principles of section 172(e) of the CAA. Section 172(e) is an anti-backsliding provision of the CAA. As part of applying the principles in section 172(e) for purposes of the transition from the 1-hour standard to the 1997 8-hour standard, EPA can either require states to retain programs that applied for purposes of the 1-hour standard, or alternatively can allow states to adopt alternative programs, but only if such alternatives are determined through notice-and-comment rulemaking to be “not less stringent” than the mandated program.

- d. Memorandum from William Harnett, Director of the Air Quality Policy Division to the Regional Air Division Directors, entitled, “Guidance on Establishing Emissions Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment Date,” March 21, 2008. This guidance can be found on the Internet at:  
[http://www.epa.gov/ttn/oarpg/t1/memoranda/20080321\\_harnett\\_emissions\\_baseline.pdf](http://www.epa.gov/ttn/oarpg/t1/memoranda/20080321_harnett_emissions_baseline.pdf)

## 5. EPA EVALUATION

Rule 3170 complies with the evaluation criteria as discussed below.

- a. Enforceability – The rule is generally clear and consistent with the Bluebook and the Little Bluebook and other relevant EPA guidance regarding enforceability.
- b. Rule Relaxation – EPA believes that this SIP revision would comply with CAA sections 110(l) and 193, because it would not interfere with the on-going process for ensuring that requirements for RFP and attainment of the NAAQS are met, and the submitted SIP revision is more stringent than the rule previously approved into the SIP. Furthermore, amended Rule 3170 addresses the deficiencies identified in EPA’s limited approval/limited disapproval by demonstrating, consistent with the principles of section 172(e) of the Act, that SJVUAPCD’s alternative program would raise at least as much revenue as would result under the section 185 fee program if all section 185 sources paid fees for each applicable calendar year.
- c. Sections 182 and 185 of the CAA – SJVUAPCD submitted amended Rule 3170 and its alternative fee equivalent program to meet the requirements of sections 182 and 185. The amended rule applies to all major sources of VOC or NO<sub>x</sub>, and took effect for state law purposes on May 19, 2011. Rule 3170 is not in strict conformance with section 185 because it exempts clean units from fees and it allows a different method to calculate baseline emissions. However, SJVUAPCD’s alternative program includes provisions to compensate for any shortfall in collected funds that might result from these two provisions. As explained above, EPA believes that states can meet the 1-hour ozone section 185 obligation through a SIP revision containing either the fee program prescribed in section 185 of the Act, or an equivalent alternative program if EPA determines, through notice-and-comment rulemaking, that it is consistent with the principles of section 172(e) of the CAA.

SJVUAPCD’s alternative equivalent program consists of three primary components: 1) assessment of fees on certain major stationary sources, 2) the collection of an additional \$12 for each motor vehicle registered in the San Joaquin Valley, and 3) an annual demonstration that the combined fees from stationary sources and motor vehicle registration are at least equal to the amount of fees that would have been collected under a fee program as prescribed in section 185 of the Act. If SJVUAPCD fails to make that demonstration in any year, Rule 3170 requires SJVUAPCD to remedy any shortfall in fees through collecting additional fees from major stationary sources.

One initial step in an equivalency demonstration is to determine the benchmark. Rule 3170 requires SJVUAPCD to determine the amount of fees that would have been collected under a direct implementation of section 185. These calculation procedures (section 7.2.1.3, and sections 5.1 through 5.3) do not include a clean unit exemption, are based on actual emissions in 2010, and meet the requirements of section 185 of the Act as well as EPA’s March 2008 baseline guidance memorandum.<sup>9</sup> These provisions provide the correct benchmark for a comparison of equivalent fees.

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<sup>9</sup> See TSD section 4.d above.

With respect to the assessment and collection of fees, Rule 3170 includes enforceable provisions for assessing and collecting fees from certain major stationary sources (sections 5.0 and 6.0). Under state law, SJVUAPCD approved the assessment of a new motor vehicle registration fee, which will be collected by the DMV and forwarded to SJVUAPCD.

Rule 3170 also requires the APCO to implement a system to track all information with respect to emissions data, the calculation, assessment, and collection of fees from stationary sources, as well as tracking of the amount of collected motor vehicle registration fees (section 7.1). The APCO is required to prepare and submit to EPA an annual fee equivalency demonstration report which shows that the sum of the total fees collected from stationary sources and motor vehicle registrations are equal to or greater than the fees that would have been collected under a direct implementation of section 185 (section 7.2). Lastly, in the event that the annual fee equivalency demonstration report shows insufficient funds collected (i.e., a shortfall), Rule 3170 requires the collection of additional funds from stationary sources (section 7.3).

We believe Rule 3170 adequately provides for an equivalency demonstration and the remedy for fee collection shortfall will guarantee that Rule 3170 provides equivalent fees. Furthermore, SJVUAPCD will be using the revenues for projects that reduce emissions and improve air quality in the San Joaquin Valley. We therefore believe Rule 3170 is at least as stringent as a rule required by CAA section 185.

## **6. EPA ACTION**

EPA staff recommends full approval of the submitted version to Rule 3170 because it complies with all relevant Clean Air Act requirements including those regarding enforceability, and it is consistent with CAA sections 172(e) and 185. Because of the recommendation for full approval, EPA staff also recommends simultaneously issuing an interim final determination to defer the imposition of sanctions pending EPA's final approval of Rule 3170. The issuance of the interim final determination to defer sanctions is based on a finding that it is more likely than not that Rule 3170 meets the requirements of section 185 of the CAA. EPA staff believes relief from sanctions should be provided as quickly as possible.

## **7. ATTACHMENTS**

- a. SJVUAPCD Rule 3170, "Federally Mandated Ozone Nonattainment Fee," amended May 19, 2011.
- b. SJVUAPCD Final Staff Report, "Draft amendments to Rule 3170 (Federally Mandated Ozone Nonattainment Fee)," May 19, 2011.