



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2019-0176; FRL-10017-96-Region 9]

Air Plan Approval; California; South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a revision to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). This revision concerns emissions of oxides of nitrogen (NO_x) from on-road heavy-duty vehicles. We are approving a local measure to reduce emissions from these sources under the Clean Air Act (CAA or the Act).

DATES: This rule will be effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R09-OAR-2019-0176. All documents in the docket are listed on the <http://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <http://www.regulations.gov>, or please contact the person identified in the “**FOR FURTHER INFORMATION CONTACT**” section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who

needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Rebecca Newhouse, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972-3004 or by email at *newhouse.rebecca@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, “we,” “us” and “our” refer to the EPA.

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I. Proposed Action

On April 25, 2019 (84 FR 17365), the EPA proposed to approve the following measure, submitted by the California Air Resources Board (CARB), into the California SIP.

Local Agency	Resolution #	Measure Title	Adopted	Submitted
CARB	18-3	South Coast On-Road Heavy-Duty Vehicle Incentive Measure	03/22/18	05/04/18

We proposed to approve the South Coast On-Road Heavy-Duty Vehicle Incentive Measure based on a determination that it satisfies the applicable CAA requirements for approval of voluntary measures for SIP emission reduction credit. Our proposal was based on our evaluation of the documents provided in the SIP submission, including the measure itself (i.e., the State commitments set forth on page 5 of CARB Resolution 18-3), CARB’s analysis of the

measure in a document entitled “South Coast On-Road Heavy-Duty Vehicle Incentive Measure,” Release Date: February 16, 2018 (hereafter “Demonstration”), and a document entitled “Additional Information for the South Coast On-Road Heavy-Duty Vehicle Incentive Measure.” Our proposed rule and associated technical support document (TSD)¹ contain more information about the SIP submission and our evaluation thereof.

On November 24, 2020, CARB submitted a technical clarification to the South Coast On-Road Heavy-Duty Vehicle Incentive Measure that clarifies its commitment to make certain documents concerning the incentive projects implemented to achieve emission reductions available to the public upon request. CARB adopted this technical clarification to the measure by Executive Order S-20-030 (November 23, 2020).² We refer to CARB’s commitments in Resolution 18-3, as clarified by Executive Order S-20-030, as the “South Coast Incentive Measure.”

II. Public Comments and EPA Responses

The EPA’s proposed action provided a 30-day public comment period. During this period, we received comments from Earthjustice, on behalf of a coalition of environmental and community organizations, and comments from an anonymous commenter.³

We respond below to a selection of the most significant comments on our proposed rule. We respond to all other comments that are germane to the proposed rule in our separate Response to Comments document available at <https://www.regulations.gov>, Docket ID No. EPA-

¹ EPA Region IX, “Technical Support Document for EPA’s Rulemaking for the California State Implementation Plan, California Air Resources Board Resolution 18-3, South Coast On-Road Heavy-Duty Vehicle Incentive Measure,” April 2019.

² Letter dated November 23, 2020, from Richard W. Corey, Executive Officer, CARB, to John W. Busterud, Regional Administrator, EPA Region IX (transmitting, inter alia, CARB Executive Order S-20-030, “Adoption and Submittal of Technical Clarifications to the South Coast On-Road Heavy-Duty Incentive Measure,” November 23, 2020).

³ Letter dated May 28, 2019, from Adriano L. Martinez, Earthjustice, to Rynda Kay, EPA, Region IX, Subject: “Docket ID No. EPA-R09-OAR-2019-0176” (on behalf of the California Communities Against Toxics, Center for Community Action and Environmental Justice, Coalition for a Safe Environment, and the Natural Resources Defense Council) and letter dated May 28, 2019, from anonymous commenter.

R09-OAR-2019-0176. We do not respond to the comments from the anonymous commenter because they fail to identify any specific issue that is germane to our action on this measure.

Comment 1: Earthjustice states that the South Coast Incentive Measure does not satisfy the enforceability requirements in section 110(a)(2)(A) of the CAA. Citing the EPA's Memo to Docket for a rulemaking entitled "State Implementation Plans: Response to Petition for Rulemaking; Finding of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction," Earthjustice states that to be "enforceable," a measure must be enforceable by the state, the EPA, and citizens. Earthjustice also states that the mere approval of a measure into the SIP does not convert an unenforceable provision into an enforceable one, and that the EPA's SIP rulemaking must explain how the proposed measure can be enforced. According to Earthjustice, the EPA's proposed rule to approve the South Coast Incentive Measure has not provided a legally defensible analysis of how this rule is enforceable.

Response 1: We agree with Earthjustice's statement that the mere approval of a measure into the SIP does not convert an unenforceable provision into an enforceable one, but we disagree with Earthjustice's claim that CARB's commitments in the South Coast Incentive Measure are not enforceable. We explain below how the EPA and citizens may enforce the provisions of CARB's SIP commitments in the South Coast Incentive Measure. We respond to Earthjustice's more specific comments concerning enforceability in our responses to comments 2 through 11. We note that our evaluation here is limited to CARB's commitments in the South Coast Incentive Measure and that the EPA will review each incentive-based control measure submitted by a state on a case-by-case basis, following notice-and-comment rulemaking, to determine whether the applicable requirements of the Act are met.

Under CAA section 110(a)(2)(A), SIPs must include enforceable emission limitations and other control measures, means or 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 national ambient air quality standards (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,” including a state,⁴ who is alleged “to be in violation of . . . an emission standard or limitation. . . .” “Emission standard or limitation” is defined in subsection (f) of section 304.⁵ 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.⁶

⁴ CAA section 302(e) (defining “person” to include a State or political subdivision thereof).

⁵ Section 304(f) of the CAA defines “emission standard or limitation,” in relevant part, to mean “a schedule or timetable of compliance” which is in effect under the Act “or under an applicable implementation plan.” Section 302(p) of the Act defines “schedule and timetable of compliance” to mean “a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.” Section 302(q) of the Act defines “[a]pplicable implementation plan,” in relevant part, as “the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110 of [title I of the Act]. . . and which implements the relevant requirements of [the Act].”

⁶ See also *Committee for a Better Arvin, et al. v. EPA*, 786 F.3d 1169, 1181 (9th Cir. 2015) (finding that California’s commitments to propose and adopt emission control measures and to achieve aggregate emission reductions are enforceable “emission standards or limitations” under the CAA).

SIP control measures and commitments may also be enforced by the EPA under section 113(a)(1) of the Act, which authorizes the EPA to issue notices and compliance orders, assess administrative penalties, and bring civil actions against any “person,” including a state, who “has violated or is in violation of any requirement or prohibition of an applicable implementation plan. . . .”⁷

CARB’s commitments in the South Coast Incentive Measure are set forth on page 5 of CARB Resolution 18-3 (March 22, 2018), as clarified by Executive Order S-20-030 (November 23, 2020),⁸ and include six key components, as summarized below:

- (1) a commitment to monitor the District’s implementation of 1,300 on-road heavy-duty compression ignition truck repower and replacement projects in accordance with specified portions of the 2017 Carl Moyer Guidelines;
- (2) a commitment to achieve 1 ton per day (tpd) of reductions in NO_x emissions from the 2023 baseline inventory in the 2016 South Coast AQMP through implementation of these repower or replacement projects or substitute measures in the South Coast Air Basin (hereafter “tonnage commitment”);
- (3) a commitment to submit reports to the EPA by March 31 of each year from 2020 through 2023, each of which must include, among other things, specific information about the incentive projects funded through the previous year, about changes to the applicable guidelines, and about actions by CARB and the District to monitor projects for compliance with contract requirements (hereafter “annual demonstration reports”);

⁷ CAA section 113(a)(1)-(2) (establishing EPA’s SIP enforcement authorities), section 302(e) (defining “person” to include a state or political subdivision thereof), and section 302(q) (defining “applicable implementation plan” to include the portion(s) of the implementation plan approved under CAA section 110 that implement relevant CAA requirements).

⁸ CARB Resolution 18-3, “South Coast On-Road Heavy Duty Vehicle Incentive Measure” (March 22, 2018), 5 and CARB Executive Order S-20-030, “Adoption and Submittal of Technical Clarifications to the South Coast On-Road Heavy-Duty Incentive Measure” (November 23, 2020) (hereafter “South Coast Incentive Measure”).

- (4) a commitment to make each annual demonstration report publicly available or available upon request;
- (5) a commitment to provide to the public, upon request, certain project-specific documents relied upon in the preparation of CARB’s annual demonstration reports, including project applications, grant contracts, and inspection-related documents, and
- (6) a commitment to adopt and submit to the EPA, by September 1, 2022, substitute measures or rules that address any shortfall in emission reductions required to meet the tonnage commitment by no later than January 1, 2023, if the EPA determines by July 1, 2021 that information submitted by CARB is insufficient to demonstrate that it will fulfill the tonnage commitment on schedule.⁹

In the Demonstration, CARB states that “CARB is the responsible party for enforcement of this measure and is responsible for achieving the emission reductions from this measure,”¹⁰ thus expressing CARB’s decision to voluntarily commit itself to fulfilling the tonnage commitment and to being held accountable for failure to fulfill this commitment.

Upon the EPA’s approval of these commitments into the SIP under CAA section 110, the commitments will become federally enforceable requirements of an “applicable implementation plan” as defined in CAA section 302(q). Therefore, as discussed below, both citizens and the EPA may enforce these commitments under CAA sections 304(a)(1) and 113(a)(1), respectively. We describe each enforceable component of the South Coast Incentive Measure below.

First, the South Coast Incentive Measure obligates CARB to monitor District implementation of 1,300 on-road heavy-duty compression ignition truck repower and

⁹ Id. We use the shorthand term “insufficiency finding” to refer to a determination by the EPA that information submitted by CARB is insufficient to demonstrate that CARB will fulfill the tonnage commitment on schedule. An insufficiency finding by the EPA triggers CARB’s obligation, under the terms of paragraph 5 of the South Coast Incentive Measure, to adopt and submit substitute measures and/or rules that address any shortfall in required emission reductions.

¹⁰ Demonstration, 14.

replacement projects in accordance with specified portions of the 2017 Carl Moyer Guidelines.¹¹ The 2017 Carl Moyer Guidelines enable CARB to carry out its oversight responsibilities by requiring, among other things, that air districts (1) maintain, for specified periods of time, all project-related documentation obtained from participating sources and through the air district's on-site project inspections;¹² (2) make such documents available to CARB staff during CARB's periodic "incentive program reviews" and upon request;¹³ (3) submit a certified "yearly report" to CARB containing specific information about funded projects, including information sufficient to calculate emission reductions and cost-effectiveness for source categories where required;¹⁴ and (4) allow CARB and its designees to conduct fiscal audits and to inspect project engines, vehicles, and/or equipment and associated records during the contract term.¹⁵ The 2017 Carl Moyer Guidelines also specifically identify types of actions on the part of the implementing air district that CARB may treat as violations of program requirements – e.g., misuse of Carl Moyer Program funds to fund ineligible projects and insufficient, incomplete, or inaccurate project documentation¹⁶ – and authorize CARB to enforce the terms of a project contract at any time during the contract term to ensure that emission reductions are obtained.¹⁷ If CARB fails to document in each annual demonstration report the steps it has taken to exercise these monitoring responsibilities, that failure would constitute a violation of the SIP commitment.

¹¹ South Coast Incentive Measure, para. 1. CARB is required under California law to monitor air district implementation of Carl Moyer projects to ensure compliance with the applicable guidelines. California Health & Safety Code (Ca. HSC) section 44291(d) (requiring CARB to "monitor district programs to ensure that participating districts conduct their programs consistent with the criteria and guidelines established by the state board and the commission pursuant to this chapter").

¹² The 2017 Carl Moyer Guidelines require that each implementing air district maintain a file for each funded project (a "project file") that includes, among other things, a copy of the application, a copy of the executed project contract and any related amendments, photographic and other documentation of the baseline (replaced) engine, vehicle, or equipment, and photographic and other documentation of the new engine, vehicle, or equipment. 2017 Carl Moyer Guidelines, Volume I, Part 1, Chapter 3, Section S ("Requirements for Project Applications"), para. 2; Section T ("Application Evaluation and Project Selection"), paras. 1 and 8; Section V ("Minimum Contract Requirements"); Section W ("Project Pre-Inspection"); and Section X ("Project Post-Inspection"). Air districts must generally maintain each project file for three years after the end of the contract term. *Id.* at Section T ("Application Evaluation and Project Selection"), para. 8.

¹³ *Id.* at Section M ("Yearly Report"), para. 4 and Section R ("Incentive Program Review"), para. 5.

¹⁴ *Id.* at Section M ("Yearly Report").

¹⁵ *Id.* at Section V ("Minimum Contract Requirements"), para. 10.

¹⁶ *Id.* at Section Q ("Program Nonperformance").

¹⁷ *Id.* at Section V ("Minimum Contract Requirements"), para. 11 ("Repercussions for NonPerformance").

Second, the South Coast Incentive Measure obligates CARB to achieve, by December 31, 2022, 1 tpd of reductions in NO_x emissions from the 2023 baseline inventory¹⁸ in the 2016 South Coast AQMP through implementation of these projects in the South Coast Air Basin or substitute measures and/or rules consistent with paragraph 5 of the commitment.¹⁹ If CARB fails to achieve 1 tpd of NO_x emission reductions by December 31, 2022 through implementation of the identified incentive projects or substitute measures and/or rules that meet the identified criteria, that failure would constitute a violation of the SIP commitment.

Third, the South Coast Incentive Measure obligates CARB to submit annual demonstration reports to the EPA by March 31 each year from 2020 through 2023, each of which must include, among other things, specific information about the incentive projects funded through the previous year, about changes to the applicable guidelines, and about actions by CARB and the District to monitor projects for compliance with contract requirements.²⁰ If CARB fails to timely submit an annual demonstration report containing all of the information listed in paragraph 3 of the South Coast Incentive Measure, that failure would constitute a violation of the SIP commitment.

Fourth, the South Coast Incentive Measure obligates CARB to make each annual demonstration report publicly available or available upon request. If CARB fails to make any annual demonstration report publicly available or to provide it within a reasonable period after receiving a request for it, that failure would constitute a violation of the SIP commitment.

Fifth, the South Coast Incentive Measure obligates CARB to provide to any requestor, beginning May 15, 2021 and through 2029, certain project-specific documents relied upon in the

¹⁸ CARB uses the term “baseline inventory” to refer to the projected emissions inventories for future years that account for, among other things, the ongoing effects of economic growth and adopted emissions control requirements.

¹⁹ South Coast Incentive Measure, para. 2. We understand that the reference to “substitute measures” in paragraph 2 is intended to reference the “substitute measures and/or rules” that CARB must adopt and submit under paragraph 5 if the EPA determines that information submitted by CARB fails to demonstrate that CARB will fulfill the tonnage commitment on schedule.

²⁰ Id. at para. 3.

preparation of CARB's annual demonstration reports, including project applications, grant contracts, and inspection-related documents. If CARB fails to provide any of these project records within a reasonable period after receiving a request, that failure would constitute a violation of the SIP commitment.

Finally, the South Coast Incentive Measure obligates CARB to adopt and submit to the EPA, by September 1, 2022, substitute measures and/or rules that address any shortfall in emission reductions no later than January 1, 2023, if the EPA determines by July 1, 2021 that information submitted by CARB is insufficient to demonstrate that it will fulfill the tonnage commitment on schedule. If CARB fails to adopt and submit timely substitute measures and/or rules sufficient to address a shortfall in required emission reductions, this failure would constitute a violation of the SIP commitment. We provide a more detailed discussion of CARB's obligation to adopt and submit substitute measures in Response 7 in the Response to Comments document.

This series of actions mandated by the South Coast Incentive Measure constitutes a specific enforceable strategy for achieving a specific amount of NO_x emission reductions by the beginning of 2023. The fact that CARB may meet its SIP commitments 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 emissions reductions unenforceable.²¹

For all of these reasons, we conclude that CARB's commitments in the South Coast Incentive Measure to monitor and report annually on the implementation of specific types of incentive projects, to achieve a specified tonnage of NO_x emission reductions from these projects or substitute measures, to make the annual demonstration reports and related documentation available to the public, and to adopt and submit substitute control measures where

²¹ *Citizens for a Better Environment v. Deukmejian*, 731 F. Supp. 1448, 1454-59 (N.D. Cal. 1990) ("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"), modified, 746 F. Supp. 976 (1990) (holding state and district liable for failing to satisfy SIP commitment).

necessary to address an emission reduction shortfall identified by the EPA, constitute appropriate means, techniques, or schedules for compliance under sections 110(a)(2)(A) and 172(c)(6) of the Act.

Comment 2: Earthjustice states that citizens and the EPA can only enforce “violations,” and that the EPA must describe what would constitute a violation of the SIP provisions being approved here. Citing section 304(a)(1) of the CAA, Earthjustice states that citizens can commence civil actions for violations of emission standards or limitations or orders issued by the EPA or a state with respect to such standards or limitations. Additionally, citing section 113(a)(1) of the Act, Earthjustice states that the EPA can enforce a violation of any requirement or prohibition of an applicable implementation plan. According to Earthjustice, the EPA “suggests that EPA and citizens can enforce the commitments to achieve and report on emission reductions” but that the EPA and the South Coast Incentive Measure “muddy what exactly would constitute a violation.”

Earthjustice notes the EPA’s statement in the TSD that to be enforceable, program violations must be defined, and asserts that the EPA must explain where in the South Coast Incentive Measure such definitions are provided.

Response 2: We disagree with Earthjustice’s claim that the commitments at issue in this action do not create obligations that EPA or citizens can enforce, were CARB or the District to violate them. We identify in Response 1 the types of violations of the commitments that could provide the basis for an enforcement action by the EPA or by citizens under section 113(a)(1) or 304(a)(1) of the CAA, respectively. As explained in Response 1, CARB’s commitments, as set forth in the South Coast Incentive Measure, constitute a specific enforceable strategy for achieving 1 tpd of NO_x emission reductions on a fixed schedule and, upon approval into the SIP, become requirements of an “applicable implementation plan” as defined in CAA section 302(q). Although the South Coast Incentive Measure does not specifically define potential violations of

the commitments, we find that it describes each of the actions that CARB has committed to undertake in sufficient detail to enable the EPA and the public to determine whether and when a violation has occurred. Accordingly, these commitments are enforceable by citizens under CAA section 304(a)(1) and by the EPA under CAA section 113(a)(1).

Comment 3: Earthjustice states that CARB’s commitment to “monitor” District implementation of projects in accordance with the Carl Moyer Guidelines is a “vague and unenforceable commitment.” Earthjustice asks what would constitute a violation, and how one could prove that CARB is not monitoring implementation in accordance with the guidelines. Earthjustice asserts that there is no means of measuring or independently verifying compliance because there is no reporting requirement and no deadline. Additionally, Earthjustice claims that the reference to “1300 repower and replacement projects” in CARB’s commitment “is a deliberate attempt to mislead the reader on what is actually required.” For example, Earthjustice states, nothing in this monitoring “requirement” specifies that these projects actually need to occur.

Response 3: We disagree with these comments. CARB’s commitment to monitor District implementation of projects in accordance with the 2017 Carl Moyer Guidelines is enforceable through specific provisions in the South Coast Incentive Measure that require CARB to, among other things, report annually on the incentive projects it is relying on to achieve emission reductions and the actions that CARB has taken to ensure that these projects comply with the contracts issued by the District in accordance with the 2017 Carl Moyer Guidelines. See Response 1.

Specifically, the South Coast Incentive Measure obligates CARB to identify, in each annual demonstration report submitted to the EPA by March 31 of each year from 2020 through 2023, those specific projects funded through the previous year that CARB is relying on to achieve the tonnage commitment. CARB must identify each of these projects “by project

identification number, project life and implementation date, description of both baseline and new equipment, applicable incentive program guidelines, and quantified emission reductions.”²² Additionally, each annual demonstration report must describe any changes to the 2017 Carl Moyer Guidelines and related impacts on program integrity, describe CARB’s and the District’s actions to monitor selected projects for compliance with contract requirements, and contain CARB’s determination of whether the identified projects are projected to achieve the full 1 tpd of NO_x emission reductions in the South Coast Air Basin by 2023.²³

These provisions ensure that CARB’s annual demonstration reports will contain both the project-specific information needed to independently calculate the emission reductions that CARB attributes to each project and the programmatic information needed to determine whether CARB and the District are taking appropriate steps to ensure that the identified projects comply with contract terms, which in turn assure compliance with the 2017 Carl Moyer Guidelines.²⁴ The 2017 Carl Moyer Guidelines specifically require that air districts audit at least five percent of active Carl Moyer projects or 20 active projects (whichever is less), including any audits conducted following unsatisfactory annual reporting.²⁵ If CARB’s annual demonstration report for a given year fails to identify the project-specific information described in paragraph 3.a of the South Coast Incentive Measure or to document the steps that CARB and the District have taken to monitor selected projects for compliance with contract terms, consistent with paragraph 3.c of

²² South Coast Incentive Measure, para. 3.a. The “project life” begins on the purchase date of the new equipment and is the period during which the project is under contract. Email dated February 13, 2020, from Austin Hicks (CARB) to Rynda Kay (EPA Region IX), Subject: “RE: Follow-up questions on the Valley Incentive Measure.” We understand the “implementation date” to mean the post-inspection date, which is the date on which the District verifies that the old equipment has been destroyed and that the new equipment has been purchased, is operational, and is the same equipment that was used in the emission reduction calculations. 2017 Carl Moyer Guidelines, Volume I, Part 1, Chapter 3, Section V (“Minimum Contract Requirements”) and Section X (“Project Post-Inspection”).

²³ Id. at paras. 3.b – 3.d.

²⁴ The 2017 Carl Moyer Guidelines require that each contract issued to a grantee contain provisions to ensure compliance with Carl Moyer program requirements. See, e.g., 2017 Carl Moyer Guidelines, Volume I, Part 1, Chapter 3, Section V, para. 6(C) (requiring that each contract state that the project complies with Moyer Program requirements) and para. 11(C) (requiring that each contract inform grantee that CARB and the District may seek any remedies available under the law for noncompliance with Moyer Program requirements).

²⁵ 2017 Carl Moyer Guidelines, Volume I, Part 1, Chapter 3, Section AA (“Air District Audit of Projects”), para. 1.

the South Coast Incentive Measure, the EPA or citizens may bring an enforcement action against CARB for violating its monitoring and reporting obligations.

We also disagree with Earthjustice's claim that the reference to "1300 repower and replacement projects" in CARB's commitment is misleading as to what is actually required. As explained in Response 1, CARB is specifically obligated to monitor the District's implementation of at least 1,300 on-road heavy-duty compression ignition truck repower and replacement projects in accordance with specified portions of the 2017 Carl Moyer Guidelines.²⁶ The 2017 Carl Moyer Guidelines enable CARB to monitor the District's compliance with these guidelines by requiring, among other things, that air districts maintain compliance-related documentation, make such documents available to CARB staff upon request, submit certified "yearly reports" to CARB containing specific information about funded projects, and allow CARB and its designees to inspect project engines, vehicles, and/or equipment and associated records during the contract term.²⁷ The 2017 Carl Moyer Guidelines also specifically identify types of actions on the part of the implementing air district that CARB may treat as program violations and authorize CARB to enforce the terms of a project contract.²⁸ If CARB fails to document in each annual demonstration report the steps it has taken to exercise these monitoring responsibilities, that failure would constitute a violation of the SIP commitment.

Additionally, as explained in Response 1, CARB is obligated to achieve 1 tpd of NO_x emission reductions in the South Coast Air Basin, either through implementation of the identified truck repower and replacement projects or through substitute measures adopted and submitted in accordance with the deadlines specified in paragraph 5 of the South Coast Incentive Measure.²⁹ Thus, although CARB is not necessarily obligated to ensure that 1,300 incentive projects are implemented or to achieve 1 tpd of NO_x emission reductions through these incentive projects,

²⁶ South Coast Incentive Measure, para. 1.

²⁷ See footnotes 12-15, *supra*.

²⁸ See footnotes 16 and 17, *supra*.

²⁹ South Coast Incentive Measure, para. 2.

CARB is obligated to monitor at least 1,300 such projects for purposes of determining whether those projects will achieve 1 tpd of NO_x emission reductions by December 31, 2022. If those projects do not fulfill the tonnage commitment, CARB is obligated to adopt and submit substitute measures sufficient to address the shortfall.³⁰

Comment 4: Earthjustice states that nothing in CARB’s commitment to “achieve 1 ton per day of [NO_x] emission reductions . . . by December 31, 2022” specifies where these emission reductions must come from or where they must occur. Earthjustice claims that nothing specifies whether these reductions must be the result of some action by the agencies or merely the result of favorable economic conditions, and that CARB has relied on the latter in the past to claim compliance with similar “commitments.” Earthjustice further claims that there is no way for the EPA or citizens to look at the entire emissions inventory for the South Coast on December 31, 2022 and determine whether CARB has achieved this emission reduction, and that even if overall emissions increase between 2019 and 2022, CARB could still claim that but for some unspecified reason, the total NO_x emissions would have been 1 tpd higher. Earthjustice argues that because there is no way to prove that CARB has not achieved the 1 tpd of NO_x reductions, the commitment fails to define any possible violation and is not practicably enforceable.

Response 4: We identify in Response 1 the types of violations of the commitments that could provide the basis for an enforcement action by the EPA or by citizens under section 113(a)(1) or 304(a)(1) of the CAA, respectively. As explained in Response 1, CARB’s commitments constitute a specific enforceable strategy for achieving 1 tpd of NO_x emission reductions on a fixed schedule and, upon approval into the SIP, become requirements of an “applicable implementation plan” as defined in CAA section 302(q). Accordingly, these commitments are enforceable by citizens under CAA section 304(a)(1) and by the EPA under CAA section 113(a)(1).

³⁰ Id.

Earthjustice’s characterization of CARB’s commitments is incorrect in several respects. First, with respect to CARB’s commitment to achieve 1 tpd of NO_x emission reductions by December 31, 2022, Earthjustice claims incorrectly that the commitments do not specify where these emission reductions must come from or where they must occur. The South Coast Incentive Measure specifies that CARB must achieve 1 tpd of NO_x emission reductions through implementation of one or both of the following types of measures: (1) heavy-duty compression-ignition truck repower and replacement projects implemented in accordance with specified portions of the 2017 Carl Moyer Guidelines, and/or (2) substitute measures and/or rules adopted and submitted to the EPA by specified deadlines.³¹ It also makes clear that these emission reductions must occur in the South Coast Air Basin.³²

Second, Earthjustice claims incorrectly that nothing in the commitment “specifies whether [the emission reductions] must be the result of some action by the agencies or merely the result of favorable economic conditions,” and that CARB has relied on the latter in the past to claim compliance with similar “commitments.” As explained in Response 1, the South Coast Incentive Measure explicitly states that CARB will do the following:

By December 31, 2022, achieve one ton per day of reductions in NO_x emissions from the 2023 baseline inventory, as detailed in the 2016 South Coast Air Quality Management Plan and discussed in the State SIP Strategy, through implementation of these projects or substitute measures for the [South Coast Air] Basin; [and]

If U.S. EPA determines by July 1, 2021, that information submitted by CARB is insufficient to demonstrate that emission reductions required under Paragraph 2 will occur on schedule, adopt and submit to U.S. EPA, no later than September 1, 2022, substitute measures and/or rules that will achieve emission reductions addressing the shortfall as expeditiously as practicable and no later than January 1, 2023.³³

³¹ South Coast Incentive Measure, paras. 1, 2, and 5.

³² Id. at para. 2 (requiring CARB to achieve NO_x emission reductions “from the 2023 baseline inventory, as detailed in the 2016 South Coast Air Quality Management Plan and discussed in the State SIP Strategy, through implementation of these projects or substitute measures for the [South Coast Air] Basin.”). The 2016 South Coast Air Quality Management Plan (AQMP), relevant portions of the 2016 State Strategy and other related documents (hereafter “2016 South Coast Ozone SIP”) contain California’s attainment demonstrations for the 1979 1-hour ozone NAAQS, the 1997 ozone NAAQS and the 2008 ozone NAAQS in the South Coast Air Basin. 84 FR 52005, 52012-52013 (October 1, 2019).

³³ South Coast Incentive Measure, paras. 2, 5.

Thus, by its terms, the South Coast Incentive Measure obligates CARB to “achieve” 1 tpd of NO_x emission reductions no later than January 1, 2023, either by confirming implementation of identified incentive projects in accordance with the specified portions of the 2017 Carl Moyer Guidelines or by adopting and submitting to the EPA substitute measures and/or rules that achieve equivalent emission reductions. In the interpretative statements preceding these commitments and in the Demonstration, CARB states that it is creating a “publicly-enforceable commitment to achieve emission reductions”³⁴ and confirms that “CARB is the responsible party for enforcement of this measure and is responsible for achieving the emission reductions from this measure.”³⁵ Nowhere in the South Coast Incentive Measure or in CARB’s interpretative statements does CARB indicate that favorable economic conditions may suffice to achieve the aggregate tonnage commitments.

We note that in prior EPA actions approving aggregate tonnage commitments from CARB, the EPA has rejected claims that “actual emission decreases” resulting from an economic recession or other circumstances may count towards meeting the commitments and made clear that the only permissible means for achieving the required emission reductions is through notice-and-comment rulemaking procedures leading to the adoption and implementation of enforceable control measures.³⁶

Third, Earthjustice suggests, incorrectly, that the EPA and citizens would have to look at the entire emissions inventory for the South Coast on December 31, 2022, to determine whether CARB has achieved 1 tpd of NO_x emission reductions. For the reasons stated in this response and earlier in Response 1, it is not necessary to review an emissions inventory to determine whether CARB has achieved the required reductions. The South Coast Incentive Measure

³⁴ CARB Resolution 18-3, 4 (“Whereas, the South Coast Incentive Measure provides a publicly-enforceable commitment to achieve emission reductions”).

³⁵ Demonstration, 14.

³⁶ See, e.g., 76 FR 69896, 69914-16 (November 9, 2011) (approving PM_{2.5} attainment demonstration for San Joaquin Valley).

obligates CARB to provide, in each annual demonstration report submitted to the EPA from March 2020 through March 2023, detailed information about each incentive project that CARB is relying on to achieve the required 1 tpd of NO_x emission reductions.³⁷ Each of these annual demonstration reports must be readily available to the public on CARB's website or available upon request.³⁸ If CARB's 2023 annual demonstration report (which is due March 31, 2023) fails to demonstrate that the identified projects have achieved 1 tpd of NO_x emission reductions from the 2023 baseline inventory in the 2016 South Coast AQMP, citizens may sue CARB for violating its SIP commitment. The tonnage commitment remains enforceable even if the EPA has not made an insufficiency determination in accordance with paragraph 5 of the South Coast Incentive Measure. See Response 6 and Response 8 in the Response to Comments document.

Additionally, if the EPA determines by July 1, 2021, that information submitted by CARB is insufficient to demonstrate that the emission reductions necessary to fulfill the 2023 tonnage commitment will occur on schedule, CARB must adopt and submit to the EPA, no later than September 1, 2022, substitute measures and/or rules that will achieve emission reductions addressing the shortfall as expeditiously as practicable and no later than January 1, 2023.³⁹ Any such substitute control measure must be adopted following state rulemaking procedures through which the EPA and the public may track the State's progress in achieving the requisite emissions reductions. We expect CARB to make clear during any such rulemaking that it is proposing the identified measure or rule for purposes of submission to the EPA consistent with its commitment in the South Coast Incentive Measure.⁴⁰ If, following an insufficiency finding by the EPA, CARB fails to adopt and submit substitute control measures that fully address the identified

³⁷ South Coast Incentive Measure, para. 3.

³⁸ Id. at para. 4.

³⁹ By its terms, the commitment is to "adopt and submit to U.S. EPA... substitute measures and/or rules" – i.e., new or revised control measures subject to notice-and-comment rulemaking – that achieve the necessary emission reductions, if the EPA makes an insufficiency finding. Id. at para. 5.

⁴⁰ See EPA, Memorandum dated November 22, 2011, from Janet McCabe, Deputy Assistant Administrator, EPA Office of Air and Radiation, to Air Division Directors, EPA Regions 1-10, Attachment B ("Guidelines to States Agencies for Preparing the Public Notices for State Implementation Plan (SIP) Revisions") (noting that state public notices must state that the regulation or document at issue will be submitted to the EPA for approval into the SIP).

shortfall in required emission reductions by the relevant deadline, citizens may sue CARB for violating its SIP commitment.

For all of these reasons, we disagree with Earthjustice's claim that the South Coast Incentive Measure fails to define any possible violation and is not practicably enforceable.

III. Final Action

No comments were submitted that change our assessment of the rule as described in our proposed action. Therefore, the EPA is fully approving this measure into the California SIP in accordance with section 110(k)(3) of the Act.

In addition, the EPA is determining that CARB's adoption, implementation, and submission of the South Coast Incentive Measure satisfy the State's commitment in the 2016 South Coast Ozone SIP to bring to the Board for consideration an incentive-based measure for on-road heavy-duty vehicles and achieves 1 tpd of CARB's aggregate NO_x emission reduction commitment for 2023, as codified in 40 CFR 52.220(c)(517)(ii)(A)(3).⁴¹

We are codifying this measure as additional material in the code of federal regulations (CFR), rather than through incorporation by reference, because, under its terms, the measure contains commitments enforceable only against CARB and because the measure is not a substantive rule of general applicability.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely

⁴¹ 84 FR 52005, 52013-52014 (October 1, 2019) (referencing CARB Resolution 17-7 (March 23, 2017), Attachment A ("Proposed New SIP Measures and Schedule")) and 84 FR 28132, 28149 (June 17, 2019) (Table 6, "Defined Measures in the 2016 State Strategy--Continued").

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- 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 (Public Law 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 the 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, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. section 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. The 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 **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. 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, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 11, 2020.

John Busterud,
Regional Administrator,
Region IX.

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

PART 52 - APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—CALIFORNIA

2. Section 52.220 is amended by adding paragraph (c)(550) to read as follows:

§52.220 Identification of plan-in part.

* * * * *

(c) * * *

(550) The following plan was submitted on May 4, 2018 by the Governor’s designee.

(i) [Reserved]

(ii) *Additional materials.* (A) California Air Resources Board.

(1) CARB Resolution 18-3, adopted March 22, 2018, as revised by Executive Order S-20-030, adopted November 23, 2020.

(2) [Reserved]

(B) [Reserved]