

final rule, we are disapproving the 2001 version of Regulation VIII for failure to adequately demonstrate BACM and have started a valid BACM sanctions clock for SJVUAPCD to correct the deficiencies. In accordance with section 179 of the Clean Air Act, the State has 18 months to correct the deficiencies identified in EPA's action prior to the imposition of sanctions.

*Comment 12:* EPA's April 1, 2002 interim final determination must be withdrawn because EPA cannot approve any individual rule without first approving an attainment demonstration. The judgement that EPA must make in approving a SIP revision, is "to measure the existing level of pollution, compare it with national standards, and determine the effect on this comparison of specified emission modifications." Without an attainment demonstration, it is impossible to determine whether any revision is "adequate to the task." *Hall v. EPA*, 263 F.3d 937 (9th Cir. 2001).

*Response 12:* EPA regularly takes action on individual rules independent of action on overarching plans. As with the thousands of other rules we have acted on independent of attainment demonstrations, we believe we can effectively evaluate compliance with § 110 and other CAA requirements and approve or disapprove these rules consistent with § 110(k). In fact, the Court of Appeals for the Ninth Circuit specifically endorsed this practice in *Hall*. The Court held that "[t]he Act explicitly contemplates that \* \* \* attainment demonstrations may be submitted for EPA review at different times than other elements of the States' SIP revisions (for example, revisions to control measures) are submitted for review." *Id.* at 937.

The Commenter reasoned that language it quoted from *Hall* requires a rigorous comparison by EPA of emission reductions resulting from a proposed SIP revision to overall reductions necessary for attainment, and such an analysis cannot be done outside the context of an attainment demonstration. However, other language in the Court's *Hall* ruling softened this requirement in circumstances where an attainment demonstration is not yet in place. In the absence of an attainment plan, the Court held that EPA need only show that "the particular plan revision before it is consistent with the development of an overall plan capable of meeting the Act's attainment requirements." *Id.* at 938. In accordance with *Hall*, we have determined that Regulation VIII is consistent with development of an overall plan and we intend to evaluate Regulation VIII in the context of a PM-

10 plan when the plan is submitted to us for review.

*Comment 13:* For reasons given above, EPA must fully disapprove the Regulation VIII submittal, withdraw the interim final determination that SJVUAPCD has corrected the deficiencies, reinstate the associated sanctions clock, and promulgate a FIP.

*Response 13:* For reasons discussed in the other responses, nothing in the comments has caused us to change our position as described in the proposal.

Following the close of the comment period, we received two additional inquiries from Earthjustice. While EPA is not obligated to summarize or respond to these inquiries, we have done so below.

*Comment 14:* Did EPA consider fugitive dust control measures adopted in other PM-10 nonattainment areas when evaluating SJVUAPCD's Regulation VIII for RACM and/or BACM? If so, is the review of other rules part of the record for EPA's action on Regulation VIII?

*Response 14:* EPA considered control measures adopted in Maricopa County, Clark County and other areas as background information during our evaluation of Regulation VIII. Where EPA's approval of control measures for these other areas has been published in the **Federal Register**, they are incorporated by reference into the administrative record for EPA's decision on Regulation VIII.

*Comment 15:* What is the origin of the "more likely than not" criteria used by EPA in its decision to conditionally approve Regulation VIII for RACM purposes.

*Response 15:* In the preamble to the federal regulations implementing the sanctions provision of CAA Section 179, EPA stated that it can conditionally approve a SIP revision when "it believes it is more likely than not that the State is complying with the relevant requirements of the Act." 59 FR 39832, 39838 (August 4, 1994). EPA clarified that this finding can also serve as a basis for an interim final determination that a State has corrected previously identified deficiencies.

### III. EPA Action

No comments were submitted that change our assessment of the rules as described in our proposed action. Therefore, as authorized in CAA section 110(k)(4), EPA is finalizing a conditional approval of Rules 8011, 8021, 8031, 8041, 8061, 8071 and 8081 with respect to CAA section 172(c)(1) and 189(a)(1)(C) RACM requirements. We have concluded that the December 6, 2001 submittal corrects the prior

enforceability and RACM deficiencies identified in our March 8, 2000 final action, subject to one condition. That condition is for SJVUAPCD to provide a comprehensive and adequate demonstration that these rules fulfill RACM requirements for the source categories covered by Regulation VIII. SJVUAPCD has committed to provide this RACM demonstration within one year after the date of publication of this final action. This conditional approval action terminates the CAA section 189(a) sanction implications of our March 8, 2000 final action. However, the conditional approval will be treated as a disapproval, with section 189(a) sanctions immediately reinstated, if SJVUAPCD fails to fulfill this commitment within the statutory one year period or upon EPA's final disapproval of a submitted RACM demonstration.

In addition, as authorized in sections 110(k)(3) and 301(a) of the Act, EPA is finalizing a limited approval of submitted Rules 8011, 8021, 8031, 8041, 8051, 8061, 8071 and 8081 with respect to CAA section 189(b)(1)(B) BACM requirements. Specifically, the state has failed to demonstrate that thresholds of source coverage fulfill BACM requirements. This action incorporates the submitted rules into the California SIP, including those provisions identified as deficient. As authorized under section 110(k)(3), EPA is simultaneously finalizing a limited disapproval of the rule with respect to BACM requirements. As a result, sanctions will be imposed unless EPA approves subsequent SIP revisions that correct the deficiencies within 18 months of the effective date of this action. These sanctions will be imposed under CAA section 179 according to 40 CFR 52.31. In addition, EPA must promulgate a federal implementation plan (FIP) under section 110(c) unless we approve subsequent SIP revisions that correct the deficiencies within 24 months. Note that the submitted rules have been adopted by SJVUAPCD, and EPA's final limited disapproval does not prevent the local agency from enforcing them.

### IV. Statutory and Executive Order Reviews

#### A. Executive Order 12866

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

#### B. Executive Order 13045

Executive Order 13045, entitled "Protection of Children from