

emission reduction to be used for NSR offset purposes even if it was required by a provision of the CAA as long as it was incorporated into the area's emissions inventory and accounted for in the area's attainment plan. CCEEB justifies this proposition by the fact that the ERC "has been mitigated by other specific measures for rate of progress or attainment demonstration purposes," and therefore should be allowed as an NSR offset. Allowing the use of such an ERC as an NSR offset, however, would be counter to section 173(c)(2)'s prohibition against use of emission reductions that are otherwise required by the CAA. The mere fact that an ERC is recognized in the inventory and accounted for in the attainment plan and rate of progress in no way "mitigates" the fact that the reduction was elsewhere required under the CAA.⁷

Comment 4: Item number 5 in the list of categories of non-surplus emission reductions in the proposed approval reads "any emission reduction required by a condition of a permit issued to comply with NSR CAA requirements." CCEEB commented that "[t]his item is of concern because air permits in California will typically include requirements that are not required under Federal law. Such requirements

are not required by the federal Clean Air Act and should be considered surplus to Federal requirements. This item should not be listed in its current form as an emission reduction that is required by the Act." WSPA provided an almost identical comment.

Response 4: We agree with CCEEB and WSPA, and modified item number 5 accordingly. Specifically, in the updated interpretation provided in this final action and embodied in the MOU, we recognize that the following requirements contained in a federally enforceable NSR permit should not automatically disqualify the emission reduction from use as an NSR offset: (1) Requirements to make the reduction federally enforceable to meet Federal creditability criteria for use of the reduction as an offset for new source review purposes, or (2) requirements to assure compliance with a state or local requirement that is not federally enforceable. This change addresses the commentors' concerns.

III. EPA Action

No comments were submitted that change our assessment that the submitted rules comply with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is approving these rules into the California SIP.⁸

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond

that required by state law, it 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).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, 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, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action 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. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards ("VCS"), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

⁷ In fact, emission reductions used for NSR offset purposes *must* be included in an area's inventory and attainment plan to be considered for use as an offset in the first place. 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 the use emission reductions for NSR purposes 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 emission reduction credits are rate of progress plans and attainment demonstrations. *See id.* at 13508-509 and 13552-54; *see also* 1994 Seitz Memo. Thus, inclusion of ERCs in required plans is a precondition to satisfying the statutory requirements of section 173(c)(2), but does not by itself fulfill the statutory requirements.

CCEEB and WSPA may be taking their argument one step further, however, by implying that the creation of a growth allowance in an attainment plan would enable a permitting authority to issue permits that allow new emissions despite the source's reliance on non-surplus ERCs. A growth allowance is defined as a "pollutant-specific allowance for additional growth in any designated nonattainment area by controlling existing source emissions beyond the amount of reduction required to demonstrate [reasonable further progress]." 57 FR 13554 (April 16, 1992). CCEEB and WSPA cannot rely upon a growth allowance as a justification for use of non-surplus ERCs, however, as the 1990 CAA amendments restricted the use of new growth allowances with the exception of areas that have been targeted by the administrator, in consultation with the Secretary of Housing and Urban Development ("HUD"), for economic growth. *Id.*; *see also* CAA sections 172(c)(4) and 173(a)(1)(B). Ventura County is not a designated economic growth area.

⁸ On February 13, 2003, EPA proposed to find that the California SIP was substantially inadequate due to Health & Safety Code Section 42310(e), which exempts certain agricultural sources from all permitting actions, including NSR permitting actions. 68 FR 7237. This SIP-call, if finalized, will not reactivate the sanctions clock permanently stopped by this final action.