when the Commonwealth has most likely corrected the deficiency that triggered the sanctions clock. Moreover, it would be impracticable to go through notice-and-comment rulemaking on a finding that the Commonwealth has corrected the deficiency prior to the rulemaking approving the March 22, 1996 I/M SIP revision. Therefore, EPA believes that it is necessary to use the interim final rulemaking process to defer sanctions while EPA completes its rulemaking process on the approvability of the March 22, 1996 I/M SIP revision. In addition, EPA is invoking the good cause exception to the 30-day notice requirement of the APA because the purpose of this notice is to relieve a restriction. *See* 5 U.S.C. 553(d)(1).

Executive Order 12866

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214–2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act, (RFA) 5 U.S.C. 600 et. seq., EPA must prepare a regulatory flexibility analysis assessing the impact on small entities of any rule subject to prior notice and comment rulemaking requirements. 5 U.S.C. 603 and 604. Alternatively, EPA may certify 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 government entities with jurisdiction over populations of less than 50,000.

Because this action is not subject to prior notice and comment requirements (see above), it is not subject to RFA. In any even, today's action temporarily relieves sources of an additional burden potentially placed on them by the sanction provisions of the Act. Therefore, the action will not have a significant impact on a substantial number of small entities.

Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final 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/promulgated 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 imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Submission to Congress and the General Accounting Office

Under section 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This interim final determination regarding the Pennsylvania I/M SIP is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: September 12, 1996.

William T. Wisniewski,

Acting Regional Administrator, Region III.

[FR Doc. 96–25396 Filed 10–2–96; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Part 52

[AZ033–0007 FRL–5628–6]

Approval and Promulgation of Implementation Plans; Arizona—Maricopa Nonattainment Area; Carbon Monoxide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving contingency measures adopted pursuant to the Clean Air Act (CAA) and submitted to EPA by the State of Arizona as revisions to the Arizona State Implementation Plan (SIP) for the Maricopa (Phoenix) carbon monoxide (CO) nonattainment area. Based on the approval of these measures, EPA is withdrawing its federal contingency process for the Maricopa area and its proposed list of highway projects subject to delay.

EFFECTIVE DATE: December 2, 1996.

FOR FURTHER INFORMATION CONTACT: Frances Wicher, A–2–1, Air and Toxics Division, U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, California 94105, (415) 744–1248.

SUPPLEMENTARY INFORMATION:

I. Background

A. Federal Contingency Process

On February 11, 1991, EPA disapproved elements of the Arizona CO SIP and promulgated a limited federal implementation plan (FIP) for the Maricopa County (Phoenix) CO nonattainment area in response to an order of the Ninth Circuit Court of Appeals in *Delaney* v. *EPA*, 898 F.2d 687 (9th Cir. 1990).[1] For a discussion of *Delaney*, the SIP disapproval, and the FIP, see the notice of proposed rulemaking (NPRM) for the FIP, 55 FR 41204 (October 10, 1990) and the notice of final rulemaking (NFRM) for the FIP, 56 FR 5458 (February 11, 1991).

As required by the *Delaney* order, the FIP contained a two-part contingency process consistent with the Agency's 1982 ozone and CO SIP guidance regarding contingency procedures.[2] These two parts were a list of transportation projects that would be delayed while an inadequate plan was being revised and a procedure to adopt measures to compensate for unanticipated emission reduction shortfalls. The FIP contingency process is described in detail at 56 FR 5458, 5470–5472.

Implementation of the FIP contingency process was triggered by violations of the CO standard in Phoenix in December 1992. On June 28, 1993 (58 FR 5458), EPA published a notice of proposed rulemaking proposing to find that the implementation plan was inadequate

[1] While the FIP was promulgated after the enactment of the 1990 Clean Air Act Amendments, it was designed, pursuant to the *Delaney* Court's order, to comply with the CAA and EPA guidance as they existed prior to the 1990 Amendments.

[2] ''State Implementation Plans; Approval of 1982 Ozone and Carbon Monoxide Plan Revisions for Areas Needing an Attainment Date Extension. Final Policy.'' 46 FR 7182 at 7187, 7192 (January 22, 1981) (hereafter referred to as ''1982 guidance'').

and that additional control measures were necessary to attain and maintain the CO national ambient air quality standard (NAAQS) in the Maricopa area. In the same notice, EPA also proposed an updated list of highway projects subject to delay while the implementation plan was being revised. On August 9, 1993, EPA issued a SIP call under section 110(k)(5) of the CAA requiring that Arizona submit a new plan by July 19, 1994. Arizona submitted SIP revisions to EPA in November 1993, March 1994 and August 1995 that contained new control measures and a demonstration that the area would attain the CO NAAQS by December 31, 1995, the attainment deadline under the 1990 Clean Air Act Amendments for CO nonattainment areas classified as ''moderate'' such as Phoenix.[3] See CAA section 186(a). As a result, EPA took no final action on the June 28, 1993 proposal and is today withdrawing that proposal.

B. CAA Contingency Requirements and EPA Guidance

The Clean Air Act Amendments (CAAA) of 1990 completely revised the nonattainment provisions of the Act, part D of title I, repealing the generally applicable provisions of section 172 and adopting substantial new requirements and planning and attainment deadlines applicable to CO nonattainment SIPs. See sections 171–193. A number of these provisions are discussed in detail in section III of this document.

Among the new requirements in the 1990 CAAA is section 172(c)(9) which provides for contingency measures. Section 172(c)(9) requires that plans for nonattainment areas ''shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national ambient air quality standard by the attainment date applicable under this part [D]. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.''

EPA has issued several guidance documents related to the post-1990 requirements for CO SIPs. Among them is the ''General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990.'' See generally 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992) (hereafter ''General Preamble'') and the ''Technical Support Document to Aid the States with the Development of Carbon Monoxide State Implementation Plans,'' July 1992 (hereafter ''1992 TSD'').

For CO, the General Preamble addresses specifically only the contingency measures required under section 187(a)(3) of the Act for moderate areas with design values above 12.7 ppm (high moderate areas). See 57 FR 13498, 13532–13533. As a low moderate area, section 187(a)(3) did not apply to Phoenix. In connection with the discussion of requirements for moderate ozone areas, the General Preamble addresses generally the section 172(c)(9) requirements which are also applicable to low moderate CO nonattainment areas such as Phoenix. See 57 FR 13498, 13510–13511. In both discussions, EPA states that the contingency measure provisions of the 1990 Amendments supersede the contingency requirements contained in the 1982 guidance.

The 1992 TSD contains a discussion directly applicable to low moderate CO areas. See pages 5–6. This guidance explains that the trigger for implementation of the section 172(c)(9) measures is a finding by EPA that such an area failed to attain the CO NAAQS by the applicable attainment date and that states must show that their contingency measures can be implemented with minimal further action on their part and with no additional rulemaking actions upon such a finding.

In the 1992 TSD, EPA notes that section 172(c)(9) does not specify how many contingency measures are needed or the magnitude of emission reductions they must provide if an area fails to attain the CO NAAQS. EPA suggests that one appropriate choice would be to provide for the implementation of sufficient reductions in vehicle miles traveled (VMT) or emission reductions to counteract the effect of one year's growth in VMT while the state revises its SIP to incorporate the new requirements for a serious CO area. Thus, in suggesting a benchmark of one year's growth in VMT, EPA concluded that the purpose of the Act's contingency requirement is to maintain the actual attainment year emissions level while the serious area attainment demonstration is being developed.

II. Summary of Proposed Action

On April 9, 1996 (61 FR 15745), EPA proposed to approve two contingency measures submitted by the State of Arizona for the Phoenix CO nonattainment area. These measures are enhancements to the State's remote sensing program for vehicle emissions and a traffic diversion measure. Both measures are described in detail in the proposal. See 61 FR 15745 at 15746–15747 and 15749–15750. In the proposal, EPA also described in detail the SIP approval standards applicable to the State's contingency measure submittals. EPA proposed to conclude that the State's two contingency measures, when considered in conjunction with emission reductions expected to be achieved in 1996 and 1997 through the continued implementation of the State's federally approved Vehicle Emission Inspection program (enhanced I/M program), met the requirements of section 172(c)(9) and other applicable provisions of the CAA. The Agency's preliminary analysis reaching that conclusion is set forth at 61 FR 15747–15750.

Based on its approval of the State's contingency measures, EPA also proposed to withdraw the federal contingency process for the Maricopa area from the State's applicable implementation plan and to withdraw the list of highway projects subject to delay that was proposed on June 28, 1993 (58 FR 5458).

III. Response to Comments Received on Proposal

EPA received comments on its proposal from three groups: the Arizona Center for Law in the Public Interest (ACLPI), the Maricopa Association of Governments (MAG), and the Arizona Department of Environmental Quality (ADEQ). A summary of the ACLPI and MAG comments and EPA's responses to those comments follow. The comments submitted by ADEQ were not substantive and are therefore only addressed in the TSD.

A. Comments by the Arizona Center for Law in the Public Interest, May 7, 1996

Comment: ACLPI states that it is strongly opposed to EPA's proposed action and some of its reasons for this opposition are contained in its January 4, 1994 letter commenting on the EPA's December 12, 1993 proposal (58 FR 64530). ACLPI requests that its previous comments of January 4, 1994 be incorporated by reference into this

[3] At the time of the SIP submittals that are the subject of today's document, Phoenix was classified as moderate and, because its design value is under 12.7 ppm, was considered a low moderate area. EPA has recently found that the Phoenix area failed to attain the CO NAAQS by the statutory deadline. See 61 FR 39343 (July 29, 1996) As a consequence of this finding, the area has been reclassified to ''serious'' under section 186(b)(2). As a result, the area is now subject to the section 187(b) requirements for serious CO areas. These requirements include those applicable to CO areas with design values between 12.7 ppm and 16.4 ppm (high moderate areas) in section 187(a). For the purpose of today's action, however, the relevant CAA requirements are those that apply to low moderate CO nonattainment areas. The serious area requirements are referred to throughout this notice when they inform individual discussions.

rulemaking along with the docket for the December 12, 1993 proposal.

Response: EPA has incorporated ACLPI's January 4, 1994 comment letter into the docket for this rulemaking and, to the extent that the comments are germane to this rulemaking, has responded to them below. The vast majority of ACLPI's 1994 comments dealt with the specific merits of EPA's proposed substitution of the Maricopa Association of Governments (MAG) contingency process and the State's gasoline volatility control measure for the FIP's contingency process and highway delays. Because EPA is not acting in this rulemaking on either the MAG process or the volatility control measure, most of ACLPI's 1994 comments are not relevant to this action. ACLPI did comment at that time on the application of CAA section 193 to the FIP contingency process and has made almost identical comments on this action. EPA has responded to these comments below.

It should be noted that EPA has not finalized the December 12, 1993 proposal and has not done so for reasons unrelated to the comments received on the proposal. Because it is acting on an entirely different State submittal from the one it proposed to approve in December 1993, EPA does not believe that the rulemaking docket for that proposal, except for ACLPI's comment letter, is relevant to this document. Therefore, EPA has included in the docket for today's rulemaking only ACLPI's comment letter from the docket for the 1993 proposal.

Comment: ACLPI comments that EPA's proposed action violates the CAA's antibacksliding clause. Under section 193 of the CAA, no control requirement in effect, or required to be adopted by an order in effect before the date of enactment of the 1990 CAAA in any nonattainment area may be modified in any manner unless the modification insures equivalent or greater emission reductions. The contingency provisions of the existing CO FIP were ordered by the Ninth Circuit prior to enactment of the 1990 CAAA (*Delaney* v. *EPA*, 898 F.2d 687, entered March 1, 1990) and, therefore, according to ACLPI, cannot be modified without insuring equivalent or greater emission reductions. ACLPI asserts that the proposal does not assure equivalent or greater emission reductions and provides several grounds for this assertion.[4]

ACLPI also disagrees with the Agency's statement that section 193 does not apply to the FIP contingency provisions because those provisions constitute ''procedures'' rather than ''control requirements.'' ACLPI claims that the FIP provisions are not merely procedural but are also substantive because they mandate EPA adoption of specific control measures adequate to produce attainment and delay of road projects. The FIP contingency provisions have already been triggered.

Further, ACLPI does not agree that the control requirements preserved by section 193 are limited to measures that have previously been identified and defined in detail, or that the term ''control requirement'' excludes mandated procedures. ACLPI argues that no such limitation appears in the language of the statute and such limitation would sharply conflict with the statutory purpose-namely to prevent backsliding. ACLPI believes that EPA's construction also conflicts with the Agency's own policies and guidelines and with the Act itself, all of which require implementation plans to include both procedural and substantive provisions, and which treat both as enforceable control requirements.

Response: ACLPI made the same comments regarding the applicability of section 193 to the FIP in its January 4, 1994 comment letter. The following discussion is a response to both the 1994 and 1996 comments.

EPA addressed the relevancy of section 193 to its proposed action in the April 9, 1996 notice (61 FR 15748–49). The Agency concluded that the FIP contingency process does not constitute a ''control requirement'' within the meaning of section 193 of the Act (see footnote 10 for the text of section 193) and provided its reasoning. EPA elaborates here on its section 193 discussion in the proposal.

The contingency process contained in the Maricopa CO FIP was required by a March 1, 1990 order of the Ninth Circuit—before the enactment of the CAAA on November 15, 1990. Having concluded that Maricopa's pre-amendment CO plan did not contain contingency procedures that met EPA's 1982 guidance, the Ninth Circuit ordered EPA to promulgate a FIP that contained contingency procedures in accordance with that guidance. *Delaney*, at 695. The Court, however, did not order EPA to implement that process or to promulgate any specified control requirements in that plan. Indeed, the inclusion of any specific control requirements by EPA would have been inconsistent with the terms and intent of EPA's 1982 guidance on contingency procedures. EPA's 1982 guidance required a two-part contingency plan:

> ''The first part * * * [is] a list of planned transportation measures and projects that may adversely affect air quality and that will be delayed, while the SIP is being revised, if expected emission reductions or air quality improvements do not occur. The second part * * * consists of a description of the process that will be used to determine and implement additional transportation measures beneficial to air quality that will compensate for the unanticipated shortfalls in emission reductions. (45 FR 7187)

A list of highway projects that may be delayed and a description of actions that may occur at some later date are not control requirements. A list and a description have no air quality impacts and yield no emission reductions. Nor do they have any potential for either air quality impacts or emission reductions until and unless they are triggered by ''unanticipated shortfalls in emission reductions.'' Even triggered, the particular contingency process in the Maricopa FIP is not a control requirement within the meaning of section 193.

The FIP contingency process, promulgated in accordance with the Court's order, consists of an intricate series of actions by EPA potentially spanning a minimum of 14 to 16 months. The federal process may involve, among other things, various assessments and findings, air quality modeling, and the review and the potential adoption of additional control measures. The eventual length and scope of the process is dependent upon the outcome of the assessments and findings called for in the process and is, therefore, not predictable in advance. See 56 FR 5471–5472.

Likewise, the highway delay provision in the FIP contingency process involves the development of a new list of highway projects with potentially adverse air quality impacts and triggering of project delays only if certain findings are made as part of the overall contingency process. Since it is not known in advance what projects, if any, will be listed and whether any projects will be delayed, the scope of highway delays is also not predictable. Additionally, because the contingency process only requires the delay of highway project construction and not elimination of the projects altogether,

[4] In extensive comments on this issue, ACLPI argues that the SIP contingency measures approved today cannot supplant the FIP contingency process because they do not assure equivalent or greater emission reductions as required by section 193. Because EPA does not agree, as discussed below, with ACLPI's basic premise that the FIP contingency process is a control requirement within the meaning of section 193, for which equivalent emissions would otherwise be required prior to substitution, the Agency is not addressing ACLPI's equivalency arguments in today's notice.

the long-term direct impact on air quality and attainment—good or bad—is also extremely uncertain.[5]

While the term ''control requirement'' is not defined in the Act, it is generally viewed as a discrete regulation directed at a specific source of pollution; e.g., an emission limitation on a smoke stack at a power plant. By contrast, a contingency process, as outlined by EPA's 1982 guidance, is much broader and more far-reaching than a simple, quantifiable control limitation.[6]

It should also be noted that the use of the term ''control requirement'' in the Act is unique to section 193. Its closest parallel is the use of the term ''control measures'' in various provisions of the statute. The term ''control measures'' in these provisions clearly means direct, effective, enforceable controls on sources of air pollution (such as reasonably available control technologies or transportation control measures) and not procedures for the adoption of such controls.[7]

EPA also disagrees with ACLPI that the failure to include the FIP procedures or process within the meaning of section 193's ''control requirement'' conflicts with the statutory purpose of preventing backsliding by assuring that modifications will not occur without the substitution of equivalent or greater emission reductions. This argument would have some merit if section 193 were the sole savings clause in the Act. The Act, however, has other savings clauses, including section 110(n) which specifically applies to all plan elements, procedural or otherwise. Moreover, a procedure per se does not yield emission reductions. For example, the FIP contingency process is just as likely to conclude with no additional emission reductions.[8] Similarly, as discussed above, highway delays may result in no emission reductions.

EPA agrees with ACLPI that the Agency's own policies and guidelines require implementation plans to include both procedural and substantive provisions and that the Agency considers both as enforceable elements of SIPs. The fact that a particular provision is enforceable, however, does not automatically make it a control requirement. Under section 113(a), EPA can enforce ''any requirement or prohibition of an applicable implementation plan.'' There is no requirement that such provisions be considered to be ''control requirements'' in order to be enforceable.[9]

In summary, under a straightforward reading, the savings clause is best viewed as an anti-backsliding provision by which Congress intended to prevent the relaxation of actual, existing control requirements on specific pollution sources or controls required to be adopted for specific pollution sources while states are proceeding with their new planning obligations under the 1990 Amendments.

There is simply no evidence that Congress intended ''control requirement'' to encompass a process as complex and broad as the FIP contingency procedures. Indeed it is fundamental that the words of a statute are to be given their ordinary, plain meaning unless it is clear that some other meaning is intended. See *Columbia Pictures Indus., Inc.* v. *Professional Real Estate Investors, Inc.*, 866 F.2d 278, 280 n. 4 (9th Cir. 1989); *Arizona Elec. Power Coop., Inc.* v. *United States*, 816 F.2d 1366, 1375 (9th Cir. 1987), *cert. denied*, 488 U.S. 818 (1988). EPA's interpretation of the savings clause is in full accord with the plain language of section 193. Under the standard articulated in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), where Congress has spoken directly on an issue, that is the end of the matter.

Beyond the plain language, however, EPA's interpretation of section 193 is consistent with the structure of the 1990 Amendments as they relate to the new planning requirements for nonattainment areas and the failure of those areas to attain the NAAQS. Under the pre-1990 Act, nonattainment areas were not classified according to the severity of their air quality problems. An area found to have failed to attain by the applicable attainment deadline was subject only to a SIP call under pre-amended section 110. The pre-amended Act contained no provisions for contingency procedures or measures. Therefore, EPA added administratively in the 1982 guidance a SIP process that included, among other things, a delay of highway projects that could adversely affect air quality while the SIP was being revised in response to a SIP call.

In contrast, under the 1990 CAAA, a finding of failure to attain by the applicable attainment date for any area triggers the implementation of discrete contingency measures under new section 172(c)(9) and also results in the area being reclassified. The reclassification in turn results in a new attainment deadline and more stringent planning requirements to be submitted on a date certain. See e.g., sections 186(b)(2), 186(c) and 187(f). The eternal retention of the FIP contingency process (or its equivalent) in the applicable plan would forever overlay its outdated and inconsistent planning scenario on to the new statutory scheme.

The FIP contingency process was never grounded in a statutory requirement but was rather based on guidance designed to fill a perceived gap in the absence of a statutory requirement. In 1990, Congress remedied that omission by adding both section 172(c)(9) to fill that gap and a new scheme for additional planning for areas failing to attain the NAAQS. As discussed above and further below, EPA's pre-amendment contingency guidance is inconsistent with this new statutory scheme and thus became ineffective under section 193 upon enactment of the CAAA.[10] EPA affirmed

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[5] ACLPI notes (repeating an EPA statement) that the highway delay provision provides an important coercive benefit in inducing the State to adopt control measures. However, if the primary impact of the highway delay provision is to leverage State controls, then the provision is best characterized, in this context, as a sanction and not as a control requirement.

[6] It is instructive to contrast the FIP contingency process, and EPA's 1982 guidance on which it is based, with the new contingency measure requirements in the 1990 CAAA. For example, section 172(c)(9) requires all nonattainment area plans to provide for the implementation of *specific measures* to be undertaken if the area fails to attain the NAAQS by the applicable attainment date. See also sections 187(a)(3) and 182(c)(9). The remainder of this discussion refers primarily to section 172(c)(9) because, as stated before, it is the only contingency measure requirement that applies to Maricopa.

[7] Wherever the statute mandates ''control measures'' it is clear that it is speaking in terms of discrete means or techniques of controlling emissions from particular sources. For instance, section 110(a)(2)(A) requires state implementation plans to include enforceable emission limitations ''and other control measures, means, or techniques * * *'' as are necessary to attain the national standards. All state plans for nonattainment areas must also provide ''for the implementation of all reasonably available control measures * * * (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology).'' Section 172(c)(1). See also section 172(c)(6).

[8] See, for example, the end of section (a) under *Determination of the Need for Additional Measures* (56 FR 5471):

> Should the Agency find that no additional measures are needed, the [Notice of Final Rulemaking] shall contain this finding and conclude the contingency process.

[9] See also section 118(a) of the CAA which requires compliance with all requirements whether substantive or procedural.

[10] Section 193 states:

> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator as in effect before November 15, 1990 shall remain in effect according to its terms, except to the extent otherwise provided under this chapter, *inconsistent with any provision of this chapter*, or revised by the Administrator. No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the date of enactment of the Clean Air Act Amendments of 1990 in any area which is a nonattainment area for any air pollutant may be modified after such enactment in any manner unless the modification insures equivalent or

this position in the General Preamble. See General Preamble at 57 FR 13498, 13511 and 13532. It is axiomatic that two parts of a single statutory section cannot be read to have opposite effects. Since the first sentence of section 193 renders ineffective the 1982 guidance for contingency processes, the second sentence cannot be read to retain a requirement that is intimately based on that 1982 guidance.

Both the plain language of section 193 and the new statutory scheme support EPA's interpretation that the FIP contingency process is not saved. If, however, there is any ambiguity in the savings clause, EPA's interpretation of section 193 is reasonable, consistent with the language and revised structure of the Act, and serves to advance the goals of the statute. Therefore, it is a permissible construction entitled to considerable deference. *Chevron,* 467 U.S. at 844.

Comment: ACLPI disagrees with EPA's suggestion that the contingency mandate in section 172(c)(9) supplants the FIP contingency provisions and EPA's pre-amendment contingency guidance. ACLPI asserts that there is nothing in the Act or its legislative history to suggest such a result and such a result would be contrary to sections 110(n), 193, and other provisions of the Act. Therefore, according to ACLPI, the section 172(c)(9) mandate is in addition to, and not in lieu of pre-existing control requirements. ACLPI concludes that in enacting the 1990 Amendments, Congress made clear that it intended to strengthen the Act, and preserve preexisting control requirements to ensure maximum progress toward clean air.

Response: As discussed previously, the Agency's 1982 contingency guidance was an effort by EPA to fill a gap in the statute as it existed prior to the 1990 CAAA. The pre-amended Act contained no requirement for contingency provisions in non-attainment area plans. In amending the Act in 1990 to explicitly include a requirement for specific contingency measures in section 172(c)(9), Congress clearly anticipated that EPA would update its nonattainment area guidance to reflect the new statutory scheme.[11] There is nothing in the language or structure of the 1990 Amendments or their legislative history to suggest that Congress intended to reaffirm EPA's 1982 guidance regarding appropriate contingency procedures. On the contrary, by providing explicit contingency measure requirements that differed from that guidance, if anything, it can be concluded that Congress intended to overrule the 1982 guidance in the 1990 Amendments.

Moreover, the amended Act and EPA's pre-amendment contingency guidance are in fact both duplicative and inconsistent and thus made ineffective by section 193 on enactment of the CAAA. See footnote 10. EPA's 1982 contingency guidance required the State to invoke a new planning process if the SIP was inadequate for attainment. In the 1990 Amendments, Congress established a different scheme for areas that failed to attain.[12] The new contingency measure provisions serve a different purpose than EPA's pre-amendment guidance in that they call for immediate implementation of already adopted control measures. Consistent with the new scheme for implementation of contingency measures and reclassification with new planning requirements for areas that fail to attain, EPA stated that its pre-amendment guidance had been superseded. See General Preamble at 13498, 13511, and 13532. Such statements are reasonable in light of the 1990 Amendments and was within EPA's discretion. See *Ober* v. *EPA*, 84 F.3d 304, 311–312 (9th Cir. 1996).

Furthermore, neither section 193 nor section 110(n) of the Act bars revisions to EPA's 1982 contingency guidance as ACLPI suggests. Both sections provide for revisions to EPA guidance and SIPs upon affirmative action by the Administrator.[13]

Comment: ACLPI also disagrees with EPA's proposed interpretation of section 172(c)(9) as requiring only such SIP contingency measures as necessary to offset one year's growth in vehicle miles traveled (VMT). ACLPI claims that the focus of section 172(c)(9), other provisions of 172, and section 110 is on timely attainment and achievement of reasonable further progress (RFP)—not on VMT offsets. Thus ACLPI states that contingency measures must be adequate to make up the entirety of any potential emission reduction shortfall. ACLPI further asserts that EPA's proposed approach would allow states to defer attainment and RFP. It also allegedly allows states to defer attainment to the deadline for the new classification, even if additional contingency measures could produce attainment much sooner.

Response: First, it should be noted that there is nothing in the plain language of section 172(c)(9) or any other provision of the Act to support ACLPI's contention that contingency measures must be adequate to make up the entirety of any potential emission reduction shortfall. Indeed, such an interpretation makes no sense when considered in the context of the new statutory scheme. Because section 172(c)(9) does not specify either the number or type of contingency measures required, EPA's reasonable interpretation of the required measures should receive deference. *Chevron,* 467 U.S. at 844.

As discussed before, section 172 and the pollutant-specific requirements in sections 181 through 189 establish a basic classification scheme and associated planning cycles. This scheme started with the original classifications of nonattainment areas following enactment. An area's initial classification established its attainment deadline and the initial elements of its plan. Sections 181, 186, and 188 all require EPA to review an area's air quality after the passage of its attainment date to determine if an area in fact attained by its deadline. If the Agency finds that an area has not attained, then the area is reclassified to the next higher classification by operation of law.

This reclassification triggers new planning requirements that in all cases lead to the development of new attainment and RFP demonstrations. The role of the section 172(c)(9) measures in this scheme is to assure areas do not lose ground during the period that they are developing these new plans. It is not the role of these

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greater emission reductions of such air pollutant. (Emphasis added).

[11] Additional contingency provisions for certain moderate CO nonattainment areas are found in section 187(a)(3). See also contingency provisions in section 182(c)(9) for certain ozone nonattainment areas.

[12] EPA's 1982 policy stated that ''the contingency provision must be initiated when the EPA Administrator determines that a SIP is inadequate to attain NAAQS and additional emission reductions are necessary.'' 46 FR 7187. In the 1990 Amendments, Congress in section 186(b)(2)(A) required EPA to determine within 6 months of an area's attainment date whether the area has attained the CO standard and, should EPA find a failure to attain, the area is reclassified by operation of law to serious, triggering new planning requirements under section 187(f). Under section 172(c)(9), contingency measures are also triggered if an area fails to attain.

[13] Section 110(n)(1) states that ''[a]ny provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such implementation plan, except to the extent that a revision to such provision is *approved or promulgated by the Administrator* pursuant to this chapter.'' (Emphasis added). However, the FIP contingency provisions were not promulgated as a part of the Arizona applicable implementation plan until February 11, 1991, and therefore are clearly not subject to section 110(n)(1). Further, even if this section applied to the FIP contingency process, it would, by its terms, present no impediment to EPA's withdrawal of the FIP process. See footnote 10 for the text of section 193.

measures to replace or accelerate the development of the new plans. To require the section 172(c)(9) contingency measures to be adequate to make up the entirety of any potential emission reduction shortfall would in fact result in replacing the reclassification scheme in part D with just section 172(c)(9).[14] Such a result is clearly not what Congress intended. Thus it is the basic statutory structure, and not EPA's approach, that allows states to defer attainment to the deadline for the new classification.[15]

Regarding ACLPI's disagreement with EPA's use of one year's growth in VMT as a benchmark for the amount of emission reductions section 172(c)(9) measures should achieve,[16] it should be noted that EPA went beyond the suggested approach in the 1992 TSD. EPA showed in its proposal that the State's contingency measures coupled with continuing emission reductions from the State's enhanced inspection and maintenance program (as well as other measures whose effectiveness was built into the baseline) provided sufficient emission reductions to offset on-road mobile source emissions growth during the period of time that the Phoenix area would be developing its serious area attainment plan (i.e., from early 1996 until late 1997).

EPA agrees with ACLPI that the primary thrust of sections 110 and 172 of the Act is for timely attainment and achievement of RFP and not on VMT offsets. It, however, is an indisputable fact that the bulk of CO emissions in Phoenix (as in the vast majority of CO nonattainment areas) are from motor vehicles and the main culprit behind increases in overall CO levels is growth in vehicle usage. It is, therefore, reasonable to relate needed emission reductions from contingency measures to the factor that most influences emissions growth, that is vehicle miles traveled. Thus EPA's guidance on contingency measures in the General Preamble and the 1992 TSD is reasonable.

On the other hand, as discussed above, EPA does not agree with ACLPI that the purpose of section 172(c)(9) is to alone assure attainment of the standard or RFP. To read that purpose into section 172(c)(9) is to ignore the broader reclassification and new planning requirements scheme in part D of title I of the Act. For the foregoing reasons, EPA believes that its interpretation of section 172(c)(9) is reasonable and, as such, is entitled to considerable deference. *Chevron,* 467 U.S. at 844.

Comment: ACLPI also comments that the State is not eligible to base its contingency measures on EPA's VMT emission offset policy. According to the General Preamble, that policy applies where failure to timely attain or achieve RFP is due to ''exceedence of a VMT forecast'' and the State has made no claim or showing that its failure to timely attain or achieve RFP is due to exceedence of a VMT forecast. ACLPI cites 57 FR 13532 for this policy.

Response: The section of the General Preamble cited by ACLPI addresses the contingency requirement in section 187(a)(3) for high moderate CO nonattainment areas. Section 187(a)(3) requires CO nonattainment areas with design values of 12.7 ppm or higher (that is, high moderate areas) to provide for the implementation of specific measures to be undertaken if any estimate of VMT exceeds forecasts. Section 187(a)(3) is a companion requirement to section 187(a)(2)(A) which requires high moderate areas to forecast VMT for each year before the attainment year and annually update those forecasts. Because section 187(a)(3) contingency measures are triggered by higher than expected VMT growth, it is reasonable to link its contingency measure requirement to annual VMT growth. However, section 187(a)(3) and the cited section of the General Preamble concern contingency requirements applicable only to high moderate nonattainment areas whereas Phoenix is a low moderate area. As stated previously, neither the statute nor the General Preamble addresses how many contingency measures or emission reductions from them are necessary in low moderate CO areas. EPA's interpretation of the statute, which has been shown above to be reasonable, for these areas is only in the 1992 TSD.

Comment: ACLPI comments that just offsetting one year's growth in VMT does not even assure EPA's stated goal—namely, to prevent air quality from worsening while the SIP is being revised. ACLPI points out that on-road mobile sources in Phoenix contribute only about 70 percent of the total emission inventory; therefore, there is no assurance whatsoever that RFP will be maintained merely because VMT-related emission increases are offset.[17]

Response: The 70 percent figure for on-road mobile sources is the contribution of this source category to the 1990 base year annual daily CO season emissions inventory (found on page 3.3 of the MAG 1993 CO Plan for the Maricopa County Area, November 1993). EPA believes that the purpose of section 172(c)(9) for contingency measures is to prevent air quality from worsening while the SIP is being revised. EPA's calculations indicate that during this period total CO emissions will not increase and the State's contingency measures therefore are sufficient to accomplish that purpose. See the TSD for this rulemaking. As discussed below, EPA does not believe that section 172(c)(9) measures are required to assure RFP.

Comment: ACLPI requests the entirety of the MAG 1993 Carbon Monoxide Plan for the Maricopa County Area (November 1993) as well as the March 1994 Addendum to that Plan be incorporated by reference into the record for this rulemaking.

Response: EPA has not relied on substantial portions of the MAG 1993 CO Plan for its action in this rulemaking and declines to incorporate the entire plan into its rulemaking docket.[18] The March 1994 Addendum and relevant excerpts from the MAG 1993 CO Plan are already included in the docket for the proposal. EPA is also incorporating by reference the rulemaking docket for its proposed approval of the Phoenix area's CO inventory. This docket includes additional portions of the MAG 1993 CO Plan. EPA has included all applicable portions of the plan in the docket for today's rulemaking.

Comment: ACLPI comments that even if an offset of emissions from one year's VMT growth were sufficient to assure RFP in that year, it would not assure continued RFP during the entire period

[14] The fact that Congress did not intend section 172(c)(9) contingency measures to entirely make up any shortfall needed for attainment of the CO standard is made even clearer by section 187(g). Section 187(g) requires submittal, nine months after EPA determines that a serious CO nonattainment area failed to attain by December 31, 2000, of controls sufficient to demonstrate a five percent per year reduction in CO emission until attainment occurs. If section 172(c)(9) were intended to require immediate implementation of measures sufficient to correct any attainment shortfall, then section 187(g) would not be necessary.

[15] Note, however, that the attainment deadline for the new classification is not a fixed date providing a number of additional years while attainment is reached; rather the deadline is ''as expeditiously as practicable but not later than'' a fixed date. If practicable controls can bring an area into attainment prior to the fixed date, they must be implemented to achieve earlier attainment.

[16] See section I.B. of this notice.

[17] Although acknowledging that EPA's action is limited to CO, ACLPI also comments on the Agency's section 172(c)(9) policy as it relates to ozone. Because today's action concerns only CO contingency measures, these comments are not germane and need not be addressed here.

[18] Section 307(d)(3) requires the docket accompanying a proposed Agency action to include all data, information, and documents on which the proposed rule relies. Section 307(d)(4)(B)(i) requires the final docket to include all comments received on the proposed rulemaking, the transcript of any public hearings, as well as any documents which become available after the proposed has been published and which EPA determines are of central relevance to the rulemaking.

that the SIP is being revised. EPA is apparently planning to give the State 18 months to revise the SIP and the normal approval process will protract this SIP revision period even further.

Response: ACLPI misinterprets the RFP requirements of the CAA. Sections 172(c)(2) and 171(1) require ''such annual incremental reductions in emissions * * * for the purpose of *ensuring attainment of the applicable national ambient air quality standard by the applicable attainment date*'' (Emphasis added). Thus the moderate area plan for Phoenix was required to assure RFP through 1995, the moderate area attainment deadline under section 186(a)(1).[19] However, since the area has now been reclassified, additional RFP requirements apply to the serious area plan. In the interim, the section 172(c)(9) contingency measures will ensure that air quality does not deteriorate while the plan is being revised. There is nothing in the language of that section to suggest that the contingency measures are expected to assure RFP during this period.

EPA does not believe that EPA's approval process can be reasonably interpreted to ''protract the SIP revision process'' as ACLPI suggests. Revision of the SIP clearly relates to the State's actions to develop and submit rather than EPA's actions to approve or disapprove. Moreover, the vast majority of State control measures do not depend upon EPA's approval of them into the SIP to be implemented and effective.[20] Therefore, it is appropriate to consider the contingency period to run only until the date the State is required to submit its serious area plan with its accompanying control measures. As discussed above, EPA has concluded that there will be sufficient emission reductions during 1996 and 1997 to offset all emissions growth while the plan is being revised.

Comment: ACLPI comments that the Arizona's contingency measures also fail the Act's contingency requirements because there are no contingency measures for the contingency measures and if the first contingency measures do not achieve the emission reductions expected of them then there is no assurance that an offset of emissions from VMT growth will be achieved, even in the first year.

Response: It would be an absurd reading of the Act to conclude that contingency measures need their own contingency measures. The only reading of the Act for which such an interpretation would make any sense is the one that EPA has already rejected for the reasons explained above: that section 172(c)(9) requires sufficient measures to immediately make up any potential shortfall in attainment or RFP. As discussed earlier, the purpose of the section 172(c)(9) contingency measures is to assure that air quality does not worsen during the period a new plan is being developed. This new plan will necessarily evaluate the existing situation, including any failure of contingency measures to achieve emission reductions, and factor the effectiveness of existing controls into determining the additional controls necessary for attainment.

Comment: ACLPI comments that in proposing to find that the State's contingency measures will offset emissions from one year's VMT growth, EPA relies primarily on emission reductions from the State's enhanced I/M program. ACLPI asserts that this reliance is misplaced for several reasons. First, the enhanced I/M program is not a contingency measure, rather it is one of the primary strategies included in the SIP and the State has already claimed emission reductions from this strategy in the SIP attainment and maintenance demonstration. ACLPI claims that EPA cannot now convert the program to a contingency measure to create an offset of VMT emission increases.

Response: EPA did not claim that the Arizona's enhanced I/M program is a section 172(c)(9) contingency measure, just that it contributes to reducing emissions during the contingency (SIP revision) period. In establishing a benchmark of one year's growth in VMT for these measures, EPA intended that the status quo, as represented by the emissions level in the attainment deadline year, be maintained during this period. EPA believes that this result can be achieved by considering reductions from the section 172(c)(9) measures in combination with new reductions scheduled to occur in the area during the SIP revision period, as long as these offsetting reductions are from measures approved into the SIP and are in excess of reductions occurring in the attainment deadline year. As discussed above, the emission reductions from the enhanced remote sensing program, the traffic diversion measure, and the additional reductions from the I/M program in 1996 and 1997 more than meet this test.

While the State explicitly identified in the proposal emission reductions from its enhanced I/M program in determining that the contingency measures are adequate to maintain the area at or below 1995 levels during the contingency period, it need not have done so. In order to make this determination, the State calculated the baseline emissions level, i.e., the emissions level expected in the year after the attainment deadline prior to the implementation of the contingency measures. Rather than incorporating emission reductions from the enhanced I/M program into the baseline, the State chose to explicitly account for reductions from the program.[21] If the State had incorporated the emission reductions from the enhanced I/M program into the baseline emissions level, the determination that the contingency measures are adequate would have been the same. The difference between explicitly accounting for reductions from the program or implicitly including them in the emission baseline is simply the method of bookkeeping.

Comment: ACLPI comments that neither the state nor EPA has provided viable technical justifications for the emission reductions claimed from the enhanced I/M and enhanced remote sensing programs. There is no explanation of how the State arrived at the estimated effectiveness percentages for these programs. ACLPI asserts that under EPA guidelines and rules, as well as general principles of administrative law, EPA cannot credit these measures with emission reductions without a sound, thoroughly justified technical basis for the level of reductions being claimed. The State now has considerable experience with both remote sensing and enhanced I/M in 1995 and should be required to provide evidence of their actual performance as proof of their emission reduction potential.

Response: EPA does not believe the State must submit evidence of the actual performance of the enhanced I/M and remote sensing programs to support their estimated emission reduction potential. For both the enhanced I/M

[19] On August 9, 1993, EPA issued a SIP call under section 110(k)(5) of the CAA that required Arizona to submit a plan to EPA that demonstrated attainment of the CO NAAQS by December 31, 1995. As an area with a design value under 12.7 ppm, the State would not otherwise have been required to submit an attainment plan, including an RFP demonstration, for the Phoenix area. See section 187(a).

[20] Even the contingency measures that are the subject of this rulemaking did not require EPA's formal approval into the SIP in order to be triggered. EPA triggered their implementation when its finding that the Phoenix area failed to attain the CO standard became effective on August 28, 1996.

[21] In fact, there are emission reductions anticipated to occur after the attainment deadline year from numerous measures whose effects are assumed in the baseline emissions. These measures include federal tailpipe standards, oxygenated gasoline, basic I/M, RVP limitations, and transportation control measures.

and enhanced remote sensing programs, the State used EPA's MOBILE5A model to calculate emission reductions. The MOBILE5A inputs used to generate the reduction estimates for enhanced I/M and the methodology and assumptions used to estimate the effectiveness of the enhanced remote sensing program are also provided in the 1994 Addendum at pp. 3–191 and 3–201, respectively. EPA requires the use of its latest mobile sources emissions model (in this case,the MOBILE5A)to determine credits for I/M programs. See 40 CFR 51.351(a) and 51.352(a).[22] The MOBILE models have been the standard methodology for this purpose for more than a decade and EPA does not believe that it should or can require States to independently validate the accuracy of the model.

Comment: ACLPI comments that a related and equally serious flaw is the State's reliance on the air quality modeling in the 1994 Addendum that has not been reviewed and approved by EPA as part of the SIP review process. Stating that EPA has neither proposed to approve that modeling nor has it evaluated that modeling in the context of this rulemaking, ACLPI maintains that if EPA is going to rely on the State's CO modeling, it must first specifically propose approval of that modeling and allow public comment on it.

ACLPI also comments that the emission reductions from the control measures are not adequate. ACLPI states that the State contends that emission reductions from the contingency measures and enhanced I/M will be sufficient to offset increased emissions from VMT growth and bases this claim on its projections of on-road mobile source emissions and its estimates of emission reductions from contingency and enhanced I/M measures. ACLPI claims that aside from the lack of substantiation for the latter, the projections of mobile source emissions are not supported by EPA-approved emissions inventories and VMT projections. The State is relying on the emission inventory and VMT projections in the MAG 1993 CO Plan for Phoenix, but EPA has not yet even proposed approval of those components of the Plan. ACLPI further states that the Agency cannot simply assume that the State's inventory and VMT projections are accurate, particularly when the State's attainment projections (based on this inventory) have proven to be incorrect nor can EPA simply approve these items at this stage of the rulemaking. ACLPI concludes that because a current, accurate emissions inventory is a mandated component of the SIP, EPA must first propose approval or disapproval of the inventory and provide an opportunity for public comment.

Response: EPA has relied on the base year and 1995 projected year emission inventories in the 1993 CO plan and 1994 Addendum in this rulemaking and has recently proposed to approve the base year inventory as meeting the requirements of sections 172(c)(3) and 187(a)(1) and EPA's guidelines. Because it is closely related to the base year inventory, EPA has also fully evaluated the 1995 projected year inventory against applicable guidelines as part of its rulemaking on the base year inventory and has found that that inventory conforms to these guidelines. EPA's evaluation of the projected inventory can be found in the draft TSD available for public comment in the docket for the proposed emission inventory approval. Should EPA ultimately disapprove the base year inventory in response to public comments on its proposed approval or re-evaluate its finding on the projected inventory, the Agency will consider the effect, if any, of such an action on this rulemaking and revise it if appropriate.

EPA, however, has not relied on the air quality modeling in either the 1993 CO plan or the 1994 Addendum for this rulemaking. Since the adequacy of contingency measures is based on their effect on emission levels and not on ambient air quality levels, air quality modeling does not factor into the adequacy determination. While contingency measures are triggered by a failure to attain the NAAQS, that determination is based solely on *monitored* air quality and not on *modeled* air quality.

Comment: ACLPI noted that the Arizona legislature had recently repealed the funding for the State's I/M program. It also stated that the State had not identified the financial and manpower resources necessary to implement enhanced remote sensing, nor provide legal commitments to adequately fund and staff that measure. Under EPA guidelines and rules, as well as section 110 of the Act, EPA cannot approve, or credit the State with emission reductions for the measures without funding or commitments.

Response: On July 18, 1996 the Governor of Arizona signed Arizona Senate Bill 1002 (42nd Legislature, 1st Special Session). Section 51 of the bill provided $4.3 million to fund the State's Vehicle Emissions Inspection Program (including its enhanced remote sensing component)[23] through June 30, 1997. See section 51 of the bill. The bill also includes a statement of intent that the program become self-funding from July 1, 1997 on.[24] See section 52 of the bill. While there is no longer an explicit funding source identified for the program beyond the middle of 1997, EPA believes there are adequate grounds, based on past practice and the contribution of test fees to the administration of the program, to believe the program will continue operating at its current level without interruption. Arizona's I/M program has been in operation since 1976, is a key element of both the State's ozone and CO control strategies, and is a model for the rest of the Country.

EPA approved Arizona's basic and enhanced I/M program on May 8, 1995 (60 FR 22518). As part of that approval, EPA evaluated the program against the requirements in 40 CFR 51.354 which requires that the State demonstrate that appropriate administrative, budgetary, personnel, and equipment resources have been allocated to the program.[25] At that time, EPA concluded that the funding mechanism met EPA's requirements for I/M programs. Despite the recent turbulence in the funding for the program, EPA believes its evaluation is still correct. Should EPA in the future find that funding is not forthcoming for the program, EPA would issue a SIP call based on failure to implement the program under section 110(k)(5).

Finally EPA notes that under section 307(b)(1) of the CAA, petitions for review of the Agency's 1995 final action approving the basic and enhanced I/M program would need to have been properly filed within 60 days of such action. Comments relating to EPA's approval were required to have been raised during the comment period for that rulemaking. Therefore, ACLPI's comments regarding financial and

[22] Remote sensing programs are components and are means of increasing the effectiveness of I/M programs; therefore, emission reduction estimates for these programs are also calculated using MOBILE5a consistent with EPA guidance.

[23] There is a tendency to refer to the components of Arizona's Vehicle Emission Inspection Program (VEIP) as if they are separate and distinct programs. This is done primarily to identify the additional emission reduction benefits that each new component adds to the overall VEIP. Arizona VEIP is operated and funded as a single program with multiple components including enhanced I/M, basic I/M, diesel I/M, and remote sensing. See EPA's approval of Arizona's VEIP, 60 FR 22520 (May 8, 1995).

[24] It should be noted that the program is already partially funded by fees charged for vehicle emission inspections. The legislative appropriation covers the shortfall between the fees and the cost to run the program.

[25] The requirements in 40 CFR 51.354 define for I/M programs what states must submit to meet the section 110(a)(2)(E)(i) requirement that SIPs provide necessary assurances that adequate personnel, funding, and authority under state law are available to implement the program.

manpower resources of the I/M program are not timely.

Comment: ACLPI comments that yet another flaw is the State's use of 513 tpd as the 1995 baseline figure for on-road mobile source emissions. MAG's 1994 Addendum projected attainment in 1995 with a mobile source CO emission budget of 513 tpd. ACLPI notes that there were CO violations in 1995, so the 1995 design day emissions must have been higher than 513 tpd. Yet MAG has used this 513 tpd figure as the baseline for projecting actual emissions in 1995, 1996, and 1997. ACLPI concludes that because actual emissions were almost certainly higher than these projections, MAG's projections are flawed as well.

Response: The 513 tpd figure, like all emission inventory figures, is an estimate subject to an unavoidable degree of uncertainty. It was arrived at through a series of modeling steps including transportation and motor vehicle emissions modeling. See, in general, Chapter 5 of ''1990 Base Year Carbon Monoxide Emission Inventory for the Maricopa County, Arizona Nonattainment Area,'' (located in Appendix B, Exhibit 1 of the 1993 CO Plan). Each one of these models attempts to reproduce highly complex processes with comparatively limited data sets and thus introduces some natural range of error into the results.[26] Given that no absolute ton per day figure is likely to be entirely accurate, the real question is whether the use of the 513 tpd figure is acceptable for the purpose at hand.

As stated before, EPA's primary test for determining the adequacy of contingency measures is to assure emissions do not increase during the period the SIP is being revised. This is a comparative process: is the emission level at the end of the SIP revision period, considering the effect of the contingency measures, less than or equal to the emission level at the beginning of that period? Comparisons tend to mitigate errors between numbers that are derived in similar manners because the errors tend to cancel themselves out. Therefore, even though 513 tpd may not be the absolute attainment emission level for on-road motor vehicles in Maricopa, EPA believes it is acceptable for determining the adequacy of the contingency measures since it is used as the baseline for calculating both emissions with the contingency measures and emissions without such measures.

[26] For example, EPA has discussed the potential sources of errors in the MOBILE model and work underway to correct those errors in *Highway Vehicle Emission Estimates—II,* U.S. EPA, May 1995.

Comment: ACLPI also questions the State's projections regarding the rate of emissions growth from on-road mobile sources. The State predicts that VMT will increase at a rate of about 3.9 percent in 1995–96, and about 3.7 percent between 1996–97. Yet the State also predicts that, even without additional controls, on-road mobile sources will only increase at a rate of about 1.8 percent per year in 1995–96 and at a rate of 1.5 percent in 1996–97. ACLPI concludes that these figures indicate that the State is substantially understating the emissions growth likely from on-road mobile sources and therefore understating the emission reductions needed to offset that growth.

Response: Actually, the State is not predicting that ''without additional controls,'' on-road mobile sources will increase at a rate less than VMT growth. Implicit in the State's baseline inventory is the effect of ''additional controls,'' including the impact of the federal tailpipe standards (which reduces the composite vehicle fleet emission rate as newer cars replace older cars) and continuing reductions from the State's non-enhanced I/M program, oxygenated gasoline, RVP limits, and other required controls. All of these control programs serve to dampen the growth in CO emissions compared to growth in VMT. Therefore, the figures cited by ACLPI do not indicate that the State is substantially underestimating the emissions growth from on-road mobile sources. Historically, CO emission levels in Phoenix have not increased at the rate of VMT growth and, for many years, actually decreased as VMT has grown. Despite the fact that the Phoenix area has not yet attained the CO standard, it has experienced substantial reductions in ambient CO levels even in the face of its rapid population and VMT growth.[27]

Comment: ACLPI states that EPA's proposal to approve the State's CO SIP contingency measures without acting on the overall CO SIP itself is contrary to the Act. The SIP contains an attainment demonstration and other provisions proposed by the State to meet all of the SIP requirements for moderate CO areas and to address EPA's 1993 CO SIP call. ACLPI asserts that under applicable court precedent (*Abramowitz* v. *EPA,* 832 F.2d 1071 (9th Cir. 1987)), EPA cannot select out a few provisions of the plan for approval (i.e., the contingency measures) while deferring action on the attainment demonstration and all other provisions.

Response: The Ninth Circuit in *Abramowitz* reviewed the Agency's action to approve certain control measures in the California carbon monoxide and ozone SIPs and to withhold action on the attainment demonstrations in those plans. The Court concluded that EPA could not approve the control measures without requiring any demonstration that those measures would achieve attainment by the statutory deadline. The control measures at issue were adopted by the State as an integral part of the attainment and RFP demonstrations and were intended to be implemented before the passage of the applicable attainment date. Those control measures were not contingency measures whose implementation was to be triggered by the failure of an area to actually make RFP or attain, as is the case for the measures under consideration in this rulemaking.

In addition, the *Abramowitz* case was decided prior to the 1990 Amendments to the Act. As noted before, the pre-amended Act had no contingency provisions. Congress added specific contingency provisions in 1990, including the section 172(c)(9) requirement of interest here. This section refers to ''implementation of specific measures to be undertaken if the area *fails to make reasonable further progress, or to attain the [NAAQS] by the attainment date applicable under this part.''* (Emphasis added)

These specific contingency measures are clearly outside the set of control measures that make up a State's attainment and RFP demonstrations required under sections 172(c) (1) and (2).[28] They are not triggered until or unless an area fails to make RFP or attain by the applicable attainment date. For the foregoing reasons, EPA does not

[27] See, for example, pages 2 and 3 in ''Conformity Analysis Appendices, Volume 2'' for the *MAG Long Range Transportation Plan, Summary and 1996 Update* and the *1997–2001 MAG Transportation Improvement Program* (MAG, July 1996) which juxtapose daily VMT figures for each year from 1979 to 1993 and the 8-hour CO concentrations and number of annual exceedences at the Indian School monitor from 1981 to 1993. The VMT figures double between 1981 and 1993 while CO concentrations drop by half and the number of exceedences decreases from more than 60 to less than 5 between the same years.

[28] The fact that contingency measures are a distinct and separate requirement from and unrelated to prospective attainment and RFP demonstrations is clearly demonstrated by the Act's planning requirements for low moderate CO nonattainment areas. While these areas are required to submit section 172(c)(9) contingency measures, they are specifically exempt from the requirement to submit an attainment (and by extension, an RFP) demonstration by section 187(a). Note that even where contingency measures and attainment demonstrations are required, section 172(b) authorizes EPA to set separate SIP submittal deadlines for them which shows these can (and sometimes must) be acted on separately.

believe the Court's finding in *Abramowitz* applies to this rulemaking.

It should also be noted that EPA routinely receives SIP submittals that include rules, regulations, and other elements responding to various SIP requirements such as I/M programs, new source review programs, and reasonably available control technology rules. EPA has traditionally acted on these elements independently.

Comment: ACLPI claims that approving contingency measures while deferring action on the attainment and other provisions of the 1993 CO SIP as amended stands the process on its head. ACLPI asserts that if the CO SIP is inadequate to produce timely attainment, or fails to meet other requirements of the Act, then EPA is obligated to disapprove the plan and require additional control measures as part of the plan. ACLPI concludes that EPA cannot evade this responsibility via the alleged artifice of treating essential measures as ''contingency'' measures and avoiding action on the attainment demonstration in the SIP itself.

Response: As discussed above, EPA believes that the section 172(c)(9) contingency measure requirement is separate and distinct from the attainment demonstration requirement and, thus, may be acted on independently. EPA agrees that if it finds that a SIP is inadequate to achieve timely attainment, then EPA is obligated to disapprove the plan and require additional control measures as necessary for timely attainment. However, in developing its new attainment demonstration, a state would not be compelled to choose its section 172(c)(9) contingency measures to contribute to that demonstration. While the Clean Air Act explicitly requires certain controls in SIP attainment demonstrations (e.g., oxygenated gasoline, I/M programs, RACT), it also allows states broad discretion to identify the exact controls that make up the remaining portion of such demonstrations.[29]

Under the circumstances posited by ACLPI, EPA could approve a state's contingency measures as meeting the requirements of section 172(c)(9) while at the same time disapproving the plan's attainment demonstration, assuming such an action were warranted. See section 110(k)(3). The state would then be required to develop and submit a new attainment demonstration. In so doing, the state could choose to include its pre-existing contingency measures as part of the attainment demonstration, in which case it would also be required to submit new contingency measures. On the other hand, the state would be free to choose entirely different measures as long as they resulted in expeditious attainment. In that event, the approved contingency measures would remain as such.

Therefore, acting on a state's chosen contingency measures prior to acting on the attainment demonstration does not ''stand the process on its head;'' it merely acknowledges the state's right under the Act to select what measures will and will not make up its control strategy and what measures will and will not make up its section 172(c)(9) contingency measures.

Comment: ACLPI states that the proposal violates section 110(l) of the Act because under that section, EPA cannot approve a revision to a plan if the revision would interfere with any applicable requirement concerning attainment and RFP. Contrary to EPA's assertion, ACLPI claims that the Agency's proposed action would most definitely interfere with applicable requirements for attainment and RFP—namely, those set forth in the FIP and, because the FIP contingency provisions explicitly require adoption of federal measures to provide for attainment of the CO NAAQS, these provisions are most assuredly ''applicable requirements.'' ACLPI additionally asserts that EPA's action would interfere with those requirements by repealing them and that EPA's action further interferes with the Act's requirement that the state produce, and EPA approve or disapprove, a CO SIP that provides for attainment and RFP. ACLPI also comments that EPA's assertion that its approval of the State's contingency measures will not interfere with RFP because the measures are only triggered if there is a failure to make RFP is truly disingenuous. ACLPI objects to EPA's proposing to replace a FIP which mandates RFP and timely attainment with a plan that requires neither, and that will allegedly allow air quality to worsen.[30]

Response: EPA refers the reader to the discussion of the application of section 110(l) to today's action in its proposal. See 61 FR 15647. That analysis shows why the proposed action meets the requirements of section 110(l). That discussion is expanded here.

Section 110(l), added to the CAA in the 1990 Amendments, states that the ''Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * * or any other applicable requirement of this Act.'' As addressed below, EPA believes that the purpose of this provision is to assure that in changing one substantive aspect of its SIP, a state does not simultaneously impair its compliance with another aspect of the SIP or with the statutory mandates applicable to the aspect under revision.

In making its arguments regarding section 110(l), ACLPI attempts to re-write the section to serve its own purposes. It is clear, however, from the plain language of section 110(l) that that provision is referring to noninterference with the requirements of the statute, and not to the requirements of a FIP as ACLPI contends. The term ''applicable implementation plan,'' which includes FIPs as well as SIPs, is specifically defined in the Act and used throughout title I. See section 302(q); see also, e.g., section 110(c) and (n). Therefore, had Congress intended section 110(l) to have the meaning ACLPI suggests, it could easily have included at the end of the section the clause ''or requirements of any applicable implementation plan.''

It is consistent with the Act as a whole for Congress to have limited section 110(l) to statutory rather than SIP requirements. States are at liberty to include such provisions as they see fit in their attainment demonstrations, provided attainment is demonstrated. They are also free to change those measures at any time, subject to certain savings clauses, provided expeditious attainment is still demonstrated. Congress did not in section 110(l) intend to override this general scheme by forbidding revisions (including revocations and replacements) of any SIP measure because it would by definition interfere with the pre-existing requirement of that very SIP measure. This analysis applies even more so to FIPs. In a FIP, EPA promulgates measures for a state which may be very different from the measures that the state would choose to implement in its own SIP. In keeping with the overriding statutory goal of federalism in the Act, when a state does adopt measures to replace FIP measures it should be able to select those measures it deems most suited to the state needs, provided they comply with the statutory requirements applicable to the element at issue. A state should not be subject forever to the

[29] See, for example, section 172(c)(6) which states: Such plan provisions shall include enforceable emission limitations, and *such other control measures, means or techniques * * * as may be necessary or appropriate to provide for attainment* of the [NAAQS] by the applicable attainment date * * *. (Emphasis added).

[30] Contrary to ACLPI's comments, the FIP contingency process does not mandate RFP. See the FIP contingency process at 56 FR 5472. Therefore the discussion below does not address this aspect of ACLPI's comments.

identical measures in the FIP, notwithstanding its initial failure to meet the statutory requirement giving rise to the FIP.

In contrast, ACLPI, without any textual support, attempts to turn section 110(l) into a savings clause. In so doing, ACLPI's interpretation would render the Act's actual savings clauses virtually meaningless. For example, the section 110(n) savings clause keeps in effect pre-amendment provisions of any approved or promulgated applicable implementation plan, including a FIP, except to the extent that EPA approves a revision.[31] Using ACLPI's interpretation of section 110(l), virtually any change to a pre-amendment SIP approved by EPA to conform to new 1990 statutory provisions would be prohibited. Clearly, Congress would not in one section of the statute effectively outlaw all SIP revisions to meet the new Act's many requirements wherever a prior SIP had addressed a similar requirement while allowing those revisions in another section.

One example should suffice to demonstrate the untenability of ACLPI's position: pre-amendment SIPs were required under pre-amended section 110(a)(2)(B) to provide for maintenance as well as attainment of the NAAQS. Under the 1990 Amendments, maintenance plans for nonattainment areas are only required in connection with a nonattainment area's redesignation to attainment. See sections 107(d)(3)(E) and 175A. Under ACLPI's interpretation, a state could never revise its SIP to eliminate or modify its pre-amendment maintenance plan because such an action would interfere with a requirement of the applicable implementation plan. Clearly this result is not what Congress intended in section 110(l).

Likewise, if ACLPI's all-encompassing interpretation of section 110(l) were to prevail, the section 193 control requirement savings provision would make no sense. For example, if any emission limitation for a specific source in a pre-amendment SIP (approved by EPA) were considered an ''applicable requirement'' within the meaning of section 110(l), then any change in such a limitation would constitute interference. If that were the case, there would be no point in Congress' requiring that modifications to such requirements assure equivalent or greater emission reductions. Obviously Congress intended to allow substitution of control measures provided emissions reductions were equivalent in such cases.

The section 110(l) admonishment that a SIP revision cannot ''interfere with any applicable requirement concerning attainment and reasonable further progress'' or with any other ''applicable requirement of the Act'' must be read within the broad context of the Act rather than the narrow context of the SIP. As ACLPI has pointed out, the primary purpose of the nonattainment provisions of the Act is to assure attainment of the NAAQS and RFP towards attainment. Congress in 1990 explicitly established provisions in pursuit of these goals including contingency measures, reclassification and additional planning requirements for attainment and RFP that are triggered by an area's failure to attain by its attainment deadline. For CO, these provisions lie in sections 172, 186, and 187. These statutory requirements have been discussed extensively above and the FIP contingency process, including the highway delay provision, serves essentially the same purpose.[32] Withdrawal of the FIP contingency process leaves these statutory provisions fully operable and, therefore, does not interfere with ''an applicable requirement concerning attainment and RFP;'' to wit, the area still remains under an applicable requirement to attain the standard and demonstrate RFP.

As stated previously, for low moderate CO areas, section 172(c)(9) establishes the only requirement for contingency measures. As discussed elsewhere in this notice, EPA has concluded that the State's submittals meet the requirements of section 172(c)(9). Neither the statute nor current EPA policy requires contingency procedures (as distinguished from actual contingency measures) in SIPs. As noted above, the 1982 SIP guidance, which required contingency procedures and under which the FIP was promulgated are inconsistent with the new statutory scheme and are no longer in effect. Therefore, withdrawal of the FIP contingency process, in conjunction with the approval of contingency measures consistent with the requirements of the CAA, does not conflict with current law or EPA policy regarding contingency requirements.

To summarize, EPA believes that ACLPI's contention that section 110(l) precludes EPA from approving the State's section 172(c)(9) contingency measures and withdrawing the FIP contingency process is supported neither by the plain language of section 110(l) nor by the structure of the 1990 Amendments.

Finally, even if EPA believed, which it does not, that section 110(l) encompasses purely procedural statutory requirements, EPA does not understand how its approval of the State's contingency measures and withdrawal of the FIP contingency process could be deemed to interfere with the Act's requirement that the State produce, and EPA approve or disapprove, a CO SIP that provides for attainment and RFP. EPA's action in this notice does not in any way affect the State's obligation under the Act to produce a CO SIP that provides for attainment and RFP, nor does it preclude in any way EPA's action on that or any other SIP the State has submitted or will submit.

Comment: ACLPI requests that its December 22, 1995 and March 29, 1996 notices of intent to sue EPA for failing to comply with the FIP contingency provisions be incorporated into the record of this matter.

Response: ACLPI's two notices have been incorporated into the docket as comments on EPA's action.

Comment: ACLPI states that rather than moving forward with adoption of additional measures to produce attainment, the Agency is proposing to ignore the bulk of the State's CO SIP and its SIP call and only act on the State's contingency procedures.

Response: Approval of the State's contingency measures does not indicate what future action EPA will or will not take on the State's 1993 CO plan, which was submitted in response to EPA's August 9, 1993 SIP call, nor does it preclude any future actions on that plan. EPA's SIP call did not require that the State submit section 172(c)(9) contingency measures. As discussed above, the section 179(c)(9) requirement for specific contingency measures is a separate and distinct provision of the Act that may be approved separately from other elements of the CO plan.

Comment: ACLPI claims that the extension and reclassification procedures in the 1990 Amendments assume that EPA will first review, and approve or disapprove moderate area CO SIPs before considering reclassification and attainment deadline extensions, and that EPA has flouted those requirements here.

[31] See footnote 13 for the text of section 110(n). As a savings clause, section 110(n) works in tandem with section 193, the Act's general savings clause. Pre-amendment SIP (or FIP) provisions remain in effect until a revision is approved by EPA, except that discrete controls on specific sources cannot be modified unless equivalent or greater emission reductions are assured.

[32] This is true except for RFP. As noted before, the FIP contingency process did not require RFP; therefore, in this regard, the FIP contingency process does not go as far as the new statutory scheme.

Response: EPA does not agree that reclassification of an area to serious under the Act requires prior review and approval or disapproval of a moderate area plan.[33] Once an attainment date has passed, EPA must determine, based solely on ambient air quality data, whether an area has failed to attain without regard to whether EPA has approved a plan for the area. Once the Agency makes this finding, the area is reclassified to serious by operation of law. See section 186(b)(2). As a result of its recent reclassification to serious, the Maricopa area is now required to submit a new serious area CO plan by February 28, 1998. See footnote 3. Because the Phoenix area experienced violations of the CO standard in 1995, it did not qualify for an extension of its attainment date; therefore, CAA requirements for extension of the attainment date are not relevant.

B. Comments by the Maricopa Association of Governments, May 9, 1996

Comment: MAG made three technical comments correcting certain references in the proposal:

- Page 15747, second column, first partial paragraph: The appropriate reference is ''See 1993 CO Plan Addendum, Appendix, Exhibit 4, memo re: Re-calculation of Carbon Monoxide Emission Reductions for the Committed Measures.''
- Page 15750, first column, first full paragraph, third sentence: The phrase ''1996 and 1997'' is inconsistent with the data provided and should be replaced with ''1995 through 1997.''
- Page 15750, first column, second full paragraph, third sentence: The phrase ''1996 and 1997'' is inconsistent with the data provided and should be replaced with ''1995 through 1997.''

Response: EPA notes the first correction.

EPA states in the proposal that ''data indicat[e] that emission increases of 17 tpd from VMT growth are expected to occur in 1996 and 1997.'' EPA arrived at this number by subtracting the expected CO 1997 emissions level (without post 1995 I/M 240), 530 tpd, from the expected CO 1995 emission level (without post 1995 I/M 240), 513 tpd. Both the 530 tpd figure and the 513 tpd figure are calculated for December 1997 and 1995, respectively. EPA's statement in the proposal is, therefore, correct: an emission increase of 17 tpd is expected in the two year period (characterized as 1996 and 1997 in the proposal) from December 1995 through December 1997. The same reasoning applies to MAG's third correction.

III. Final Actions

EPA is approving into the Arizona SIP for the Phoenix CO nonattainment area the State's enhanced remote sensing program and traffic diversion measure as meeting the requirements of sections 110 and 172(c)(9) of the CAA.

Based on the approval of the State's contingency measures, EPA is withdrawing the federal contingency process for the Phoenix CO nonattainment area. Specifically, the Agency is deleting the phrase ''After December 31, 1991 for the Maricopa CO nonattainment area or'' from the contingency provisions at 56 FR 5470, column 2 (February 11, 1991). This deletion leaves the federal contingency process in place for the Pima County CO nonattainment area. EPA also is withdrawing the list of highway projects potentially subject to delay that was proposed on June 28, 1993 during the partial implementation of the FIP contingency process at that time. 58 FR 34547.

EPA is taking these actions because, with its final approval of the State's section 172(c)(9) measures, the federal process will become unnecessary for attainment and maintenance of the CO NAAQS in the Phoenix area. To leave the federal process in place would complicate air quality planning within Maricopa County and would be unnecessarily redundant. In addition, giving preference to the State's measures is consistent with the Clean Air Act's intent that states have primary responsibility for the control of air pollution within their borders. See CAA sections 101(a)(3) and 107(a).

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for a revision to the state implementation plan shall be considered separately in light of specific technical, economic and environmental factors and in relation to relevant statutory and regulatory requirements.

IV. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget has exempted this regulatory action from Executive Order 12866 review.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small business, small not-for-profit enterprises and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under sections 110 and subchapter I, part D of the Clean Air Act, do not create any new requirements but simply approve requirements that the State is already imposing. Similarly, withdrawal of the FIP contingency process does not impose any new requirements. Therefore, because the federal SIP approval and FIP withdrawal does not impose any new requirements, the Administrator certifies that they do not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal/state relationship under the Act, preparation of a regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S.E.P.A.*, 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. 7410(a)(2).

C. Unfunded Mandates

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), 2 U.S.C. 1501–1571, 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 that 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 this rule.

EPA has determined that the approval action promulgated does not include a federal mandate that may result in estimate costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector.

[33] Note that for low moderate areas the only plan submittals required by the CAA are section 172(c)(9) contingency measures and a section 187(a) emissions inventory. Therefore Congress could not have intended that EPA act on attainment plans for these areas before considering an attainment deadline extension or reclassification.

Through submission of these SIP revisions, the State and any affected local or tribal governments have elected to adopt the program provided for under sections 110 and 182 of the CAA. These rules may bind State, local, and tribal governments to perform certain actions and also require the private sector to perform certain duties. To the extent that the rules being approved today will impose any mandate upon the State, local, or tribal governments either as the owner or operator of a source or as a regulator, or would impose any mandate upon the private sector, EPA's action will impose no new requirements; such sources are already subject to these requirements under State law. Similarly, EPA's withdrawal of the FIP contingency process will not impose any new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action. EPA has also determined that this action does not include a mandate that may result in estimated costs of $100 million or more to State, local, or tribal governments in the aggregate or to the private sector. This federal action approves pre-existing requirements under State or local law, imposes no new Federal requirements, and withdraws other federal requirements applicable only to EPA. Accordingly, no additional costs to State, local or tribal governments, or to the private sector, result from this action.

D. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

E. Petitions for Judicial Review

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 December 2, 1996. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations.

Dated: September 26, 1996.

Carol M. Browner,

Administrator.

For the reasons set forth in this preamble, 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart D—Arizona

2. Section 52.120 is amended by adding paragraphs (c)(83) and (c)(85) to read as follows:

§ 52.120 Identification of plan.

* * * * *

(83) Plan revisions were submitted on December 11, 1992, by the Governor's designee.

(i) Incorporation by reference.

(A) State Transportation Board of Arizona.

(*1*) Resolution to Implement a Measure in the Maricopa Association of Governments 1992 Carbon Monoxide Contingency Plan, adopted on November 20, 1992.

(85) Plan revisions were submitted on April 4, 1994, by the Governor's designee.

(i) Incorporation by reference.

(A) Arizona Revised Statutes.

(*1*) House Bill 2001, Section 27: ARS 49–542.01(E) approved by the Governor on November 12, 1993.

[FR Doc. 96–25400 Filed 10–2–96; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 413

[BPD–805–F]

RIN 0938–AG68

Medicare and Medicaid Programs; New Payment Methodology for Routine Extended Care Services Provided in a Swing-Bed Hospital

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This final rule revises the regulations governing the methodology for payment of routine extended care services furnished in a swing-bed hospital. Medicare payment for these services is determined based on the average rate per patient day paid by Medicare for these same services provided in freestanding skilled nursing facilities (SNFs) in the region in which the hospital is located. The reasonable cost for these services is the higher of the reasonable cost rates in effect for the current calendar year or for the previous calendar year. In addition, this final rule revises the regulations concerning the method used to allocate hospital general routine inpatient service costs for purposes of determining payments to swing-bed hospitals. These changes are necessary to conform the regulations to section 1883 of the Social Security Act (the Act), and section 4008(j) of the Omnibus Budget Reconciliation Act of 1990.

EFFECTIVE DATE: These regulations are effective on November 4, 1996.

FOR FURTHER INFORMATION CONTACT: John Davis (410) 786–0008.

SUPPLEMENTARY INFORMATION:

I. Background

Before the enactment of the Omnibus Budget Reconciliation Act of 1980 (Public Law 96–499), small rural hospitals had difficulty in establishing separately identifiable units for Medicare and Medicaid long-term care because of limitations in their physical plant and accounting capabilities. These hospitals often had an excess of hospital beds, while their communities had a scarcity of long-term care beds in Medicare and Medicaid participating facilities. To alleviate this problem, Congress enacted section 904 of Public Law 96–499, known as the ''swing-bed provision,'' which authorized a cost-efficient means of providing nursing home care in rural communities. This provision added sections 1883 and 1913 of the Social Security Act (the Act), under which certain rural hospitals with fewer than 50 beds could use their inpatient facilities to furnish long-term care services to Medicare and Medicaid patients. These hospitals were paid at rates that were deemed appropriate for those services and were generally lower than hospital rates. Medicare payment for routine SNF services was made at the average Statewide Medicaid rate for the previous calendar year. Payment for ancillary services was made based on reasonable cost.