

any element of the Postal Service employee's established checkout and withdrawal process for any meter, unless approval for the change in procedures is granted in writing by the Postal Service.

(h) Handle faulty meters, including those that are inoperable, those that are misregistering or the registers are unreadable, those that inaccurately reflect their current status, those that show any evidence of tampering or abuse, and those for which there is information or other indication that the meter has some mechanical or electrical malfunction of any critical security component, such as any component the improper operation of which could adversely affect Postal Service revenues, or of any memory component, or that affects the accuracy of the registers or the accuracy of the value printed, as follows:

(1) Ensure that all functions required to handle faulty meters are completed in a timely manner and in accordance with Postal Service regulations and procedures.

(2) Begin the process to retrieve any faulty meter within 2 business days of being notified of a problem.

(3) Complete PS Form 3601-C, Postage Meter Activity Report, in the presence of the licensee and obtain the licensee's signature on the form confirming that the information is accurate.

(i) Include the register information on the form when the registers can be read.

(ii) Print the system report, if available for the meter, and attach the report to PS Form 3601-C when the register values cannot be read.

(iii) Have the licensee provide any original daily usage logs with PS Form 3601-C for refund calculation when the register values cannot be read.

(4) Identify and tag the meter as faulty as soon as the manufacturer or the manufacturer's agent receives it from the customer. Keep the identification tag and the PS Form 3601-C, which was completed under paragraph (h)(3) of this section, with the faulty meter until processing is completed and the meter is returned to service or is scrapped.

(5) Secure all faulty meters and maintain the integrity of the meter and of the information residing on the meter. Maintain control of the meter until processing is completed.

(6) Ensure that under no circumstance are registers on a faulty meter cleared or any funds refunded or transferred until examination and processing are completed, the Postal Service has reviewed and analyzed the manufacturer's report and determined the appropriate postage adjustment, if

any, and approved refund procedures are followed.

(7) Maintain a record of the faulty meter and all changes in its custody, state, and condition (including availability of register information) from the time the meter is reported as faulty until processing is completed under paragraphs (h)(9), (12), or (14) of this section. Make the record available to the Postal Service for its review upon request.

(8) Examine each meter withdrawn for faulty operation as soon it is received from the customer to determine if the registers can be read and if there is any evidence of tampering.

(9) When the registers can be read or a summary report of the appropriate redundant electronic register memory readouts is available using Postal Service-approved methods, and there is no evidence of tampering or any problem covered by paragraph (h)(13) of this section:

(i) Check out the meter and withdraw it from service under paragraph (g) of this section.

(ii) Submit a report to the Postal Service by the 15th of each month listing all faulty meters with readable displays and no other problems received in the prior month, identifying the meter and including an explanation of the meter malfunction.

(10) Maintain a dedicated, secure facility, approved by the Postal Service, for handling faulty meters that cannot be handled under paragraph (h)(9) of this section.

(11) Ship faulty meters not handled under paragraph (h)(9) of this section directly to the secure facility described in paragraph (h)(10) of this section for processing. Ship these faulty meters via Registered Mail service, Express Mail service, or Priority Mail service with Delivery Confirmation service.

(12) If there is no evidence of tampering, if the meter registers cannot be read, and if a summary report of the appropriate redundant electronic register memory readouts cannot be retrieved:

(i) Develop other data to support the request for Postal Service approval of a postage adjustment amount, such as a manual calculation of the estimated value of the descending register based on estimated highest average daily usage, or applicable system-generated register documentation. Include the original daily usage logs maintained by the customer, if any, with the supporting data.

(ii) Furnish a report explaining the malfunction to the Postal Service within 7 days of receiving the meter. Accompany the report with a

recommendation of the postage adjustment amount that includes all data developed to support the recommendation.

(iii) Maintain control of those meters that have unreadable registers and hold them in the manufacturer's dedicated, secure facility described in paragraph (h)(10) of this section until a representative of the Postal Service approves the postage adjustment amount or verifies the condition of the meter before proceeding with the meter repair or destruction.

(13) In some instances, even though the registers can be read, there is information or other indication that the meter has some mechanical or electrical malfunction that affects the accuracy of the registers or the accuracy of the value printed. Handle such meters under paragraph (h)(12) of this section.

(14) If there is evidence or suspicion of tampering:

(i) Ensure that the meter is handled in a secure manner and maintained in its original state until the Postal Service or its agent can be present during the examination.

(ii) After examination, if approved by the Postal Service or its agent, process the meter under paragraph (h)(12) of this section.

(15) Issue the refund of any postage value said to remain in a faulty meter, after Postal Service approval of the amount of the refund, when the Postal Service requires it. Request reimbursement from the Postal Service for these refunds by periodically submitting a reimbursement request letter to the Postal Service. Accompany the letter with listings and support documentation for each refund and indicate the cause of failure for each incident.

\* \* \* \* \*

**Stanley F. Mires,**

*Chief Counsel, Legislative.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[CA-079-SIPS; FRL-7408-5]

#### Motor Vehicle Emissions Budgets in Progress, Attainment, and Maintenance State Implementation Plans for Ozone, Carbon Monoxide, and Nitrogen Dioxide; California

AGENCY: Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to limit the duration of our approvals of motor vehicle emissions budgets (“budgets”) in certain existing California state implementation plans (SIPs) that provide for progress, attainment, and maintenance of the 1-hour ozone, 8-hour carbon monoxide (CO), and annual nitrogen dioxide (NO<sub>2</sub>) national ambient air quality standards (NAAQS). Specifically, we are limiting our approvals of the existing budgets to last only until the effective date of our adequacy finding for new budgets that replace the existing approved budgets for the same pollutant, Clean Air Act (CAA) requirement, and year. The State of California will submit new budgets as part of comprehensive revisions to certain approved progress, attainment, and maintenance plans that reflect updated information and a new version

of California’s motor vehicle emission factor model. On the effective date of EPA’s adequacy finding for a new budget, our approval of the existing budget would terminate and thus the new adequate budget would apply instead of the existing budget for transportation conformity purposes.  
**EFFECTIVE DATE:** This rule is effective on December 16, 2002.  
**ADDRESSES:** You can inspect copies of the docket for this action at EPA’s Region 9 office during normal business hours. You can inspect copies of the SIP materials at the following locations:  
 U.S. EPA, Region 9, 75 Hawthorne Street, San Francisco, CA 94105–3901.  
 California Air Resources Board, 1001 I Street, Sacramento, CA 95814.  
**FOR FURTHER INFORMATION CONTACT:** Dave Jesson, EPA Region 9, (415) 972–3957, or *Jesson.David@epa.gov*  
**SUPPLEMENTARY INFORMATION:** Throughout this document, “we,” “us,” and “our” refer to EPA.

**I. Proposed Action**

On July 16, 2002 (67 FR 46618), we proposed to limit the duration of our prior approvals of existing motor vehicle emissions budgets associated with the SIPs for the areas listed below in Table 1—California SIPs Whose Budget Approvals Are Being Modified. Under this modification, the existing budgets will be approved and apply for transportation conformity purposes only until we have found the new budgets that California submits to be adequate. The proposed action provides background information on the California SIPs, the State’s request, the federal rule (40 CFR part 93) and current policies to implement the transportation conformity provisions of CAA section 176(c), and our process for determining adequacy of motor vehicle emission budgets.<sup>1</sup>

TABLE 1.—CALIFORNIA SIPs WHOSE BUDGET APPROVALS ARE BEING MODIFIED

Area	Pollutant	Plan	Adoption	Submittal	FR approval
Antelope Valley (SE Desert).	Ozone	Attainment Plan	9/9/94 12/9/94 4/12/96	11/15/94 12/29/94 7/10/96	1/8/97, 62 FR 1150.
Bakersfield	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Chico	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Coachella (SE Desert)	Ozone	Attainment Plan	9/9/94 12/9/94 12/29/94 7/10/96	11/15/94 12/29/94 7/10/96	1/8/97, 62 FR 1150.
Fresno	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Kern (SE Desert)	Ozone	Attainment Plan	12/1/94	1/28/94	1/8/97, 62 FR 1150.
Lake Tahoe—North	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Lake Tahoe—South	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Modesto	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Mojave (SE Desert)	Ozone	Attainment Plan	10/26/94	11/15/94	1/8/97, 62 FR 1150.
Monterey	Ozone	Maintenance Plan	5/25/94 10/19/94	7/14/94 11/14/94	1/17/97, 62 FR 2597.
Sacramento	Ozone	Attainment Plan	12/1/94 12/12/94 12/13/94 12/14/94 12/20/94	12/29/94	1/8/97, 62 FR 1150.
Sacramento	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
San Diego	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
San Francisco Bay Area	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
South Coast	Ozone	Attainment Plan	11/15/96 12/10/99	2/5/97 2/4/00	4/10/00, 65 FR 18903.
South Coast	NO <sub>2</sub>	Maintenance Plan	11/15/96	2/5/97	7/24/98, 63 FR 39747.
Stockton	CO	Maintenance Plan	4/26/96	7/3/96	3/31/98, 63 FR 15305.
Ventura	Ozone	Attainment Plan	11/8/94 12/19/95	11/15/94 7/12/96	1/8/97, 62 FR 1150.

**Note:** The Attainment plans typically also address CAA provisions relating to progress.

Our proposed action was requested by the California Air Resources Board (CARB) because the State is in the process of making comprehensive updates and enhancements to most of

its air quality plans and budgets, which will include much more accurate motor vehicle emission information than existing SIPs. California wishes to replace the existing approved budgets as

soon as possible so that the new budgets can be used in conformity. Normally, new budgets that replace existing budgets in approved plans cannot be used until the corresponding plans have

<sup>1</sup> The adequacy process is explained at 40 CFR 93.118(e)(4) and (5), and in a May 14, 1999 memo

from Gay MacGregor, Director, Regional and State Programs Division, Office of Mobile Sources,

entitled, “Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision.”

been fully approved as part of the SIP. However, if approval of the existing budgets expires when we determine that the new budgets are adequate (as we proposed), the superior new budgets can be then employed in transportation conformity determinations within a few months of their submission, rather than only when the SIP is finally approved, which could take as long as 18 months.

In a June 14, 2002, letter from Mike Kenny, CARB Executive Officer, to Wayne Nastri, EPA Region 9 Regional Administrator, CARB states that the new plan revisions will benefit air quality and strengthen the SIPs by incorporating: New federally enforceable commitments and control measures; new and updated data that reflect the various emission control rules adopted since the old SIPs were developed; recent vehicle test data for cars and trucks to better represent real-world emissions; and updated vehicle registration data and activity data. The CARB letter concludes: "Without the ability to replace existing budgets with submitted ones using the budget adequacy process, the benefits of using the updated data from the stronger, more effective SIPs would not be realized for a year or more after the SIPs are submitted, due to the SIP approval process." In response, we proposed to modify our approvals of the California SIPs in light of the age of the motor vehicle data in the existing SIPs and the improvements to be included in the new SIPs.

Today's final action is not intended to modify the generally applicable rules regarding when submitted budgets become effective for the purposes of transportation conformity. Rather, today's action sets forth a means to accommodate the State's request to allow for the prompt use of new more accurate budgets in California within the bounds of existing regulatory and statutory requirements.

## II. Public Comments

We received three comments: one letter of support, one letter requesting clarification, and one letter opposing the proposed action. We summarize and respond to the comments below.

### A. Comments From Georgia

A letter of support was submitted jointly by the Environmental Protection Division of the Georgia Department of Natural Resources, the Georgia Regional Transportation Authority, and the Atlanta Regional Commission. These agencies supported the flexibility being proposed for California and encouraged its wide application for other nonattainment and maintenance areas:

The Agencies are in complete support of the proposed EPA action, in California and elsewhere, as it will eliminate the lengthy SIP approval process currently needed to replace existing SIP budgets, and will enable a quicker, smoother transition to motor vehicle emissions budgets which more accurately reflect current conditions—with the ultimate end being improved alignment between mobile source emission estimates used in both the SIP and the transportation plan and program. By reducing the potential delay experienced before new budgets may be utilized and by reducing the associated risk to the transportation planning process, we believe that this rulemaking also provides an incentive for nonattainment and maintenance areas to revisit their approved budgets more frequently. This would improve the air quality planning process, and ultimately air quality, by causing newer and better planning assumptions to be incorporated into SIPs more often. Therefore, we encourage EPA to provide the flexibility contained in this rulemaking throughout the country, especially in those areas, such as Atlanta, where there is an active and effective interagency consultation process.

*Response:* We appreciate the support of the Environmental Protection Division of the Georgia Department of Natural Resources, the Georgia Regional Transportation Authority, and the Atlanta Regional Commission for this action on SIPs in California. In response to their request that we extend this flexibility to all nonattainment and maintenance areas, we can only do so under certain specific circumstances. First, a state must acknowledge that its currently approved budgets have become outdated or are deficient. Second, the state must make a commitment to update these budgets as part of a comprehensive update of its SIP. Third, a state must request that EPA limit the duration of the approval of the state's current approved SIPs. If a state meets all of these criteria, it would be appropriate to allow that state also to take advantage of this flexibility.

California has committed to undertake comprehensive updates of nearly two dozen attainment demonstrations and/or maintenance plans. Many of these plans have not been updated in the last eight years. In that time much has been learned about motor vehicle emissions and many planning assumptions have been updated. As discussed above, California has sent a letter to EPA formally requesting that we limit the duration of the State's currently approved SIPs. Therefore, California has

fulfilled the criteria necessary to receive this flexibility and we believe it is now appropriate to limit our prior SIP approvals and allow new budgets that come from these revised SIPs and reflect much better information to be used for conformity after they are found adequate.

### B. Comments From Miwok Indians

The following comments were submitted on behalf of the Shingle Springs Band of Miwok Indians ("Tribe").

1. *EPA should clarify that projects from federally approved transportation plans may continue if new budgets apply.*

*Response:* In general, the establishment of new applicable budgets would not affect projects incorporated in approved regional transportation plans (RTPs) and transportation improvement plans (TIPs). A conformity determination remains valid even if we later, upon further analysis, find new budgets applicable. The fact that new information became available that changed the applicable budgets does not affect a prior conformity determination; a subsequent conformity determination would take the new information into account. However, whether or not a new budget applies, a project carried forward into a new RTP or TIP must be analyzed, together with all other federally supported highway and transit activities, to demonstrate that the RTP or TIP as a whole is consistent with the SIP, using the latest planning assumptions, the approved motor vehicle emissions factor model, and the currently applicable budgets. Also, regardless of which budget applies, the Metropolitan Planning Organization (MPO) may elect not to include any project in the next RTP or TIP for the area.

2. *EPA failed to include proposed regulatory language in the proposal.*

*Response:* We are not obligated to issue rule language in a proposed rulemaking, and generally do not do so in actions on State plans. We believe that the proposed rulemaking was clear in expressing our intended action.

### C. Comments From Marc Chytilo

Marc Chytilo submitted comments on behalf of Transportation Solutions Defense and Education Fund, Communities for a Better Environment, Our Children's Earth Foundation, Earthjustice, Sierra Club, Latino Issues Forum, and Urban Habitat. Mr. Chytilo objected to the proposal for several reasons, which are summarized and discussed below.

1. *EPA's rulemaking record must disclose that ARB's proposed action is being undertaken to avoid statewide conformity issues by replacing the emissions budgets used to demonstrate attainment in currently approved SIPs with enlarged emissions budgets that have no demonstrated relationship to attainment of the NAAQS. ARB has apparently not clearly committed to review the adequacy of prior attainment demonstrations, or submit new demonstrations, as part of its current plan to develop revised MVEBs using current estimates of motor vehicle emissions.*

*Response:* The purpose of our action is to expedite use of new budgets based on updated planning data and models, and consistent with comprehensive new progress, attainment, and maintenance plans. We expect that the new budgets would have a demonstrated relationship to attainment and maintenance of the NAAQS, and we would not find the new budgets adequate if that were not the case. We can find the budgets adequate only if the plans meet all the criteria in § 93.118(e)(4), as discussed below in response to comment 3. In fact, we expect that the use of updated information on motor vehicle emissions, emissions of other pollutant categories, air quality data, and air quality assessments in revised plans should strengthen the relationship of the budgets to the demonstrations of attainment and maintenance in each affected area.

2. *The proposed action is inconsistent with the statute, judicial interpretations, and EPA's previous interpretations. a. CAA section 176(c) requires conformity using the EPA approved or promulgated implementation plan.*

*Response:* Our proposal to terminate the approval of existing budgets in certain California SIPs at the time of an adequacy finding for new budgets does not conflict with judicial interpretations or CAA section 176(c). As discussed below, our transportation conformity regulations do allow for submitted budgets to apply following our determination of adequacy but before SIP approval, under circumstances detailed in 40 CFR 93.118(e). Although the court in *Environmental Defense Fund v. EPA et al.*, 167 F.3d 641 (D.C. Cir. 1999) remanded 40 CFR 93.118(e)(1), the offending provision was an automatic assumption of adequacy 45 days after the SIP was submitted, unless before that date we determined that the budgets were inadequate. The court did not remand the other regulatory provisions relating to use of adequate budgets, and our proposal is entirely consistent with the

our current regulations. In addition, the fourth circuit also recently found it appropriate to use submitted budgets that had been found adequate where no prior approved budget was in place. See *1000 Friends of Maryland v. Browner*, 265 F.3d 216 (4th Cir. 2001).

Our proposal provides a mechanism for enhancing compliance with the CAA section 176(c)(1) requirement that "[t]he determination of conformity shall be based on the most recent estimates of emissions. \* \* \*" Absent our proposed mechanism, transportation conformity determinations in these areas of California would need to be based on budgets and air quality plans that may have been prepared more than eight years ago until we complete comprehensive review of the air quality plans, propose rulemaking, and issue final approval of the budgets and plans. This period may take as much as 18 months from the date on which the plans and budgets were submitted. Under our proposed mechanism, transportation planning organizations must use new budgets that are based upon updated air quality plans using the most recent emissions estimates, as soon as we find these budgets to be adequate under the provisions of 40 CFR 93.118, a process that is generally completed within approximately 90 days from the submittal date.

b. *EPA's conformity regulations (40 CFR 93.118(e)) provide that submitted SIPs do not supersede budgets in approved SIPs for the period of years addressed by the approved implementation plan.*

*Response:* As mentioned, our proposal to terminate the approval of existing budgets in certain SIPs at the time of an adequacy finding for new budgets does not change our transportation conformity regulations, which allow for use of a budget prior to SIP approval in cases where there is no budget approved in the SIP for the same year and CAA requirement (40 CFR 93.118(e)). By terminating our approval of the existing budgets on the date that we find new, revised budgets to be adequate, we eliminate the old budgets from the approved SIP and thus allow the new budgets to apply under the conformity rules for purposes of transportation conformity. In this manner, our proposed action provides an option, within the framework of our existing regulations, for accelerating the air quality and transportation benefits of basing transportation plans and conformity determinations on California's new and improved plans and budgets, in lieu of the outdated SIPs and budgets that were developed and adopted, in many cases, eight years ago.

Before the revised budgets may go into effect, however, we must first review both the budgets and the air quality plans and make a finding that these updated budgets are adequate. Our finding must follow the procedures and criteria in 40 CFR 93.118 (e)(4) and (5), and the guidance contained in the EPA Guidance Memorandum from Gay MacGregor to Regional Air Directors entitled "Conformity Guidance on the Implementation of the March 2, 1999 Conformity Court Decision" (May 14, 1999). Therefore, our proposed mechanism for allowing use of these new budgets complies with the 40 CFR 93.118(e) provisions in our transportation conformity regulations, and our findings on the adequacy of the budgets in the submittals will comply with all applicable provisions of the regulations.

3. *EPA may attempt to find budgets adequate based on incomplete and/or patently inadequate SIPs, creating great uncertainty in air quality and transportation planning processes while compromising air quality and public health.*

*Response:* We will follow the statutory criteria and the regulatory criteria in 40 CFR 93.118(e)(4) and (5) for finding submitted budgets adequate. Among other mandated findings, we must analyze the budget and air quality plan and determine that the following provisions of 93.118(e)(4) have been met:

(iv) The motor vehicle emissions budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance (whichever is relevant to the given implementation plan submission);

(v) The motor vehicle emissions budget(s) is consistent with and clearly related to the emissions inventory and the control measures in the submitted control strategy implementation plan revision or maintenance plan; and

(vi) Revisions to previously submitted control strategy implementation plans or maintenance plans explain and document any changes to previously submitted budgets and control measures; impacts on point and area source emissions; any changes to established safety margins \* \* \*; and reasons for the changes (including the basis for any changes related to emission factors or estimates of vehicle miles traveled).

If the SIPs are incomplete or inadequate or otherwise fail to meet applicable requirements in our transportation conformity regulations, we will not determine the new budgets

adequate, and the existing budgets will continue to apply. Additionally, the public will have the opportunity to comment on both California's proposed SIP revisions and on our adequacy findings. We will take all submitted comments into account when making adequacy determinations.

4. *EPA previously rejected this interpretation in the 1997 conformity regulations: "Although EPA acknowledges that using updated budgets may be preferable, EPA does not believe that it is legal to allow a submitted SIP to supersede an approved SIP for years addressed by the approved SIP. As stated in the proposal, Section 176(c) specifically requires conformity to be demonstrated to approved SIPs."* 62 FR 43783.

*Response:* Again, our proposal would not amend the existing regulation, which provides that "submitted implementation plans do not supersede the motor vehicle emissions budgets in approved implementation plans for the period of years addressed by the approved implementation plan." 40 CFR 93.118(e)(1). California has requested that we approve its request to terminate the approval of the existing budgets when we find new budgets to be adequate, as a means of complying with the regulation while reducing the period of time before which the new budgets can be used for transportation planning purposes. There is nothing in the law or regulations that prohibits us from limiting the duration of a SIP approval if it is requested by the state. If our approval expires and there is no approved SIP with budgets for a given year and CAA purpose, then adequate budgets for that year and CAA purpose can apply for conformity. We agree with the State that, for the SIPs identified above in Table 1, the benefits of speeding the applicability of the new budgets are considerable. This is primarily because the existing California SIPs and budgets were developed, adopted, and approved many years ago, and new budgets and SIPs for these areas are expected to be based on comprehensively updated and enhanced information and control measures. We are taking this action because California has acknowledged the age of the information in the existing SIPs, has requested that we limit the duration of the approval, and has committed to submit new SIPs which include superior motor vehicle emissions data. We continue to agree with the State that in these cases it would provide an advantage to air quality and public health protection if the new budgets could be used once we find them to be adequate before comprehensive

rulemaking on the new attainment, progress, and maintenance submittals can be completed.

5. *Budget adequacy can only be based on valid, modeled attainment demonstrations. Budgets must be demonstrated through modeling to be consistent with attainment, maintenance, and rate of progress.*

*Response:* We expect that the new SIP submittals will document the consistency of the budgets and the attainment, maintenance, and rate of progress plan elements, as applicable, and we cannot find them adequate if they do not. However, while ambient modeling is required for most attainment plans, it is not mandatory for maintenance plans and it is not a relevant exercise for rate of progress plans, which address CAA-specified schedules of emission reductions from a SIP emissions baseline level.

6. *The proposed rulemaking is silent on the standards that EPA will employ in determining the adequacy of control strategies achieving emissions reductions necessary to accomplish attainment. The proposed strategy is unlawful to the extent that the State relies on enforceable commitments to submit later demonstrations that the NAAQS will be attained if higher estimates of motor vehicle emissions are allowed, and subsequent enforceable measures will be submitted to make up for excess emissions resulting from enlarged budgets. EPA's reliance upon mere "enforceable commitments" to accomplish further emissions reductions necessary for attainment, maintenance or rate of progress is patently illegal.*

*Response:* The standards we use to determine whether control strategies in a submitted SIP are approvable were not explicitly set forth in the proposal. As mentioned earlier, the standards for finding budgets adequate are found in the conformity rule at 40 CFR 93.118(e)(4) and (5). Since areas can account for the air quality benefit of control measures not yet implemented but which are defined in a written commitment, it is appropriate to find a SIP adequate for conformity purposes even if it contains written commitments.

The comment raises potential SIP approval issues, which could be germane to our future rulemaking on the new plan submittals. If the commenter believes that these approval issues arise at that time, we invite the commenter to submit comments specific to the submitted SIPs during the public comment periods associated with our rulemaking on the plans. In today's action, we are simply limiting the time frame of prior approvals of budgets and

are not approving any new plan submittals.

7. *EPA cannot rely on its failure to conform its regulations to the Court's remand in EDF versus EPA as a basis for conducting a state-specific rulemaking that attempts to avoid the national rulemaking process required by Congress for promulgation of conformity regulations.*

*Response:* The commenter indicates that we are taking this action to limit the approval of California's SIPs because we have not yet revised the conformity regulation to reflect the court's March 2, 1999, decision on the EDF lawsuit. However, this action is not connected to the March 2, 1999, court decision. We are taking this action in response to a request from California to revise the approval of attainment demonstrations and maintenance plans within the State based upon the age of the information in those plans. We would have to act on this request whether or not we had revised the conformity regulation in response to the court's March 2, 1999, decision.

Our action to limit the approval of California's SIPs does not make any change to the existing transportation conformity rule or to the way it is normally implemented with respect to other submitted and approved SIPs, but rather applies narrowly to the specific SIPs and circumstances as discussed above. Since we are not changing the federal conformity regulation we do not need a national rulemaking. We are acting appropriately in that we are taking a local action to amend the approval of attainment demonstrations and maintenance plans within one state at the request of that state. In any event, we are conducting rulemaking proceedings, are considering all submitted comments, and have coordinated with the U.S. Department of Transportation on this action.

We are approving California's commitment to revise the currently approved budgets; therefore, we want our approval of the current budgets to last only until adequate revised budgets are submitted pursuant to the commitment. We believe the revised budgets should apply as soon as we find them adequate; we do not believe it is appropriate to wait until we have approved the revised attainment demonstrations and/or maintenance plans. This is because we know now that once we have confirmed that the revised budgets are adequate, they will be more appropriate than the originally approved budgets for conformity purposes.

Specifically, once California has updated the currently approved SIPs to

reflect all current control measures and the latest information on vehicle emissions, the appropriate motor vehicle emissions budgets should reflect those measures and vehicle emission information. Otherwise, the budget would not be the level of motor vehicle emissions that is consistent with the attainment demonstrations or maintenance plans.

If we do not clarify our approval of the current budgets, California will revise the budgets as committed, but they would not be able to use them for conformity purposes until the SIPs were approved. This would defeat the purpose of California's commitment for the budgets to be revised quickly to incorporate updated more accurate information. In contrast, according to today's proposal, the revised budgets could be used for conformity after we have completed our adequacy review process, which we generally complete within 90 days after revisions are submitted, provided they are adequate. Today's action is consistent with the court's decision. The court held that budgets could not automatically become adequate after a certain period of time, but that we must make an affirmative finding on the adequacy of budgets after allowing the public the opportunity to comment. We will be making a finding of adequacy before the new submitted budgets are used.

8. *Enforceability issues are muddled. If revised control strategies are not fully consistent with strategies in the approved SIP, industry may be able to sue to enforce the approved SIPs' less effective control measures until the effective date of EPA's approval of revised SIPs.*

*Response:* We do not believe that this comment is relevant to our proposed rulemaking, which deals with the replacement of budgets, not control measures. In addition, we do not anticipate that this will be a problem since the control measures in the submitted SIPs would have to be enforceable at the State level prior to submission to EPA.

9. *Commenter is adversely affected by EPA's action, which will permit the expenditure of federal transportation funds on projects that fail to reduce air pollution emissions and thus cause or contribute to unhealthy air quality. EPA's action will promote single occupancy vehicle travel rather than creating viable alternative transportation systems.*

*Response:* The commenter did not explain how our proposed action would promote single occupancy vehicle travel or fail to promote alternative transportation systems. Our proposed

action does not permit the expenditure of federal transportation funds. We merely propose to terminate the approval of existing budgets for specified SIPs on the effective date of our adequacy finding, if any, on new budgets. Further, we cannot find any new budgets adequate unless they are consistent with attainment, progress, and maintenance of the air quality standards. Before federal transportation funds are awarded, the MPO must make a conformity determination on its long range plan and transportation improvement program. The public has the opportunity to comment on the content of the long range plan, transportation improvement program and conformity determination. The Federal Highway Administration and Federal Transit Administration must also determine the conformity of federally funded or approved highway and transit plans, programs, and projects to the applicable budget, based on the conformity determination prepared by the metropolitan planning organization for the area prior to awarding any federal funds.

10. *The venue for any petition for review of the proposed action will lie in the U.S. Court of Appeals for the Ninth Circuit pursuant to Section 307(b).*

*Response:* We agree with this comment.

11. *Transportation plans, programs, and project approvals based on budgets that are subsequently determined to not be adequate as part of a judicial proceeding or SIP disapproval without a protective finding are subject to suspension, unless the project demonstrates a net air quality improvement or conformity exemption.*

*Response:* We are not proposing any change in the transportation conformity regulations, which set out the consequences of SIP disapproval at 40 CFR 93.120(a). However, under 40 CFR 93.118(e)(3), conformity determinations made to adequate budgets are not disturbed by subsequent findings of inadequacy.

12. *Because the proposed action deviates from each area's SIP relating to conformity criteria, procedures, and regulations, each area's SIP will need to be revised to reflect the ad hoc exemption from the national conformity rules.*

*Response:* The San Francisco Bay Area has approved SIP regulations for transportation conformity. The remaining responsible California air quality agencies for the areas listed in Table 1 do not have approved SIP rules addressing transportation conformity, but rather comply with the Federal transportation conformity regulations at

40 CFR part 93, Subpart A. As mentioned above, we are not changing these Federal regulations in this action. We will ensure that the responsible California agencies, if they elect to adopt a revision to their attainment, progress, or maintenance SIPs and establish replacement budgets, do so through a process consistent with the applicable transportation conformity regulations, and that this process clearly identifies that one of the consequences of adopting and submitting a revised budget would be the termination of our approval of the existing budget if and when we find the replacement budget adequate.

13. *Commenter calls upon the State to aggressively develop statewide transportation control measures for the 2003 SIPs, including the commuter choice program; state and federal tax incentives for parking cash out; promotion of regional transit systems; and smart growth.*

*Response:* While we support the development of transportation control measures (TCMs) as components of SIPs, including such measures as the commenter advocates, we do not consider the comment germane to our action to limit approval of past SIPs, nor do we have a position with respect to the appropriateness of statewide TCMs as opposed to regional or local TCMs.

### III. Final Action

For the reasons stated above, and in the July 16, 2002, proposal, we are taking final action to limit the duration of our approvals of budgets in the existing SIPs identified in Table 1. In all other respects, the Table 1 SIPs will remain federally approved and enforceable unless and until we finalize approval of revised plans, and our limitations apply only to the extent that any new plans that we find adequate explicitly supersede the approved SIPs.

### IV. Administrative Requirements

#### A. Executive Order 12866

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

#### B. Executive Order 13045

Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a

disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

#### C. Executive Order 13132

Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612, Federalism and 12875, Enhancing the Intergovernmental Partnership. Executive Order 13132 requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely modifies certain previous SIP approval actions and imposes no additional requirements beyond those imposed by state law. The rule does not therefore alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of

section 6 of the Executive Order do not apply to this rule.

#### D. Executive Order 13175

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” “Policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

#### E. Executive Order 13211

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

#### F. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies 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 small governmental jurisdictions.

This final rule will not have a significant impact on a substantial number of small entities because these modifications of SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements. Therefore, because the Federal modification of certain previous SIP approvals does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

#### G. 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 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 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 modification of certain prior SIP approvals 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 requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

#### H. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use “voluntary consensus standards” (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to today’s action because it does not require the public to perform activities conducive to the use of VCS.

#### I. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small

Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit 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 United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a "major" rule as defined by 5 U.S.C. 804(2).

#### *J. 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 January 14, 2003. 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, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 5, 2002.

**Alexis Strauss,**

*Acting Regional Administrator, Region IX.*

Part 52, chapter I, title 40 of the CFR 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 *et seq.*

#### **Subpart F—California**

2. Section 52.244 is added to read as follows:

##### **§ 52.244 Motor vehicle emissions budgets.**

(a) Approval of the motor vehicle emissions budgets for the following ozone rate-of-progress and attainment SIPs will apply for transportation conformity purposes only until new budgets based on updated planning data and models have been submitted and

EPA has found the budgets to be adequate for conformity purposes.

(1) Antelope Valley, approved January 8, 1997;

(2) Coachella, approved January 8, 1997;

(3) Kern, approved January 8, 1997;

(4) Mojave, approved January 8, 1997;

(5) Sacramento, approved January 8, 1997;

(6) South Coast, approved April 10, 2000;

(7) Ventura, approved January 8, 1997.

(b) Approval of the motor vehicle emissions budgets for the following ozone maintenance SIP will apply for transportation conformity purposes only until new budgets based on updated planning data and models have been submitted and EPA has found the budgets to be adequate for conformity purposes.

(1) Monterey, approved January 17, 1997.

(2) [Reserved].

(c) Approval of the motor vehicle emissions budgets for the following carbon monoxide maintenance SIPs will apply for transportation conformity purposes only until new budgets based on updated planning data and models have been submitted and EPA has found the budgets to be adequate for conformity purposes.

(1) Bakersfield, approved March 31, 1998;

(2) Chico, approved March 31, 1998;

(3) Fresno, approved March 31, 1998;

(4) Lake Tahoe-North, approved March 31, 1998;

(5) Lake Tahoe-South, approved March 31, 1998;

(6) Modesto, approved March 31, 1998;

(7) Sacramento, approved March 31, 1998;

(8) San Diego, approved March 31, 1998;

(9) San Francisco Bay Area, approved March 31, 1998;

(10) Stockton, approved March 31, 1998.

(d) Approval of the motor vehicle emissions budgets for the following nitrogen dioxide maintenance SIP will apply for transportation conformity purposes only until new budgets based on updated planning data and models have been submitted and EPA has found the budgets to be adequate for conformity purposes.

(1) South Coast, approved on July 24, 1998.

(2) [Reserved].

[FR Doc. 02-28919 Filed 11-14-02; 8:45 am]

**BILLING CODE 6560-50-P**

## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Centers for Medicare & Medicaid Services**

#### **42 CFR Parts 405 and 419**

[CMS-1206-CN]

RIN 0938-AL19

#### **Medicare Program; Changes to the Hospital Outpatient Prospective Payment System and Calendar Year 2003 Payment Rates; and Changes to Payment Suspension for Unfiled Cost Reports; Correction**

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Correction of final rule with comment period.

**SUMMARY:** This document corrects errors that appeared in the final rule with comment period published in the **Federal Register** on November 1, 2002 entitled "Changes to the Hospital Outpatient Prospective Payment System and Calendar Year 2003 Payment Rates; and Changes to Payment Suspension for Unfiled Cost Reports." This notice is a supplement to the November 1, 2002 final rule with comment period.

**EFFECTIVE DATE:** November 1, 2002.

**FOR FURTHER INFORMATION CONTACT:** Anita Heygster, (410) 786-0378.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

In FR Doc. 02-27548 of November 1, 2002 (67 FR 66718), we omitted addresses and instructions for submitting public comments and language that justified waiving notice and comment procedures for two specific policies. This notice is a supplement to the November 1, 2002 final rule with comment period, and sets forth our rationale for waiving the notice and comment period for certain provisions. More detail regarding this correction is provided in the Correction of Errors section below. The provisions in this correction notice are effective as if they had been included in the document published November 1, 2002. Accordingly, the corrections are effective January 1, 2003.

##### **II. Correction of Errors**

In FR Doc. 02-27548 of November 1, 2002 (67 FR 66719), make the following corrections:

1. On page 66718, at the top of the second column, immediately preceding the heading **FOR FURTHER INFORMATION CONTACT**, insert the following language: "ADDRESSES: In commenting, please refer to file code CMS-1206-FC.