DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AK84

Exclusion from Countable Income of Expenses Paid for Veteran's Last Illness Subsequent to Veteran's Death but Prior to Date of Death Pension Entitlement

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations governing exclusion of expenses of the veteran's last illness, burial, and just debts from countable income for death pension purposes. This amendment eliminates the prohibition against reducing countable income by the amount of these expenses that the surviving spouse paid after the date of death but prior to the date of his or her entitlement. The intended effect of this amendment is to bring the regulations into conformance with the governing statute as interpreted by VA's General Counsel.

DATES: *Effective Date:* February 28, 2002.

FOR FURTHER INFORMATION CONTACT: Beth McCoy, Consultant, Regulations Staff, Compensation and Pension Service (211A), Department of Veterans Affairs, 575 N. Pennsylvania St., Suite 309, Indianapolis, IN 46237, (317) 226–5209 extension 3058.

SUPPLEMENTARY INFORMATION: VA death pension is a needs-based benefit available to surviving spouses and unmarried children of deceased veterans with qualifying wartime service. In order for an individual to be eligible for death pension, his or her income from all sources must be less than the maximum annual pension rate established by law. The annual benefit is reduced, dollar for dollar, by the amount of the beneficiary's countable income. All income from any source is counted unless specifically excluded by statute or regulation.

Section 1503(a)(3) of 38 U.S.C. provides for certain exclusions from countable income for death pension entitlement, including an amount equal to the expenses of the veteran's last illness, burial and just debts paid by the spouse or by the surviving spouse or child of a deceased veteran. VA implemented the provisions of 38 U.S.C. 1503(a)(3) at 38 CFR 3.272(h). The last sentence of § 3.272 (h) provides that the amount of expenses of the veteran's last illness, burial, and just debts ''paid subsequent to death but prior to date of entitlement are not deductible.''

In a precedent opinion dated March 28, 2000 (VAOPGCPREC 1–2000), VA's General Counsel held that the last sentence of § 3.272(h) is inconsistent with 38 U.S.C. 1503(a)(3) because the statute does not limit the period in which expenses of a veteran's last illness may be deducted in calculating the surviving spouse's death pension entitlement. The General Counsel determined that VA may not deny a death pension claim or reduce the amount of benefits payable based on the last sentence of § 3.272(h) and that VA must revise § 3.272(h) to eliminate the prohibition against reducing the surviving spouse's countable income by the amount of expenses of the veteran's last illness, just debts and burial when paid after the veteran's death but before the date of the surviving spouse's entitlement to death pension. Pursuant to 38 CFR 14.507, a General Counsel precedent opinion is binding on VA. Accordingly, we are amending § 3.272(h) to make it consistent with that General Counsel opinion.

This final rule brings the regulations into conformance with the governing statute as interpreted by VA's General Counsel in a precedent opinion that under 38 CFR 14.507 is binding on VA and the public. Accordingly, since there is no discretion in this matter, there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

Because no notice of proposed rule making was required in connection with the adoption of this final rule, no regulatory flexibility analysis is required under the Regulatory Flexibility Act (5 U.S.C. 601–612). Even so, the Secretary hereby certifies that this regulatory amendment will not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final flexibility analysis requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance numbers are 64.101 and 64.105.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: November 19, 2001.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

§ 3.272 [Amended]

2. Section 3.272 is amended by removing the last sentence of paragraph (h) introductory text.

[FR Doc. 02–4687 Filed 2–27–02; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 169–0323; FRL–7148–8]

Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing a limited approval and limited disapproval of revisions to the San Joaquin Valley Unified Air Pollution Control District portion of the California State Implementation Plan (SIP). This action was proposed in the **Federal Register** on September 14, 1998 and concerns oxides of nitrogen (NO_X) emissions from internal combustion engines; stationary gas turbines; and from boilers, steam generators, and process heaters. Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), this action simultaneously approves local rules that regulate these emission sources and directs California to correct rule deficiencies.

EFFECTIVE DATE: This rule is effective on April 1, 2002.

ADDRESSES: You can inspect copies of the administrative record for this action

at EPA's Region IX office during normal business hours. You can inspect copies of the submitted SIP revisions at the following locations:

Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Environmental Protection Agency, Air Docket (6102), Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington D.C. 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 1001 ''I'' Street, Sacramento, CA 95814.

San Joaquin Valley Unified Air Pollution Control District, 1990 East Gettysburg Avenue, Fresno, California 93726–0244

FOR FURTHER INFORMATION CONTACT: Thomas C. Canaday, Rulemaking Office (AIR–4), U.S. Environmental Protection Agency, Region IX, (415) 947–4121.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

I. Proposed Action

On September 14, 1998 (63 FR 49053), EPA proposed a limited approval and limited disapproval of the following rules that were submitted for incorporation into the California SIP.

Local agency	Rule No.	Rule title	Adopted	Submitted
SJVUAPCD	4305	Boilers, Steam Generators, and Process Heaters	12/19/96	03/03/97
SJVUAPCD	4351	Boilers, Steam Generators, and Process Heaters—Reasonably Available Control Technology.	10/19/95	03/26/96
SJVUAPCD	4701	Internal Combustion Engines	12/19/96	03/10/98
SJVUAPCD	4703	Stationary Gas Turbines	10/16/97	03/10/98

We proposed a limited approval because we determined that these rules improve the SIP and are largely consistent with the relevant CAA requirements. We simultaneously proposed a limited disapproval because some rule provisions conflict with section 110 and part D of the Act. These provisions include the following:

1. Exemption from regulation, or exemption from federal enforceability of regulation, of facilities located west of Interstate Highway 5 in Fresno, Kern, or Kings county (the ''West Side Exemption'').
2. Automatic exemption from regulation of emissions which occur during start-up, shutdown, or breakdown conditions.
3. The application of the four rules and the circumstances under which sources might be exempt from the rules.
4. The absence of explicitly stated averaging times for emissions concentration limits.
5. The absence of interim parametric monitoring in instances of deferred source testing.
6. The overly lenient use of representative testing to fulfill monitoring requirements.
7. The lack of a requirement for a 10% additional reduction of emissions beyond established baselines as an environmental benefit when sources meet rule requirements via an alternative emission control plan.
8. The failure to require physical modification of an exempted unit to assure its operation at or below the rule application capacity threshold when the unit's nameplate capacity exceeds this threshold.
9. The failure to require source tests to be performed on units using each fuel which is allowed to be burned in that unit.
10. The lack of source test requirements for certain units through May 31, 1999.
11. The lack of specificity as to what information is required to be recorded and maintained as part of recordkeeping requirements.
12. The frequency of required compliance testing for internal combustion engines under Rule 4701.
13. The lack of specificity as to what operating records and support documentation are to be maintained by owners claiming exemption to the requirements of Rule 4701.
14. The allowance until May 31, 2001 for Reasonably Available Control Technology (''RACT'') compliance for certain internal combustion engines under Rule 4701.
15. Use of 14 day averaging to determine compliance under the alternative emission control plan provisions of Rule 4701.
16. Excessive director's discretion in specifying what method is to be used to determine the applicable conversion factor from fuel use to engine emissions in the alternative emission control plan provisions of Rule 4701.
17. The inclusion of the factor AE_{Motor} to account for emissions avoided by replacing internal combustion engines with electric motors.
18. The lack of reference to continuous emission monitoring system requirements and reporting requirements of 40 CFR part 60.

Our proposed action contains more information on the basis for this rulemaking and on our evaluation of the submittals.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. The comment period was subsequently extended for an additional 30 days. During and after the 60-day comment period, we received comments from the following parties.

1. Mark Boese, San Joaquin Valley Unified Air Pollution Control District (''SJVUAPCD'' or ''the District''); letter dated November 10, 1998.
2. Marc Chytilo, Environmental Defense Center (''EDC''); letter dated November 13, 1998.
3. William A. Brommelsiek, Chevron USA Production Company (''CUPC''); letter dated November 13, 1998.
4. Malcolm C. Weiss, McClintock, Weston, Benshoof, Rochefort, Rubalcava, & MacCuish LLP (''MWB''); letter dated November 12, 1998.
5. David R. Farabee, Pillsbury, Madison, & Sutro LLP (''PMS''); letter dated November 13, 1998.
6. Bruce Nilles, Earthjustice, email dated November 14, 2001.

The letter from EDC expressed unequivocal support for our proposed action. The letter from CUPC concurred with and incorporated by reference the comments submitted by MWB. The email from Earthjustice noted the exemption in Rule 4701 for engines used in agricultural production and requested that this exemption be added to the rule provisions determined by EPA to be deficient. Since this comment was received well after the close of the comment period, EPA simply acknowledges it in the present rulemaking and will defer any determination of whether the agricultural exemption fails to implement CAA requirements until such time as the State of California submits a revised version of this rule. The remainder of the comments and our responses are summarized below.

Comment: SJVUAPCD commented on a number of instances where EPA found that the rules should be made applicable to more sources. These instances include sections 4.1.5 and 5.2 of Rule 4305; and section 3.11 of Rule 4701. SJVUAPCD objected to our findings by referring to their cost effectiveness analyses which they performed while developing these rules. These analyses were based on a cost effectiveness threshold of $9700 per ton of NO_X reduced, and SJVUAPCD objected to our proposed requirement that their rules be made applicable to additional sources on the grounds that to do so would incur costs to sources that exceed SJVUAPCD's threshold.

Response: SJVUAPCD provided no information on how and when they selected $9,700 per ton NO_X reduced as a cost effectiveness threshold for the subject rules. We believe this figure may have been generated originally by the South Coast Air Quality Management District in the 1980s and has no link to applicable RACT or attainment requirements. In evaluating RACT, we have reviewed analogous requirements contained in other District, state and federal rules and guidance including RACT determinations developed by the California Air Resources Board (CARB). Relevant CARB RACT determinations, for example, incorporate cost effectiveness thresholds as high as $24,000/ton. We retain the specified deficiencies as proposed, but acknowledge that SJVUAPCD may be able to correct them by demonstrating local circumstances that justify alternative RACT limits.

Comment: SJVUAPCD commented on EPA's finding that the emission limits in section 5.1.3 of Rule 4701 should be made more stringent. Again SJVUAPCD's objection was based on their cost effectiveness threshold of $9700 per ton of NO_X reduced.

Response: Again, we have reviewed analogous requirements contained in other District, state and federal rules and guidance including RACT determinations developed by CARB and compared these to the limits in section 5.1.3. We retain the specified deficiencies as proposed, but acknowledge that SJVUAPCD may be able to correct them by demonstrating local circumstances that justify alternative RACT limits.

Comment: SJVUAPCD objected to our requirement that an alternate emissions limit be applicable during natural gas curtailment on the grounds that this would necessitate additional emissions testing. Also SJVUAPCD stated that gas curtailments can last longer than the 168 hours allowed by EPA.

Response: EPA does not intend that additional source testing be required and withdraws our comment to this effect in regard to section 6.3 of Rule 4351. However, if gas curtailment extends beyond 168 hours of operation per year EPA does require that the standard emissions limitations for non-gaseous fuel firing be met.

Comment: SJVUAPCD objected to our disallowance of their exemption of sources that operate only during winter months.

Response: The CAA requires that RACT level of controls be implemented at major sources of NO_X year-round. This requirement of the CAA is addressed in a March 30, 1994 memorandum ''Nitrogen Oxides Questions from the Ohio EPA,'' U.S. EPA, Ozone/Carbon Monoxide Programs Branch. The EPA's RACT guidance for volatile organic compounds (VOC) states that seasonal controls are generally not allowed (EPA clarification to Appendix D of the November 24, 1987 **Federal Register**, ''Issues Relating to VOC Regulations Cutpoints, Deficiencies, and Deviations,'' revised January 1, 1990). As stated in the NO_X Supplement to the General Preamble (57 FR 55625, November 25, 1992), the VOC RACT guidance is generally applicable to NO_X RACT. Thus the limitation on seasonal controls also applies to NO_X RACT.

Comment: SJVUAPCD objected to our requirement that averaging times for emissions measurements be explicitly stated in the rules.

Response: EPA believes that an explicit averaging time is necessary in order that emissions limits be enforceable on a continuous basis. This is consistent with the CARB RACT determination as well as other SIP-approved rules for these source categories.

Comment: SJVUAPCD commented that the excess emissions provisions in section 5.5.2 of Rule 4305 are consistent with EPA policy.

Response: On September 20, 1999, EPA issued a policy guidance document entitled ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' U.S. EPA, Office of Air Quality Planning and Standards. This guidance document is intended to assist states in drafting excess emissions provisions into SIPs that are consistent with the requirements of the federal Clean Air Act. Generally speaking, automatic exemptions from emissions limits are allowed during start-up and shutdown only insofar as control technologies or strategies are shown to be technically infeasible during these periods and are not allowed during malfunctions. The existing exemptions in Rule 4305 apply during malfunction and are not time-limited during start-up and shutdown and thus do not meet the requirements of the Act as interpreted by EPA policy.

Comment: SJVUAPCD expressed concern that EPA's requirement for equipment tune-ups between source tests may result in setting operating parameters at different levels than were established during source tests.

Response: EPA believes that equipment tune-ups, properly conducted, will result in decreased emissions. See, for example, the procedures described in Attachment 1 to the CARB Determination of Reasonably Available Control Technology for Industrial, Institutional, and Commercial Boilers, Steam Generators, and Process Heaters dated July 18, 1991.

Comment: SJVUAPCD expressed concern that requiring source tests for each fuel burned would be impractical since some fuels are burned only as a back-up during natural gas curtailment and then only for a limited period of time.

Response: EPA agrees with SJVUAPCD's concern and withdraws this requirement for section 6.3 of Rule 4351.

Comment: SJVUAPCD objected to EPA's disallowance of representative testing for internal combustion engines.

Response: EPA continues to disapprove of representative testing for internal combustion engines due to the inherently high variability of emissions from units within this source category. This is consistent with other rulemakings EPA has promulgated for this source category.

Comment: SJVUAPCD stated that 14-day averaging is appropriate for evaluating compliance with an Alternative Emissions Compliance Plan (''AECP'') as opposed to a shorter averaging time as would be required for a standard compliance determination.

Response: EPA's interpretation of CAA requirements with respect to long-term (greater than 24 hours) averaging of emissions is contained in section 16.13 of our January 2001 Economic Incentive Program guidance as well as in the January 20, 1984 memorandum ''Averaging Times for Compliance with VOC Emission Limits—SIP Revision Policy'', U.S. EPA Office of Air Quality Planning and Standards. Any State that wishes to allow long-term averaging for compliance evaluation for RACT limits must include in the SIP submittal a justification that the long-term average is needed and demonstrate that

averaging will not interfere with attainment or other requirements of the Act. Since the submittal for Rule 4701 does not contain this information, EPA cannot approve the long-term averaging provisions in section 8.0 of Rule 4701.

Comment: SJVUAPCD explained that the emission factor EF_i in section 8.3.2 of Rule 4701 is the actual NO_X emissions as determined by the most recent source test and not a general emission factor as was EPA's concern.

Response: EPA agrees and withdraws our previous comment concerning section 8.3.2 of Rule 4701.

Comment: SJVUAPCD stated that emissions reductions obtained when engines are replaced with an electric motor should be allowed to be included in an AECP so long as the engines are not being replaced solely to comply with RACT limits.

Response: EPA agrees and withdraws our previous comment concerning section 8.4 of Rule 4701.

Comment: MWB and PMS assert that the EPA's determination that NO_X sources may contribute significantly to PM–10 levels which exceed the standard in the area and that, therefore, Reasonably Available Control Measures (''RACM'') are required at West Side sources is contrary to documentation provided by the SJVUAPCD.

Response: The SJVUAPCD presented their PM–10 Attainment Demonstration Plan Progress Report 1997–1999 (''Progress Report'') to a hearing of their Governing Board on June 15, 2000. The Progress Report states that during winter months secondary ammonium nitrate is the largest contributor to PM mass and that the core sites were found to be ammonia rich with the formation of secondary ammonium nitrate limited by the amount of NO_X rather than ammonia. This finding is consistent with our September 14, 1998 Proposed Rulemaking. RACM is required for the West Side NO_X sources because section 189(a)(1)(C) and section 189(e) of the Act require RACM at major stationary sources of PM–10 precursors in PM–10 nonattainment areas independent of separate ozone attainment requirements. The SJVUAPCD has not demonstrated to EPA that the West Side sources do not contribute significantly to PM–10 levels which exceed the standard in the area.

Comment: MWB asserts that the West Side Exemption is required under state law since emissions from that area do not impact other portions of the SJVUAPCD.

Response: Without commenting on the provisions of California state law, EPA notes that our interpretation of the CAA requirements applicable to the subject Rules does not rest on any finding regarding transport of pollutants within the SJVUAPCD.

Comment: MWB asserts that EPA does not have authority under the CAA to grant limited approval and simultaneous limited disapproval of a Rule. MWB further expresses confusion over the effect of such an action.

Response: While the Act does not expressly provide for limited approvals, EPA is using its ''gap-filling'' authority under section 301(a) of the Act in conjunction with the section 110(k)(3) approval provision to interpret the Act to provide for this type of approval action. EPA routinely publishes limited approval/limited disapproval actions (e.g. we did so for nine different rules in the SJVUAPCD in the year 2000 alone). Under this action EPA approves and can enforce the entire rule as submitted, even those portions that prohibit full approval. For example, upon the effective date of this final rulemaking, the West Side Exemption becomes part of the SIP and will remain in the SIP until such time as EPA approves a SIP revision removing the exemption or EPA promulgates a FIP. The disapproval only applies to whether the submittal meets specific requirements of the Act and does not affect incorporation of the rule into the approved, federally enforceable SIP.

Comment: MWB and PMS assert that since the Rules were submitted to EPA as part of the ozone SIP, EPA lacks the authority to consider whether the provisions of the Rules are sufficient to meet requirements of the CAA related to PM–10 and that, further, this is not the proper time to consider CAA requirements related to PM–10.

Response: As stated in the September 14, 1998 Notice of Proposed Rulemaking, section 189(a)(1)(C) of the Act requires that RACM for the control of PM–10 be implemented in moderate nonattainment areas (including the SJVUAPCD) by December 10, 1993. These control requirements also apply to major stationary sources of PM–10 precursors (including NO_X) under section 189(e) of the Act unless the EPA determines that such sources do not contribute significantly to PM–10 levels which exceed the standard in the area. Section 172(c)(1) provides that RACM shall include, at a minimum, those reductions in emissions from existing sources as may be obtained through the adoption of RACT. The four subject Rules contain provisions waiving RACT requirements under the SIP for facilities on the West Side. This constitutes a failure to implement RACM at these facilities as required under section 189(a)(1)(C) of the Act. Section 110(l) of the Act forbids EPA from approving SIP revisions which would interfere with any applicable requirement, including section 189(a)(1)(C). For this reason EPA must disapprove the West Side Exemption.

Comment: MWB asserts that EPA has inappropriately concluded that Best Available Retrofit Control Technology (''BARCT''), as required under state law, is the same as RACT.

Response: EPA has determined that the control requirements waived under the West Side Exemption are reasonably available. This determination was made by comparing these requirements with those implemented elsewhere in the SJVUAPCD and the State of California, as well as by referring to applicable Determinations of Reasonably Available Control Technology published by the California Air Resources Board. We agree with the commentor that states can adopt requirements more stringent than those required by federal RACT. The SJVUAPCD could, theoretically, demonstrate that NO_X emission limits currently applied to the east-side sources are more stringent than RACT, and are therefore not needed to fulfill RACT for the West Side sources. However, some level of control beyond the existing full exemption for the West Side sources is clearly needed to fulfill RACT.

Comment: MWB and PMS noted that EPA objected to certain of the compliance deadlines in Rule 4701. MWB and PMS assert that it would be impractical to accelerate these deadlines.

Response: EPA notes that the deadlines to which the commentors refer have now passed rendering moot this particular objection by EPA.

Comment: MWB and PMS assert that the District has shown, through modeling, that the reduction of NO_X emissions from West Side sources would not contribute to the attainment of the ozone National Ambient Air Quality Standards (''NAAQS'') in the District and that therefore the West Side Exemption is consistent with CAA requirements for ozone.

Response: Since our September 14, 1998 Notice of Proposed Rulemaking, EPA on November 8, 2001 (66 FR 56476), published a final rulemaking action reclassifying the San Joaquin Valley Ozone Nonattainment Area from serious to severe nonattainment because the area was unable to attain the ozone standard by the serious area deadline of 1999. This indicates that the previous control strategy and modeling that supported the West Side Exemption were inadequate to attain the standard by the applicable attainment date and that substantial additional reductions of

ozone precursors (NO_X and/or VOC) will be necessary to achieve attainment of the ozone NAAQS.

III. EPA Action

Two of the rule provisions listed above as being in conflict with the Act included compliance dates that we proposed as deficient for being too far in the future. However, both of those dates have now passed so those issues are moot. The relevant requirements are found in section 6.3 of Rule 4351 and section 7.3 of Rule 4701. As stated in the above responses, there are three specific instances where we agree with SJVUAPCD's comments and therefore withdraw our proposed finding that the subject rule provisions are deficient. These are found in section 6.3 of Rule 4351, and sections 8.3.2 and 8.4 of Rule 4701. For the remainder of the above listed rule provisions, we have concluded that they are in conflict with the Act and are thus grounds for a limited disapproval. Therefore, as authorized in sections 110(k)(3) and 301(a) of the Act, EPA is finalizing a limited approval of the submitted rules. This action incorporates the submitted rules into the California SIP, including those provisions identified as deficient. As authorized under section 110(k)(3), EPA is simultaneously finalizing a limited disapproval of the rules. As a result, sanctions will be imposed unless EPA approves subsequent SIP revisions that correct the rule deficiencies within 18 months of the effective date of this action. These sanctions will be imposed under section 179 of the Act according to 40 CFR 52.31. In addition, EPA must promulgate a Federal implementation plan (FIP) under section 110(c) unless we approve subsequent SIP revisions that correct the rule deficiencies within 24 months. Note that the submitted rules have been adopted by the San Joaquin Valley Unified Air Pollution Control District, and EPA's final limited disapproval does not prevent the local agency from enforcing them.

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 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.

C. 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.

D. 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 acts on a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

E. 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.

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 SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply act on requirements that the State is already imposing. Therefore, because the Federal SIP approval 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.

EPA's disapproval of the state request under section 110 and subchapter I, part D of the Clean Air Act does not affect any existing requirements applicable to small entities. Any pre-existing federal requirements remain in place after this disapproval. Federal disapproval of the state submittal does not affect state enforceability. Moreover, EPA's disapproval of the submittal does not impose any new Federal requirements. Therefore, 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 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 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 acts on pre-existing requirements under State or local law, and 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 April 29, 2002. 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, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: January 14, 2002.

Wayne Nastri,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations 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 52.220 is amended by adding paragraphs (c)(230)(i)(D)(*3*), (244)(i)(E)(*2*) and (254)(i)(A)(*5*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(230) * * *

(i) * * *

(D) * * *

(*3*) Rule 4351 adopted on October 19, 1995.

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(244) * * *

(i) * * *

(E) * * *

(*2*) Rule 4305 adopted on December 19, 1996.

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(254) * * *

(i) * * *

(A) * * *

(*5*) Rule 4701 adopted on December 19, 1996, and Rule 4703 adopted on October 16, 1997.

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[FR Doc. 02–4643 Filed 2–27–02; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–301217; FRL–6822–7]

RIN 2070–AB78

Hydrogen Peroxide; An Amendment to an Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an amendment to an exemption from the requirement of a tolerance for residues of the biochemical hydrogen peroxide in or on all post-harvest agricultural food commodities when applied/used at the rate of ≤ 1% hydrogen peroxide per application. Biosafe Systems, Inc. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act (FQPA) of 1996, requesting an exemption from the requirement of a tolerance. This