NEGOCIOS Y PROPIEDADES DEL CARIBE LTDA., (f.k.a. NEGOCIAR LTDA.), Calle 74 No. 53–30, Barranquilla, Colombia; NIT # 890108102–8 (Colombia) [SDNT]

PARQUE INDUSTRIAL LAS DELICIAS LTDA., Carrera 7 No. 34–341, Cali, Colombia; Carrera 7 No. 34–341 L–6, Cali, Colombia [SDNT]

PROMOCIONES Y CONSTRUCCIONES DEL CARIBE LTDA., Calle 74 No. 53–30, Barranquilla, Colombia; Calle 78 No. 53–70 Centro Comercial Villa Country, Barranquilla, Colombia; Carrera 54 No. 72–80 Ejecutivo I, Barranquilla, Colombia; Carrera 54 No. 72–147, Barranquilla, Colombia; Carrera 55 No. 72–109 Piso 1, Barranquilla, Colombia; Carrera 56 No. 70–60, Barranquilla, Colombia; Carrera 57 No. 79–149, Barranquilla, Colombia; NIT # 890108115–3 (Colombia) [SDNT]

PROMOCIONES Y CONSTRUCCIONES DEL CARIBE LTDA. Y CIA. S.C.A., (a.k.a. PROMOCON), Calle 74 No. 53–30, Barranquilla, Colombia; Calle 78 No. 53–70 Centro Comercial Villa Country, Barranquilla, Colombia; Carrera 54 No. 72–80 L–21 Ejecutivo I, Barranquilla, Colombia; Carrera 54 No. 72–147 L–115, Barranquilla, Colombia; Carrera 55 No. 80–192, Barranquilla, Colombia; Carrera 55 No. 80–192 Ap. 6, Barranquilla, Colombia; Apartado Aereo 50183, Barranquilla, Colombia; Apartado Aereo 51110, Barranquilla, Colombia; NIT # 890108148–6 (Colombia) [SDNT]

PROMOTORA HOTEL BARRANQUILLA LTDA., Calle 74 No. 53–30, Barranquilla, Colombia; Apartado Aereo 51110, Barranquilla, Colombia; NIT # 890111684–3 (Colombia) [SDNT]

SURAMERICANA DE HOTELES LTDA., (a.k.a. SURATEL), Calle 74 No. 53–30, Barranquilla, Colombia; NIT # 800011603–0 (Colombia) [SDNT]

Dated: May 11, 1998.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

Approved: May 21, 1998.

James E. Johnson,

Assistant Secretary (Enforcement), Department of the Treasury.

[FR Doc. 98–14176 Filed 5–26–98; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AZ–005–ROP FRL–6101–9]

Approval and Promulgation of Implementation Plans; Phoenix, Arizona Ozone Nonattainment Area, 15 Percent Rate of Progress Plan and 1990 Base Year Emission Inventory

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is determining, pursuant to its federal planning authority in Clean Air Act (CAA) section 110(c), that the Phoenix, Arizona ozone nonattainment area has in place sufficient control measures to meet the 15 percent rate of progress (ROP) requirement in Clean Air Act (CAA) section 182(b)(2). EPA is also approving, under CAA sections 110(k) and 182(a)(1), the 1990 base year emissions inventory for the Phoenix metropolitan area that was submitted to EPA by the State of Arizona on April 1, 1993.

EFFECTIVE DATE: June 26, 1998.

ADDRESSES: Copies of the documents relevant to this action, including the technical support document (TSD), are contained in the docket for this rulemaking. The docket is available for inspection during normal business hours at the following locations:

U.S. Environmental Protection Agency, Region 9, Office of Air Planning, Air Division, 17th Floor, 75 Hawthorne Street, San Francisco, California 94105. Phone: (415) 744–1248.

Arizona Department of Environmental Quality, Library, 3033 N. Central Avenue, Phoenix, Arizona 85012. (602) 207–2217.

Copies of this notice and the TSD are also available in the air programs section of EPA Region 9's website, http://www.epa.gov/region09.

FOR FURTHER INFORMATION CONTACT: Frances Wicher, Office of Air Planning (AIR–2), U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, California 94105. Phone: (415) 744–1248. Email: wicher.frances@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Clean Air Act Requirements

The Phoenix metropolitan area was originally classified as a moderate ozone nonattainment area on November 6, 1991.[1] Section 182(b) of the Clean Air Act (CAA or Act) requires that each state in which all or part of a moderate ozone nonattainment area is located submit, by November 15, 1992, an inventory of actual emissions from all sources, as described in sections 172(c)(3) and 182(a)(1), in accordance with guidance provided by the Administrator. Section 182(b)(1)(A) of the CAA also requires states with moderate and above ozone nonattainment areas to develop plans to reduce volatile organic compounds (VOC) emissions by 15 percent, net of growth, from the 1990 baseline. The 15 percent rate of progress (ROP) plans were to be submitted by November 15, 1993, and the reductions were required to be achieved by November 15, 1996.

Although the November 15, 1996 deadline has now passed, the 15 percent ROP requirement remains. Once a statutory deadline has passed and has not been replaced by a later one, the deadline then becomes ''as soon as possible.'' *Delaney* v. *EPA*, 898 F.2d 687, 691 (9th Cir. 1990). EPA has interpreted this requirement to be ''as soon as practicable.'' See the proposed rule for this final action at 63 FR 3687 (January 26, 1998).[2] This requirement is discussed further in section II below.

B. Phoenix's 15 Percent Plan

The State of Arizona submitted its initial 15 percent rate of progress plan for the metropolitan Phoenix area on November 15, 1993 and supplemented it on April 8, 1994. On April 13, 1994 EPA found the initial plan incomplete because it failed to include, in fully adopted and enforceable form, all of the measures relied upon in the 15 percent demonstration. This incompleteness finding started the 18-month sanction ''clock'' in CAA section 179 and the two-year clock under section 110(c) for EPA to promulgate a federal implementation plan (FIP) covering the 15 percent ROP requirement. Subsequently, in November 1994 and April 1995, Arizona submitted an attainment plan for the Phoenix area which updated the 15 percent ROP demonstrations.

On May 12, 1995, EPA found the revised 15 percent plan and the attainment plan complete, turning off the sanctions clock; however, under section 110(c), the FIP clock continues until EPA approves the 15 percent plan. Since 1995, EPA has acted to approve many of the control measures relied upon in this plan but has not yet acted on the overall 15 percent plan.

The 15 percent ROP demonstration in the State's plan relied primarily on improvements to the State's vehicle emissions inspection and maintenance (I/M) program. Not all the emission reductions attributed to the program have been realized because of technical problems with implementing certain parts of the I/M program. In part to replace these lost emission reductions

[1] The Phoenix metropolitan area was recently reclassified from moderate to serious for ozone. 62 FR 60001 (November 6, 1997). Today's action relates to the moderate area CAA requirements for a 1990 base year inventory and a 15 percent ROP demonstration. The reclassification does not affect the area's continuing obligation to meet these requirements.

[2] The reader should consult this proposed rule for a more detailed discussion of the CAA requirements applicable to today's final action, the State's 15 percent ROP plans and EPA's evaluation of them, and EPA's proposed 15 percent demonstration.

and in part to ensure continued progress toward attainment of the ozone standard in the Phoenix area, the State opted into EPA's federal reformulated gasoline (RFG) program in 1997 (60 FR 30260 (June 3, 1997)) and EPA recently approved the State's own, more stringent Cleaner Burning Gasoline (CBG) program which is intended to replace the federal program. 63 FR 6653 (February 10, 1998).

C. EPA's 15 Percent ROP Plan

In August 1996, EPA was sued by the American Lung Association of Arizona and others, *American Lung Association of Arizona, Inc. et al.* v. *Browner*, No. CIV 96–1856 PHX ROS (D. Ariz.) to enforce EPA's obligation under CAA section 110(c) to promulgate a federal plan for the 15 percent ROP requirement. On July 8, 1997 a consent decree was filed in the case establishing a schedule of January 20, 1998 for proposing and May 18, 1998 for promulgating a 15 percent ROP plan. EPA's obligation to promulgate a federal plan is relieved to the extent that it has approved State measures.

The State's 15 percent plan as revised and submitted in 1993 through 1995 does not reflect the changes to the control strategy necessitated by the problems with the enhanced I/M program and the implementation of the federal RFG program, nor does it include the recalculation of the target emission level that EPA guidance requires if post-1996 emissions reductions (such as those from the RFG program) are to be credited to the 15 percent plan. As a result, EPA has not received a complete state submittal containing a revised 15 percent ROP demonstration that it could act on without additional analysis, public hearing and adoption by the State. Thus, EPA is complying with the *ALAA* consent decree today by promulgating, pursuant to its CAA section 110(c) FIP authority, a federal 15 percent ROP plan for the Phoenix area.

D. Proposed Action

On January 26, 1998 (63 FR 3687), EPA proposed to determine that the Phoenix area will have sufficient controls in place by no later than April 1, 1999 to meet the 15 percent rate of progress requirement and that this date is the most expeditious date practicable for achieving the 15 percent target, based on the set of controls EPA has proposed for crediting in the 15 percent demonstration and the unavailability of any other practicable controls that could advance the date. The technical basis for this determination and the list of control measures that provide the required 15 percent VOC reduction are summarized in the proposal and are fully documented in the technical support document (TSD) that accompanies this rulemaking.

EPA also proposed to approve the 1990 base year emissions inventory for the Phoenix metropolitan area that was submitted to EPA by the State of Arizona on April 1, 1993. EPA's review of this inventory is also summarized in the proposal and fully documented in the TSD.

II. Public Comment and EPA Responses

EPA received only one set of comments on its proposed determination that the Phoenix, Arizona ozone nonattainment area has in place sufficient control measures to meet the 15 percent ROP requirement in CAA section 182(b)(2). These comments were submitted by the Arizona Center for Law in the Public Interest (ACLPI) on behalf of the plaintiffs in *ALAA*.

EPA has responded to most significant comments below and has provided full responses to all comments in the TSD that accompanies this rulemaking.

Comment: ACLPI claims that EPA's proposal is flawed because it does not propose FIP measures as an alternative to approving a State 15 percent plan, and without such an alternative proposal, EPA's decision making process here will be inherently biased, unfair and violative of the Administrative Procedures Act. ACLPI states that the only way to negate this bias and prejudgment is for EPA to immediately propose a FIP, so that it has an alternative to approval of the State's demonstration.

Response: This comment, as well as others discussed below, reflects a basic misapprehension of the nature of EPA's January 26, 1998 proposal. Contrary to ACLPI's claims, EPA did not propose to approve or otherwise act on Arizona's 15 percent SIP. Rather, the Agency proposed a 15 percent ROP FIP under its federal planning authority in CAA section 110(c).[3]

Nowhere in the proposal did EPA state or otherwise indicate that it was proposing to approve the State's 15 percent plan. In fact, in the section discussing its FIP obligation under *ALAA*, EPA concluded that it did ''not have in front of it a complete state submittal containing a revised 15 percent ROP demonstration that it could act on without additional analysis, public hearing and adoption *by the State.*'' Emphasis added. 63 FR 3688. In the conclusion section of the proposal, EPA stated that it was acting pursuant to its CAA section 110(c) authority in proposing a determination that the Phoenix metropolitan area has in place sufficient control measures to meet the 15 percent ROP requirement. See 63 FR 3692. CAA section 110(c) provides EPA's authority to promulgate FIPs. In contrast, EPA's SIP approval authority resides in section 110(k).

The proposed FIP consists of a *federal* demonstration that already-approved State and federal control measures, combined with already-proposed federal measures, are sufficient to provide for a 15 percent ROP in the Phoenix area as required by CAA section 182(b)(1)(A)(i) and that there are no other measures which would meaningfully advance the date by which the 15 percent ROP will be met. See 63 FR 3692. As a consequence of this finding, EPA did not, and was not required to, propose any additional federal measures.

EPA notes that this is not the first time it has promulgated an Arizona FIP that consists only of a demonstration that existing State and federal measures were adequate. In 1991, EPA promulgated attainment and maintenance demonstrations for the Pima County (Tucson), Arizona carbon monoxide (CO) nonattainment area that consisted solely of a demonstration that existing approved State and federal measures were adequate for expeditious attainment and long-term maintenance of the CO standard in the area and that no additional federal measures were necessary. See 56 FR 5458, 5470 (February 11, 1991).

Comment: ACLPI asserts that if EPA found that the State has not submitted a complete 15 percent ROP demonstration, it should have disapproved it on that basis instead of proceeding to supply its own data and analysis to produce a showing on the State's behalf, an approach which conflicts with the Act. ACLPI states that EPA's statutory duty is to approve or disapprove what the state submits and that EPA cannot write a plan and pretend it is the State's. Finally, ACLPI states that Arizona has had more than ample time to submit its 15 percent plan and if the State's demonstration is inadequate, then EPA must disapprove it and adopt a FIP.

Response: As discussed above, EPA proposed a 15 percent ROP demonstration under its federal planning authority in CAA section 110(c) and did not propose any action on Arizona's 15 percent SIP. When

[3] EPA did at the same time propose to approve under CAA section 110(k) the State's 1990 Base Year Emission Inventory. This inventory was required by CAA section 182(a)(1) and was submitted separately from the 15 percent plan. See 63 FR 3688.

acting in place of the State pursuant to a FIP under section 110(c), EPA ''stands in the shoes of the defaulting State, and all the rights and duties that would otherwise fall to the State accrue instead to EPA.'' *Central Arizona Water Conservation District* v. *EPA*, 990 F.2d 1531, 1541 (9th Cir. 1993). Thus, in preparing this FIP demonstration, it is EPA's responsibility to supply its own data and analyses of that data and to produce the required showing that would otherwise be the responsibility of the State. Thus, the approach EPA took in this rulemaking is fully consistent with the Act.

EPA did base its proposed determination in part on a reanalysis of the State's plan. This approach is reasonable given that the State had already prepared an extensive and competent technical evaluation of emission sources in the Phoenix area and the effect of controls on reducing emissions from those sources. In preparing its own demonstration, EPA did modify some of the information in the State's plan to reflect the actual implementation status of the State's I/M program and the implementation of new federal and state controls. However, a federal plan based on technical information contained in a State plan does not constitute or imply approval of that State plan.

Since no action was proposed in regard to the State's 15 percent ROP plan, comments relating to the appropriate disposition of that plan are not relevant to this rulemaking. EPA notes that it is not required in this instance to disapprove the State plan prior to promulgating a replacement FIP under CAA section 110(c).

EPA acknowledges that it is required by the Act to take action on submitted SIPs. However, at this time inaction on the State's 15 percent plan in no way affects EPA's promulgation of this FIP.

Comment: ACLPI comments that EPA is extending until April 1, 1999 the time for achieving the 15 percent reduction that was supposed to have been achieved by November 15, 1996 and has justified this lengthy extension by adopting several policies that ACLPI asserts are not consistent with applicable case law or the Clean Air Act.

First, ACLPI states that although it agrees with EPA that *Delaney* v. *EPA*, 898 F.2d 687, 691 (9th Cir. 1990) supplies the relevant test for compliance once a statutory deadline has passed, it disagrees with the Agency's interpretation that under the *Delaney* case, the appropriate standard is ''as soon as practicable.'' ACLPI notes that the actual phrase used by the *Delaney* court was ''as soon as *possible*,'' using every available control measure and asserts that the difference between ''practicable'' and ''possible'' is not merely semantic. According to ACLPI, ''practicability,'' as used in the Act, allows for consideration of various economic and social factors in determining the required speed of progress. ACLPI believes that to say that the pace for compliance after the Clean Air Act deadline has passed is still as soon as ''practicable'' is to read the deadline out of the statute which is why the *Delaney* court allegedly set a much more stringent test—compliance as soon as possible—for areas that miss a statutory deadline.

Response: In *Delaney*, the Ninth Circuit interpreted the Clean Air Act requirement for EPA to develop a CO federal implementation attainment plan for two Arizona areas after the passage of the then applicable statutory attainment date of December 31, 1987. The Court concluded that after the passage of that date, ''the national ambient air quality standards must be attained as soon as possible with every available measure * * *.'' 898 F.2d at 691. The *Delaney* Court arrived at this test by relying on a statement in an EPA guidance document providing that if a state plan's ''control measures are not adequate to demonstrate attainment by 1987, additional measures which can be implemented after 1987 must be identified and adopted and attainment must be demonstrated by the earliest possible date * * *. 46 Fed. Reg. 7186 (January 22, 1981).''[4] In another part of the opinion concerning reasonably available control measures, the Court noted another EPA guidance document specifying that a control measure would be deemed not reasonably available if it would not advance attainment, would cause substantial widespread and long-term adverse impact, or would take too long to implement. 898 F.2d at 692.

EPA believes that the appropriate interpretation of *Delaney*'s ''as soon as possible'' test is informed by the Court's acknowledgment of certain limitations on the speed of compliance as expressed in its citation of the guidance related to the scope of reasonably available measures. Therefore, consistently since the Ninth Circuit's opinion, EPA has framed the ''as soon as possible'' *Delaney* test, in the post-statutory attainment deadline context, to mean '' 'as expeditiously as practicable,' by a fixed date,'' and has stated that ''[t]he statute does not require measures that are absurd, unenforceable, or impracticable.'' 55 FR 36458, 36505 (Sept. 5, 1990).[5] In addition to applying this interpretation of the *Delaney* test to attainment plans after the passage of the statutory attainment deadline, the Agency has also consistently applied it in its actions on plans that address the 15 percent requirement following the November 15, 1996 statutory deadline for these plans. See, e.g., 62 FR 31343, 31345–31346 (June 9, 1997) approving the 15 percent ROP SIP for Philadelphia; 62 FR 33999, 34000–34001 (June 24, 1997) approving the 15 percent ROP SIP for the northern Virginia.

Moreover, EPA notes that one court, while finding *Delaney* not precisely on point for its purpose of fashioning a remedy in a citizen's enforcement action, nevertheless made some instructive observations on the relationship between the two standards. The Court noted that:

> although the *Delaney* opinion utilized the 'as soon as possible' standard employed by EPA guidelines, it did not do so out of rejection of the 'practicable' standard or out of concern that the two standards differed. Rather it simply had no occasion to compare them. Indeed the *Delaney* court appeared to blur them when it criticized Arizona for rejecting measures without demonstrating that such measures were 'impracticable' or unreasonable.

Citizens for a Better Environment v. *Deukmejian*, 746 F. Supp. 976, 985 (N.D. Cal. 1990). The Court went on to observe that:

> [a]s a practical matter, however, no Court will use its equitable powers to impose remedies that are irrational, albeit ''possible.'' Thus as long as time is considered paramount, and the term ''practical'' is strictly construed in keeping with the purposes of the Act, the ''as expeditiously as practicable'' standard should yield no less results than an ''as soon as possible'' standard.

The Court concluded that ''when properly interpreted, there is no practical difference between the two standards.'' *Id*. EPA agrees with this assessment.

Furthermore, while EPA believes that it is consistent with the *Delaney* test to take into account socioeconomic factors as described above, the issue is effectively moot with regard to this

[4] Following the *Delaney* opinion, EPA revoked certain portions of this guidance document in order to clarify that the Agency did not intend to require post-1987 plans to include every conceivable control measure. 55 FR 38326 (September 18, 1990).

[5] In its proposal of an attainment CO FIP for Arizona, EPA restated its interpretation of the *Delaney* test as requiring ''a demonstration of attainment as expeditiously as practicable utilizing all measures available to the federal government that are capable of advancing the attainment date, short of those producing absurd results, such as severe socioeconomic disruptions.'' 55 FR 41204, 41210 (October 10, 1990).

rulemaking. In proposing, for the purposes of its 15 percent demonstration, that ''as soon as practicable'' is April 1, 1999, the Agency did not consider any economic or social factors. Rather the factors EPA considered were the Agency's authority and resources to implement a measure, whether the measure provided a significant emission reduction, and whether the measure could be implemented soon enough to meaningfully advance the date by which the 15 percent reduction could be demonstrated. The Agency believes, as discussed above and in response to an additional comment below, that the consideration of these factors is entirely appropriate and consistent with both the Clean Air Act and the *Delaney* opinion.

Comment: ACLPI comments that in its proposed action, EPA asserted that the 15 percent ROP need not be achieved until April 1, 1999 because (a) that is the soonest such reductions will be achieved under the State's adopted programs and various adopted and proposed EPA programs and (b) no other measures are available that would reduce VOC emissions by more than 0.5 percent or advance achievement of the 15 percent ROP by three or more months. ACLPI asserts that there is nothing in the Clean Air Act or *Delaney* that allows de minimis exemptions for percent reductions or months of delay.

Response: The inherent authority of administrative agencies to exempt de minimis situations from a statutory requirement has been upheld in contexts where an agency is invoking a de minimis exemption as ''a tool to be used in implementing the legislative design when ''the burdens of regulation yield a gain of trivial or no value.'' *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 360–61 (D.C. Cir. 1979).

In this rulemaking, EPA has invoked this de minimis doctrine for gauging when the promulgation of a new control would or would not contribute to meeting the statutory requirement for a 15 percent ROP in the Phoenix area as soon as is practicable. EPA has interpreted the ''as soon as practicable'' test to require a showing that the applicable implementation plan contains all VOC control measures that are practicable for the area and that meaningfully accelerate the date by which the 15 percent level is achieved. Measures that provide only an insignificant additional amount of reductions or could not be implemented soon enough to meaningfully advance the date by which the 15 percent is demonstrated are not required to be implemented. See *Memorandum,* John S. Seitz, Director of the Office of Air Quality Planning and Standards, and Richard B. Ossias, Deputy Associate General Counsel to Regional Air Division Directors; ''15 Percent VOC SIP Approvals and the 'As Soon As Practicable' Test;'' February 12, 1997.

For determining whether additional measures were necessary for this demonstration, EPA proposed to define ''significant emission reduction'' to be equal to or more than one-half of one percent (0.5 percent) of the total emission reductions needed to meet the 15 percent ROP requirement in 1999 for the Phoenix nonattainment area, the equivalent of 0.5 metric tons per day (mtpd). Thus any measures that would result in less than a 0.5 mtpd reduction by April 1, 1999 were considered to yield de minimis reductions and were rejected from further review.

In the context of this rulemaking where the 15 percent ROP will be achieved within one year, 0.5 mtpd is truly de minimis, representing *one two-hundredths* of the emission reductions needed to show the 15 percent ROP. In terms of control requirements, more than 200 of these ''de minimis'' measures would be needed to demonstrate 15 percent ROP in Phoenix. The federal imposition of a measure or group of measures with so little impact on the ROP demonstration would be nonsensical. Thus a regulation imposing one of these de minimis measures would indeed yield ''a gain of trivial or no value.'' As such, a de minimis exemption is an entirely ''appropriate tool to be used in implementing the legislative design'' of the CAA's rate of progress and general FIP requirements. *Alabama Power* at 360.

EPA proposed to define ''meaningfully accelerate the date by which the 15 percent is demonstrated'' as three or more months. EPA has projected that the 15 percent ROP will be demonstrated in the Phoenix area by April 1, 1999. Therefore, if a measure could advance that demonstration date to on or before January 1, 1999, then EPA would consider that the measure meaningfully accelerated the 15 percent ROP. In the proposal, EPA explained its selection of three months as a balance between the environmental benefit of advancing the date and the potential to trivialize the ''as soon as practicable'' demonstration. 63 FR 3687, 3691.

The 15 percent ROP progress requirement is part of the Act's overall scheme for ozone attainment. In Phoenix, ozone exceedances occur during the hot-weather months of May through October. EPA's proposed three month ''de minimis'' period (January 1 to April 1) falls well before the beginning of this season and as a result the ozone benefit of additional controls during this period would be at best, exceedingly small. Thus, the federal implementation of a measure or measures whose sole effect would be to advance by less than 3 months from the April 1, 1999 date on which the 15 percent ROP is met, would clearly yield ''a gain of trivial or no value.''

EPA does not agree that *Delaney* bars the use of de minimis exemptions. As discussed previously, the *Delaney* court itself recognized limits on its conclusion that once a statutory deadline has passed the new deadline becomes ''as soon as possible with all available measures.'' These limits include not requiring measures that would not advance attainment, would cause substantial widespread and long-term adverse impact, or would take too long to implement. These limits clearly indicate that the *Delaney* court did not expect EPA to impose controls that yield no benefit or a benefit that is outweighed by the implementation burden. Thus, EPA's use of de minimis exemptions is consistent with *Delaney.*

Comment: ACLPI notes that EPA predicts that the State will meet the 15 percent reduction target by April 1, 1999 with just 0.3 tons per day to spare and argues that this is not a credible demonstration given the size of the inventory and the many uncertainties in EPA's emission reduction predictions. ACLPI asserts that the record here shows that emission reductions expected from control measures do not always materialize.

Response: The statutory requirement for 15 percent ROP demonstrations is met when the plan demonstrates that it achieves ''at least a 15 percent'' reduction. See section 182(b)(1)(A)(i). Neither the Act nor EPA guidance requires 15 percent ROP demonstrations to include a margin of safety; therefore, reductions greater than the exact amount needed to demonstrate the 15 percent ROP are not required. As a result, the amount of excess emissions in the 15 percent demonstration is immaterial.

Both the base year inventory used to calculate the 15 percent target emission level and the projected emission inventories and emission reduction calculations were prepared using generally-accepted methodologies consistent with Agency guidance. See the TSD for this rulemaking. As such, they provide a credible and appropriate basis for the 15 percent demonstration and additional adjustments to account for uncertainties are not warranted or required. EPA notes that it already factored into its 15 percent ROP

demonstration available information on the implementation status of the control measures.

Because ACLPI neither explains how the size of the inventory relates to the credibility of the demonstration nor provides specifics on the ''many uncertainties in EPA's emission reduction predictions'' or instances where the emission reductions may not materialize, EPA is not able to further respond to this comment.

Comment: ACLPI comments that EPA proposed to credit 4.4 tons per day in emission reductions from three federal rulemakings that are still at the proposal stage and asserts that such an approach violates the Act and EPA policy. ACLPI supports that assertion by stating that under section 182(b)(1)(c) of the Act, credit can be claimed only for rules ''promulgated'' by EPA and that EPA policy and the Act also forbid the granting of emission reduction credit for measures that have not been legally adopted. ACLPI further argues that there is no assurance whatsoever that the proposed rules will be adopted in a form and on a schedule that will assure the projected emission reductions and without the credit claimed for these measures, the ROP plan does not demonstrate the required 15 percent reduction and therefore is legally deficient.

Response: Consistent with the Clean Air Act, its policies and its actions on other 15 percent plans, EPA is crediting three proposed national rules in this 15 percent demonstration: consumer products, autobody refinishing and architectural and industrial maintenance coatings. As noted in the proposal, each of these rules are required under CAA section 183(e) and the Agency had recently been sued to enforce the requirement to promulgate these rules. Since the proposal the Agency has agreed to a schedule for their promulgation by August 15, 1998. See lodged consent decree in *Sierra Club* v. *Browner,* CIV No. 97–984 PLF (D.D.C.).

CAA section 182(b)(1)(A) requires states to submit their 15 percent SIP revisions by November, 1993. Section 182(b)(1)(C) provides the following general rule for creditability of emissions reductions towards the 15 percent requirement: ''emissions reductions are creditable toward the 15 percent required * * * to the extent they have actually occurred, as of [November, 1996], from the implementation of measures required under the applicable implementation plan, rules promulgated by the Administrator, or a permit under Title V.'' CAA section 182(b)(1)(D) further states that certain emissions reductions are not creditable, including reductions from certain control measures required prior to the 1990 Amendments.

These creditability provisions are ambiguous. Read literally, they provide that, although the 15 percent SIPs are required to be submitted by November 1993, emissions reductions are creditable as part of those SIPs only if ''they have actually occurred, as of [November 1996]''. This literal reading renders the provision internally inconsistent. Accordingly, EPA believes that the provision should be interpreted to provide, in effect, that emissions reductions are creditable ''to the extent they will have actually occurred, as of [November, 1996], from the implementation of [the specified measures]'' (the term ''will'' is added). This interpretation renders the provision internally consistent.

CAA section 182(b)(1)(C) explicitly includes as creditable reductions those resulting from ''rules promulgated by the Administrator.'' This provision does not state the date by which those measures must be promulgated, i.e., does not indicate whether the measures must be promulgated by the time the 15 percent SIPs were due (November, 1993), or whether the measures may be promulgated after this due date.

Because the statute is silent on this point, EPA has discretion to develop a reasonable interpretation under *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). EPA believes it reasonable in the first instance to interpret CAA section 182(b)(1)(C) to allow areas to credit reductions from federal measures as long as those reductions are expected to occur by November, 1996, the date for achieving the 15 percent ROP, even if the federal measures are not promulgated by the November, 1993 due date for the 15 percent SIPs.

EPA's interpretation is consistent with the Congressionally-mandated schedule for promulgating regulations for consumer and commercial products, under section 182(e) of the Act. This provision requires EPA to promulgate regulations controlling emissions from consumer and commercial products that generate emissions in nonattainment areas. Under the statutory schedule, by November, 1993—the same date that the States were required to submit the 15 percent SIPs—EPA was to issue a report and establish a rulemaking schedule for consumer and commercial products. Further, EPA was to promulgate regulations for the first set of consumer and commercial products by November, 1995. It is reasonable to conclude that Congress anticipated that reductions from these measures would be creditable as part of the 15 percent SIPs, as long as those reductions were to occur by November, 1996.

EPA has also established specific policies interpreting the Act that allow crediting of these proposed national measures in 15 percent plans. See *Memorandum,* John S. Seitz, Director, OAQPS to Regional Air Division Directors; ''Credit for the 15 Percent Rate-of-Progress Plans for Reductions from the Architectural and Industrial Maintenance Coating Rule and the Autobody Refinishing Rule;'' November 29, 1994; *Memorandum,* John S. Seitz, Director, OAQPS to Regional Air Division Directors; ''Credit for the 15 Percent Rate-of-Progress Plans for Reductions from the Architectural and Industrial Maintenance (AIM) Coating Rule;'' March 22, 1995; *Memorandum,* John S. Seitz, Director, OAQPS to Regional Air Division Directors; ''Regulatory Schedule for Consumer and Commercial Products under Section 182(e) of the Clean Air Act;'' June 22, 1995; and *Memorandum,* John S. Seitz, Director of the Office of Air Quality Planning and Standards, and Richard B. Ossias, Deputy Associate General Counsel to Regional Air Division Directors; ''15 Percent VOC SIP Approvals and the 'As Soon As Practicable' Test;'' February 12, 1997.

While this analysis focuses on SIPs, it applies equally to FIPs. As noted before, EPA ''stands in the shoes of the State'' when promulgating a FIP and all the rights and duties available to a state under the Act become available to EPA in a FIP.

The above analysis also describes statutory provisions that include specific dates for 15 percent SIP submittals (November 15, 1993) and implementation (November 15, 1996). While these dates have expired and new dates for submittal (in this case, promulgation) and implementation have been developed, EPA does not believe that the expiration of the statutory dates, and the development of new ones, invalidates the conclusion that reductions from federal measures promulgated after the date the 15 percent plan is submitted (or promulgated) can be counted toward the ROP demonstration.

Because it has agreed to a schedule in a proposed consent decree to promulgate these national rules by August 15, 1998, EPA intends to promulgate the rules within 3 months of this FIP promulgation and well before the April 1, 1999 15 percent ROP demonstration date. As a result, crediting reductions from these federal measures is also sensible from an

administrative standpoint. If it did not credit these national measures, EPA would need to promulgate compensating rules, applicable only to Phoenix, to replace their 4.4 mtpd benefit. EPA has already shown that there are no other measures available that would meaningfully advance the April 1999 date by which the 15 percent ROP is demonstrated in the Phoenix area, thus any additional measures would not result in reductions any sooner than the proposed national rules. Nor would these potential Phoenix-only measures result in any greater reductions creditable to the 15 percent plan since they would simply substitute for the reductions from the national rules.[6] Thus, if it did not credit the national measures, EPA would simply be engaging in a wasteful rulemaking exercise to promulgate measures in May, 1998 that it could almost immediately withdraw when the national rules are promulgated in August, 1998.[7]

The fact that EPA cannot determine precisely the amount of credit available for the proposed national measures does not preclude granting them credit. The credit can be granted as long as EPA is able to develop reasonable estimates of the amount of VOC reductions from the measures EPA expects to promulgate. EPA believes that it is able to develop reasonable estimates, particularly because it has already proposed and taken comment on the measures at issue, and is expecting to promulgate final rules in little less than 3 months. Moreover, the use of estimated emissions and emission reductions rather than actual measurements is a common and necessary practice in attainment and reasonable further progress demonstrations because actual measurements, even for promulgated measures, are seldom available. For example, EPA's document to estimate emissions, ''Compilation of Air Pollutant Emission Factors'', January 1995, AP–42), provide emission factors used to estimate emissions from various sources and source processes. AP–42 emission factors have been used, and continue to be used, by states and EPA to determine base year emission inventory figures for sources and to estimate emissions from sources where such information is needed.

This rulemaking is based on the best information currently available to the Agency on the projected reductions from these proposed national rules. If these projected reductions turn out to be greater than the amount it determines to be appropriate after promulgation of the final rules, then EPA will take appropriate action to revise this 15 percent demonstration.

Comment: ACLPI argues that contrary to EPA's assertion there are a number of additional control measures that are currently available to advance the time for achieving the 15 percent ROP including the use of California's diesel fuel standards (''CARB diesel'') and additional controls on consumer products, both of which are identified in the *Report of the Arizona Governor's Air Quality Strategies Task Force* (1998) (''1998 Task Force Report'') as are a number of other measures.

Response: ACLPI is correct that the 1998 Task Force Report shows that adoption of the CARB diesel fuel standards would reduce Phoenix VOC emissions by 7.1 mtpd in 1999. The report, however, also states that implementation of this measure would require at least two years and thus could not occur prior to mid-2000, more than a year after the April 1, 1999 demonstration date for the 15 percent ROP. The State's consultant concluded that the two-year implementation schedule was the minimum necessary after reviewing the refining capacity available to produce CARB diesel fuel for the Phoenix market. See 1998 Task Force Report, p. 77. Since EPA has no grounds to dispute the consultant's conclusions (which were endorsed by the Task Force) regarding the minimum implementation schedule for CARB diesel, it finds the measure would not advance the date by which the 15 percent ROP would be met.

The Task Force recommended adoption of California's phase I and phase II consumer product standards. These standards are more stringent than EPA's proposed national standards for 13 product categories not currently regulated in Phoenix: single phase aerosol air fresheners, engine degreasers, solid or paste forms of furniture maintenance products, non-aerosol forms of glass cleaners, hairsprays, aerosol insect repellants, nail polish removers, automotive brake cleaners, aerosol dust aids, fabric protectants, crawling bug insecticides, and personal fragrance products.

Except for hairsprays, California's more stringent limits are already in place. The compliance date for the final VOC limit for hairsprays is June 1, 1999, two months after the April 1, 1999 demonstration date for 15 percent ROP in Phoenix. The majority of the emission reductions (or approximately 0.9 metric tons per day) that would result from implementing CARB's consumer products rule in Phoenix come from the final hairspray standard. The balance of the tighter CARB limits produce only a 0.23 mtpd reduction, which EPA finds to be de minimis.

The 1998 Governor's Task Force evaluated and recommended controls for not only VOC but also nitrogen oxides, carbon monoxide, particulate matter and regional haze. These controls range from I/M program improvements to improved compliance with the area's fugitive dust rules and include numerous study proposals (e.g., Transit Task Force). Since ACLPI was not specific about what additional control measures EPA should evaluate for this plan, it is not possible for EPA to respond in more detail to this comment.

III. Conclusion

Pursuant to its federal planning authority under CAA section 110(c) and for the reasons discussed above, EPA is determining that the Phoenix metropolitan area has in place or will have in place sufficient control measures to meet the 15 percent ROP requirement for VOCs in CAA section 182(b)(1)(A) as soon as practicable.

EPA is also approving the State's 1990 base year inventory for the Phoenix area under CAA sections 110(k)(2) and 182(a)(1).

Under 40 CFR 93.118(e), this final action establishes a VOC conformity budget of 76.7 metric tons per average summer day based on the inventory methodology and mobile source emissions model used for this 15 percent ROP demonstration. This conformity budget is in addition to, and not in lieu of, the conformity budget established in the *MAG 1993 Ozone Plan for the Maricopa County Area, Modeling Attainment Demonstration* (October 1994).

IV. Administrative Requirements

A. Executive Order (E.O.) 12866

The Office of Management and Budget has exempted this action from E.O. 12866 review.

[6] The statutory requirement EPA is fulfilling here is to demonstrate a fixed emission reduction of 15 percent from 1990 base year levels. Emission reductions in excess of this fixed amount are unnecessary. Since EPA has already concluded that the proposed national measures combined with other adopted state and federal measures will result in the required 15 percent ROP as soon as practicable, additional Phoenix-only federal measures are not necessary.

[7] In its rulemakings, EPA strives to take the least intrusive and most sensible regulatory approach that achieves the statutory requirements. In this situation, it made no regulatory sense to ignore these pending national measures (which have already been proposed and have near-term date for promulgation) that will apply automatically to Phoenix in favor of promulgating wholly new Phoenix-specific measures.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. Section 601 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. sections 603 and 604. Alternatively, EPA may certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

This action simply presents the analysis of the emission impacts on the Phoenix metropolitan area of already adopted or proposed State and federal rules. This action neither promulgates additional measures nor requires Arizona or its local jurisdictions to adopt or implement additional measures beyond those that they currently have adopted and implemented or have been proposed or implemented at the federal level. As such, it does not regulate any entities. Therefore, pursuant to 5 U.S.C. 605(b), EPA certifies that today's action does not have a significant impact on a substantial number of small entities within the meaning of those terms for RFA purposes.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, when EPA promulgates ''any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more'' in any one year. A ''Federal mandate'' is defined, under section 101 of UMRA, as a provision that ''would impose an enforceable duty'' upon the private sector or State, local, or tribal governments'', with certain exceptions not here relevant. Under section 203 of UMRA, EPA must develop a small government agency plan before EPA ''establish[es] any regulatory requirements that might significantly or uniquely affect small governments.'' Under section 204 of UMRA, EPA is required to develop a process to facilitate input by elected officers of State, local, and tribal governments for EPA's ''regulatory proposals'' that contain significant Federal intergovernmental mandates. Under section 205 of UMRA, before EPA promulgates ''any rule for which a written statement is required under [UMRA section] 202'', EPA must identify and consider a reasonable number of regulatory alternatives and either adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, or explain why a different alternative was selected.

As explained above, sections 202, 203, 204, and 205 of UMRA do not apply to today's action because it does not impose an enforceable duty on or otherwise affect any entity. Therefore, EPA is not required, and has not taken, any actions under UMRA.

D. E.O. 13045: Protection of Children From Environmental Health Risks and Safety Risks

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 EPA determines (1) ''economically significant'' as defined under E.O. 12866 and (2) the environmental health or safety risk addressed by the rule has 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.

Today's final action promulgating a demonstration that the Phoenix area meets the 15 percent VOC ROP requirement in CAA section 182(b)(1)(A)(i) is not subject to E.O. 13045 because it is not an economically significant regulatory action as defined by E.O and because it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children.

E. Submission to Congress and the General Accounting Office

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**. This rule is not a ''major'' rule as defined by 5 U.S.C. 804(2).

F. 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 July 27, 1998. 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, Intergovernmental relations, Ozone.

Dated: May 18, 1998.

Carol M. Browner,

Administrator.

Title 40, Chapter I 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 D—Arizona

2. Section 52.123 is amended by adding paragraph (g) to read as follows:

§ 52.123 Approval status.

* * * * *

(g) Pursuant to the federal planning authority in section 110(c) of the Clean Air Act, the Administrator finds that the applicable implementation plan for the Maricopa County ozone nonattainment area demonstrates the 15 percent VOC rate of progress required under section 182(b)(1)(A)(i).

[FR Doc. 98–13984 Filed 5–26–98; 8:45 am]

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