and April 21, 1997, containing supporting SIP information.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AZ033–0007; FRL–5928–3]

Approval and Promulgation of Implementation Plans; Arizona—Maricopa County CO Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action constitutes EPA's response to the Ninth Circuit Court of Appeals' July 31, 1997 opinion in *DiSimone* versus *Browner,* No. 96–70974 (9th Cir. July 31, 1997). As a result of the opinion, EPA is restoring the contingency procedures in the carbon monoxide (CO) federal implementation plan (FIP) for the Maricopa County, Arizona nonattainment area (Phoenix) that it promulgated in accordance with Agency guidance issued prior to the 1990 Clean Air Act Amendments (CAAA). EPA is also withdrawing its approval of two contingency measures submitted by the State as revisions, pursuant to the 1990 CAAA, to the CO state implementation plan (SIP) for Phoenix.

EFFECTIVE DATE: This action is effective as of December 1, 1997.

FOR FURTHER INFORMATION CONTACT: Jan Taradash, Office of Regional Counsel (ORC–2), U.S. Environmental Protection Agency, 75 Hawthorne Street, San Francisco, California, 94105–3901, (415) 744–1335 or Sara Schneeberg, Office of General Counsel, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 260–5145.

SUPPLEMENTARY INFORMATION:

I. Background

In March 1990, the United States Court of Appeals for the Ninth Circuit vacated EPA's 1988 approval of the State of Arizona's SIP for the Phoenix CO nonattainment area and directed the Agency to promulgate a Federal implementation plan (FIP) under section 110(c) of the Clean Air Act (CAA) that included contingency procedures in accordance with its then existing guidance.[1] *Delaney* versus *EPA,* 898 F.2d 687 (9th Cir. 1990). In November 1990, the 1990 Amendments to the Clean Air Act (CAAA) were enacted which comprehensively revised the statute, including the provisions dealing with nonattainment areas and the deadlines and requirements for achieving attainment. EPA then filed in the Ninth Circuit a motion to recall the *Delaney* mandate, arguing, in part, that promulgation of the FIP under the pre-amended statute was inconsistent with both the structure and substantive provisions of the new law. EPA also argued that section 193, the general savings clause, of the 1990 Amendments did not preserve the Agency's pre-amendment FIP obligation.[2] The Ninth Circuit denied EPA's motion without opinion and EPA subsequently promulgated the FIP contingency procedures. 56 FR 5458 (Feb. 11, 1991).

In 1994 Arizona submitted to EPA contingency measures (an enhanced remote sensing program and a traffic diversion measure) adopted to satisfy the requirements of section 172(c)(9), a new provision added to the CAA by the 1990 Amendments.[3] In 1996, EPA approved these State measures as meeting the requirements of sections 110(a) and 172(c)(9) of the CAA and withdrew the FIP contingency procedures. 61 FR 51599 (Oct. 3, 1996). The Arizona Center for Law in the Public Interest (ACLPI) subsequently filed a petition for review of this action in the Ninth Circuit and the Court issued its opinion on July 31, 1997. *DiSimone* versus *Browner,* No. 96–70974 (9th Cir. July 31, 1997).

In its petition, ACLPI challenged EPA's action on several grounds, including that: (1) EPA violated section 193 by approving measures that did not insure equivalent or greater emission reductions than the FIP, and (2) the contingency measures approved by EPA did not comply with the requirements of section 172(c)(9). On these grounds, petitioners' requested that the court vacate EPA's approval of the state's contingency measures and withdrawal of the FIP contingency procedures, and direct EPA to restore the FIP contingency procedures.

In its opinion, the Court found that EPA's replacement of the court-ordered federal contingency provisions with state provisions under the new statutory scheme violated the *Delaney* mandate. Slip op. at 9023. The Court further found that EPA was precluded from litigating in *DiSimone* the issue of whether the amended Act authorized EPA's withdrawal of the FIP contingency procedures and approval of the State's contingency measures in their place. Slip op. at 9025. To support that conclusion, the Court reasoned that:

> [T]he issue presented in EPA's motion to recall the mandate [in *Delaney*] and the issue presented in this case [*DiSimone*] are indeed identical. The arguments advanced by EPA in both cases were that requiring the continued adherence to pre-Amendment guidelines would thwart Congressional intent and be inconsistent with the reclassification scheme introduced by the 1990 amendments. In addition, both the motion to recall the mandate and EPA's brief in this case addressed the General Savings Clause * * * as not applicable to the court's order in *Delaney*. Slip op. at 9026.

The Court also stated that the 9th Circuit panel denying EPA's motion to recall the mandate ''decided against all of the arguments presented in EPA's motion because such a determination was necessary to deny the motion.'' Slip op. at 9027. The Court did not, however, indicate what specific relief sought by ACLPI it was granting. Instead, it merely granted the petition ''*for the foregoing reasons.*'' (Emphasis added). Slip op. at 9028.

Because of the Court's exclusive reliance on *Delaney,* the restoration of the FIP contingency procedures is clearly compelled by its granting of ACLPI's petition. As to the State's contingency measures, nowhere in the opinion does the Court address the issue of whether the State's measures meet the requirements of sections 110(a) and 172(c)(9) of the CAA.[4] Thus there is no indication as to whether EPA's approval of these measures could remain in place in light of the restoration of the FIP.

However, throughout the opinion there is evidence that the gravamen of the Court's objection to EPA's action was the substitution of the State's contingency measures for the FIP

[1] The CAA prior to the 1990 Amendments contained no statutory provision for contingency procedures or measures. As a result of this absence, EPA developed the guidance pursuant to which the FIP was promulgated. 46 FR 7187 (January 22, 1981).

[2] Section 193 provides, in pertinent part:

> No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the date of enactment of the Clean Air Act Amendments of 1990 in any area which is a nonattainment area for any air pollutant may be modified after such enactment in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

EPA did not advance in its motion an argument concerning the effect of section 193 on any subsequent replacement of the FIP contingency procedures with approved state measures.

[3] Section 172(c)(9) requires SIPs to provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress (RFP) or attain the national ambient air quality standard (NAAQS) by the applicable attainment date.

[4] In fact, ACLPI did not raise in its petition for review any issues relating to EPA's approval of the contingency measures under section 110(a).

contingency procedures.[5] Consequently EPA has concluded that the Court viewed the Agency's withdrawal of the FIP contingency procedures and approval of the State's contingency measures as interdependent. Because EPA does not intend to seek a rehearing from the Ninth Circuit, the Agency believes that, for the purpose of this action, it has no choice but to withdraw its approval of the State's measures in addition to restoring the FIP contingency procedures.[6]

II. Final Actions

A. Rule

For the foregoing reasons, EPA is taking final action to restore the federal contingency procedures for the Phoenix CO nonattainment area. Specifically, the Agency is restoring the phrase ''After December 31, 1991 for the Maricopa CO nonattainment area or'' to the contingency provisions at 56 FR 5471, col. 2 (Feb. 11, 1990). EPA is also, for the reasons discussed above, withdrawing its approval of the State's contingency measures as meeting the requirements of sections 110(a) and 172(c)(9) of the CAA.

At the time EPA approved the State's contingency measures and withdrew the FIP contingency procedures, the Agency also withdrew the list of highway projects potentially subject to delay that the Agency proposed on June 28, 1993 during the partial implementation of the FIP at that time. 58 FR 34547.[7] EPA is today reaffirming the withdrawal of that list because it is no longer current. During any future implementation of the FIP contingency procedures, EPA will propose an updated list of projects potentially subject to delay.

[5] For example: ''We hold that EPA acted in disobedience of an order of this court in withdrawing the federal plan and approving a state plan in its place.* * *'' Slip op. at 9019; ''Here, the issue to be foreclosed is whether, in light of the 1990 amendments to the Clean Air Act, EPA was permitted to approve a state implementation plan in place of the federal plan ordered by the *Delaney* panel.'' Slip op. at 9025.

[6] It should be noted that those measures no longer serve a contingency function because they were implemented when the Phoenix area was automatically reclassified from a ''moderate'' to a ''serious'' CO nonattainment area upon EPA's finding that the area had failed to meet the statutory attainment deadline of December 31, 1995. See 61 FR 39343 (July 29, 1996) and footnote 3. As a result of the reclassification, the State is required to submit a serious area SIP revision for Phoenix by February 28, 1998 that includes new contingency measures pursuant to CAA section 172(c)(9).

[7] For the full text of the FIP contingency procedures, see 56 FR 5471–5472.

B. Effective Date and Notice and Comment Under the Administrative Procedures Act

Today's action will be effective on December 1, 1997. Under the Administrative Procedures Act (APA), 5 U.S.C. 553(d)(3), agency rulemaking may take effect before 30 days after the date of publication in the **Federal Register** if an agency has good cause to mandate an earlier effective date. In today's action, EPA is simply implementing administratively a result that the Ninth Circuit Court of Appeals effectuated in its July 31, 1997 opinion in *DiSimone* v. *Browner.* Therefore an effective date prior to 30 days after the date of publication is warranted.

Similarly, while this document constitutes final agency action, EPA finds good cause to forego prior notice and comment under the APA, 5 U.S.C. 553(b). Notice and comment are unnecessary because no EPA judgment is involved in restoring the FIP contingency procedures and withdrawing the Agency's approval of the State's contingency measures pursuant to the Ninth Circuit's opinion in *DiSimone.*

III. Administrative Requirements

A. Executive Order 12866

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

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact on small entities of any rule subject to the notice and comment rulemaking requirements under the good cause exception. Because this action is exempt from such requirements, as described above, it is not subject to the RFA.

C. Unfunded Mandates

Under sections 202, 203 and 205 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), 2 U.S.C. 1501–1571, signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves 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 this rule.

EPA's withdrawal of its approval of the State's contingency measures 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 action simply makes requirements that the State is already imposing no longer subject to federal enforcement. Restoration of the FIP contingency procedures puts back in place federal requirements that existed prior to their withdrawal by the Agency in 1996. To the extent that this action imposes any mandate on State, local, tribal governments or the private sector, EPA concludes that it would not result in estimated costs of $100 million or more. With regard to both actions, EPA is simply implementing administratively what the Ninth Circuit effectuated in its July 31, 1997 opinion in *DiSimone* v. *Browner.* Therefore EPA has not prepared a budgetary impact statement for this action.

D. Submission to Congress and the General Accounting Office

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

E. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 30, 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations.

Dated: November 20, 1997.

Carol M. Browner,

Administrator.

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

PART 52 —[AMENDED]

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

Authority: 42 U.S.C. 7401 *et seq.*

Subpart D—Arizona

§ 52.120 [Amended]

2. Section 52.120 is amended by removing and reserving paragraphs (c)(83) and (c)(85).

[FR Doc. 97–31278 Filed 11–28–97; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[FRL–5930–2]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Removal of Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is removing the final rule appearing at 56 **Federal Register** (FR) 67197 (December 30, 1991) insofar as it excluded hazardous waste treatment residue generated by Reynolds Metals Company (Reynolds), Gum Springs, Arkansas, from the lists of hazardous wastes contained in 40 CFR 261.31 and 261.32 (hereinafter all sectional references are to 40 CFR unless otherwise indicated). This decision to repeal the exclusion is based on an evaluation of waste-specific information provided by Reynolds and obtained by EPA either independently or from the Arkansas Department of Pollution Control and Ecology (ADPC&E) subsequent to the promulgation of the exclusion. After the effective date of this rule, future spent potliner waste generated at Reynolds' Gum Springs, Arkansas, facility will no longer be excluded from the requirements of hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) and must be handled as hazardous waste in accordance with sections 260 through 266, 268 and 273 as well as any applicable permitting standards of section 270. This rule does not remove or affect EPA's reasoning or evaluation as it related to the modified EPA Composite Model for Landfills (EPACML).

EFFECTIVE DATE: December 1, 1997.

ADDRESSES: The public docket for this final rule is located at the Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, and is available for viewing in the EPA Review Room on the 7th floor from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Call (214) 665–6775 for appointments. The reference number for this docket is ''F–97–ARDEL–REYNOLDS.'' The docket may also be viewed at the Arkansas Department of Pollution Control and Ecology, 8001 National Drive, Little Rock, Arkansas 72209. The public may copy material from any regulatory docket at no cost for the first 100 pages, and at $0.15 per page for additional copies.

FOR FURTHER INFORMATION, CONTACT: For general and technical information concerning this notice, contact William Gallagher, Delisting Program (6PD–O), Region 6, Environmental Protection Agency, 1445 Ross Avenue, Dallas, Texas 75202, (214) 665–6775.

SUPPLEMENTARY INFORMATION:

I. Background

A. Authority for ''Delisting''

Under 40 CFR 260.20 and 260.22, facilities may petition EPA to remove their wastes from hazardous waste control by excluding them from the lists of hazardous wastes contained in sections 261.31 and 261.32. Specifically, section 260.20 allows any person to petition the Administrator to modify or revoke any provision of parts 260 through 265 and 268 of Title 40 of the Code of Federal Regulations (CFR); and section 260.22 provides generators the opportunity to petition the Administrator to exclude a waste on a ''generator-specific'' basis from the hazardous waste lists. Petitioners must provide sufficient information to EPA to allow EPA to determine that the waste to be excluded does not meet any of the criteria under which the waste was listed as a hazardous waste. In addition, the Administrator must determine, where she has a reasonable basis to believe that factors (including additional constituents) other than those for which the waste was listed could cause the waste to be a hazardous waste, that such factors do not warrant retaining the waste as a hazardous waste.

B. History of This Rulemaking

Reynolds was granted a final exclusion for K088 waste treatment residues on December 30, 1991 (*see* 56 FR 67197). In that rule, EPA also addressed the modified EPACML. The EPA believes its statements contained in that rule related to the EPACML remain accurate. Today's action is not intended to repeal or otherwise affect EPA's adoption or use of that model.

After evaluation of new data, EPA proposed, on July 31, 1997, repeal of the final rule issued December 30, 1991 (*see* 62 FR 41005). This rulemaking addresses public comments received on the proposal and finalizes the proposed decision to repeal the Reynolds exclusion.

C. Subsequent Events

Under the RCRA Land Disposal Restrictions (LDR) Program certain hazardous wastes cannot be land disposed until they satisfy treatment standards promulgated by EPA (RCRA sections 3004 (d)–(g)). On April 8, 1996, EPA prohibited land disposal, of and established treatment standards for, spent potliners from aluminum production (K088 hazardous wastes, 61 FR 15566, April 8, 1996). At that time (and still today), Reynolds has the only commercially available treatment facility that is capable of meeting those LDR treatment standards. However, as discussed below in section II., EPA had concerns about concentrations of certain hazardous constituents in the leachate from Reynolds treatment process residue, especially because such treatment residues had been delisted and were being disposed in units which were not subject to RCRA subtitle C standards [62 FR 1994–62 FR 1995 (January 14, 1997)]. The EPA initially extended the national capacity variance until July 8, 1997. At that time, after reexamination, the Agency found that Reynolds was providing treatment and disposal capacity which is protective of human health and the environment (RCRA section 3004(h)(2)), and accordingly found that there is adequate treatment capacity for K088 wastes. [62 FR 37694 (July 14, 1997)]. The national capacity variance was further extended three months to allow generators to make necessary logistic arrangements (Id. at 37694).

The Agencys decision rested upon two principal factors. Reynolds process destroys most of the most hazardous constituent in K088 wastes—cyanide—immobilizes most of the toxic metals, and destroys all polycyclic aromatic hydrocarbons (62 FR 37694, 62 FR 37696). In addition, Reynolds disposal