significant federalism implications under that Order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those unfunded mandate costs. The Coast Guard does not anticipate that any future rulemaking will result in an unfunded mandate.

Taking of Private Property

The Coast Guard anticipates that any potential rulemaking will not effect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

The Coast Guard anticipates that any potential rulemaking will meet applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

The Coast Guard anticipates that any potential rulemaking will not be economically significant and will not present an environmental risk to health or risk to safety that may disproportionately affect children under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks.

Environment

The Coast Guard anticipates that any potential rulemaking will require an Environmental Assessment due to the advertised size of the event and its proximity to sensitive environmental areas. Further, any potential rulemaking will be designed to minimize the likelihood of maritime accidents and attendant environmental consequences and to enhance the safety of event participants, spectators and other maritime traffic. The Coast Guard invites comments addressing possible effects that any such rulemaking may have on the human environment, or addressing possible inconsistencies with any Federal, State, or local law or administrative determination relating to the environment. The Coast Guard will reach a final determination once it has received a detailed parade of sail plan and environmental analysis from the sponsor organization.

Dated: December 8, 1999.

L.J. Bowling,

Captain, U.S. Coast Guard, Captain of the Port, Miami Zone.

[FR Doc. 99–32784 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–15–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA074–4094b; FRL–6501–3]

Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania; Oxygenated Gasoline Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The revision makes the oxygenated gasoline program a contingency measure for the five-county Philadelphia area, which means that the oxygenated gasoline program would only be required to be implemented in the five-county Philadelphia area if there is a violation of the carbon monoxide (CO) national ambient air quality standard (NAAQS). The revision also makes technical amendments to the oxygenated gasoline regulation. In the ''Rules and Regulations'' section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A more detailed description of the state submittal and EPA's evaluation are included in a Technical Support Document (TSD) prepared in support of this rulemaking action. A copy of the TSD is available, upon request, from the EPA Regional Office listed in the **ADDRESSES** section of this document. If EPA receives no adverse comments, EPA will not take further action. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by January 18, 2000.

ADDRESSES: Written comments should be addressed to David L. Arnold, Chief, Ozone and Mobile Sources Branch, Mailcode 3AP21, US Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, US Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Pennsylvania Department of Environmental Resources Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Mrs. Kelly L. Bunker, (215) 814–2177, at the EPA Region III address above, or by e-mail at bunker.kelly@epa.gov.

SUPPLEMENTARY INFORMATION:

For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: November 18, 1999.

A.R. Morris,

Acting Regional Administrator, Region III.

[FR Doc. 99–32374 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 172–0205; FRL–6511–5]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision; South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is withdrawing its proposed approval of a revision to the California State Implementation Plan (SIP) and proposing to disapprove the revision. This revision concerns the federal recognition of variances from certain rule requirements. Based on comments received on its proposal to approve this revision, EPA now believes the revision does not meet applicable Clean Air Act requirements and is therefore proposing to disapprove the revision.

DATES: Comments on this proposed action must be received in writing on or before January 3, 2000.

ADDRESSES: Comments may be mailed to: Ginger Vagenas, Permits Office (AIR–3), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Copies of the rule and EPA's responses to comments received on its proposed approval of the rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rule are also available for inspection at the following locations:

Environmental Protection Agency, Air Docket (6102), 401 ''M'' Street, S.W., Washington, D.C. 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 ''L'' Street, Sacramento, CA 95812.

South Coast Air Quality Management District, 21865 E. Copley Drive, Diamond Bar, CA 91765.

FOR FURTHER INFORMATION CONTACT: Ginger Vagenas, Permits Office (AIR–3), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744–1252.

SUPPLEMENTARY INFORMATION:

I. Applicability

The rule being proposed for disapproval is South Coast Air Quality Management District (SCAQMD) Rule 518.2—Federal Alternative Operating Conditions. Rule 518.2 was adopted on January 12, 1996 and was submitted to EPA by the California Air Resources Board (CARB) on May 10, 1996. This rule was found to be complete on July 19, 1996, pursuant to EPA's completeness criteria that are set forth in 40 CFR Part 51 Appendix V.[1]

II. Background

This document addresses EPA's proposed disapproval for SCAQMD Rule—Rule 518.2—Federal Alternative Operating Conditions. The rule would allow the SCAQMD to temporarily modify certain applicable requirements through the title V permitting process rather than through a SIP revision. These modifications are accomplished by establishing a mechanism for the creation of alternative operating conditions (AOCs), a means by which to offset any emissions in excess of the otherwise applicable requirements that would result, and provisions for EPA and public review and EPA veto of the proposed AOCs.

On September 25, 1998 (63 FR 51325) EPA proposed approval of Rule 518.2. At that time, EPA believed that the rule was consistent with the CAA, EPA regulations, and EPA policy. However, upon further review, EPA has reconsidered its position and now believes that certain demonstrations and rule revisions would be required for the rule to be proposed for approval. For additional background on EPA's original analysis, including a detailed discussion of the CAA requirements governing approval of Rule 518.2, please refer to the **Federal Register** notice cited above.

III. EPA Evaluation and Proposed Action

In determining the approvability of Rule 518.2, EPA must evaluate the rule for consistency with the requirements of the Clean Air Act (CAA) and EPA regulations, including those found in sections 110, 172, 173, 182, and 193 of the CAA and 40 CFR part 51 (Requirements for Preparation, Adoption and Submittal of Implementation Plans). EPA's interpretation of these requirements, which forms the basis for this action, appears in EPA policy guidance documents. In general, relevant and applicable guidance documents have been set forth to ensure that submitted rules meet Federal requirements, are fully enforceable, and strengthen or maintain the SIP.

A. Compliance with Section 110(l) of the Clean Air Act

EPA received comments that Rule 518.2 does not comply with section 110(l) of the Act and cannot be approved for this reason. These commenters oppose approval of Rule 518.2 because it will allow sources to violate the new source review lowest achievable emission rate (''LAER'') and offsets requirements of the Act as well as the requirements of Title V, and therefore does not comply with section 110(l).

LAER and Offset Requirements

Section 110(l) provides that the Administrator shall not approve a SIP revision ''if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * *, or any other applicable requirement of (the Act).'' LAER is a technology-based emission control requirement which is implemented through the nonattainment area new source review (''NSR'') permitting program mandated by sections 172(b)(5) and 173. LAER is defined in section 171(3), in pertinent part, as that rate of emission which reflects:

> (A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or
>
> (B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent * * *.

In general, we agree with the commenters that, because Rule 518.2 would permit a source to exceed a LAER emissions limit contained in its NSR permit, it would violate LAER requirements and would not comply with section 110(l).

However, because LAER is a technology-based standard, there is a limited subset of circumstances in which an AOC could apply to a LAER limit in compliance with the requirements of the Act. In *Marathon Oil* v. *EPA*, 564 F.2d 1253, 1272–73 (9th Cir. 1977), the Ninth Circuit held, in the context of a Clean Water Act case, that EPA must provide an upset defense for technology-based effluent limits to take into account the fact that even properly maintained technology can unexpectedly fail. Other cases adopted this reasoning, and they formed the basis for EPA's decision to include a malfunction provision in part 70. *See* 60 FR 45558–45561 and 40 CFR 70.6(g). This provision applies across the board, even to emission limits that derive from LAER. Accordingly, we believe that Rule 518.2 could be redrafted to allow an AOC for LAER-based limits only in the narrow instance where the source could demonstrate that an unavoidable malfunction caused the violation.

The commenters' second argument that Rule 518.2 does not comply with section 110(l) focuses on the offset requirements under section 173. As part of the NSR permitting requirements of section 173, new sources or modifications of existing sources located in nonattainment areas must obtain:

> sufficient offsetting emissions reductions * * * such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources * * * so as to represent * * * reasonable further progress. Section 173(a)(1)(A).

Further, section 173(c) requires that, ''a new or modified major stationary source may comply with any offset requirement in effect under this part for increased

[1] EPA adopted the completeness criteria on February 16, 1990 (55 FR 5830) and, pursuant to section 110(k)(1)(A) of the CAA, revised the criteria on August 26, 1991 (56 FR 42216).

emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area.''

Section 182 of the CAA requires that offsets must be obtained in a ratio determined either by the severity of the air quality in the nonattainment area. The offset ratio required in the South Coast is 1.2 to 1. Thus, when a new or modified source applies for an NSR permit, it must obtain offsetting emissions in an amount greater than the emissions it will add to the air. Therefore, not only are the new emissions not reflected in the attainment demonstration, but they should result in a decrease in the inventory due to the offset ratio. While the offset requirement is an entirely independent one, the offset ratio is the link to the reasonable further progress requirement—allowing growth to occur at the same time that air quality improves.

Based upon the above, if a source that was initially required under section 173 to offset its emissions applies for an AOC, that source must be required to offset the excess emissions in the same manner or it will violate section 173(c). Because Rule 518.2 does not require such offsets, we agree that it would violate section 173. Therefore, the current version of Rule 518.2 cannot be approved because it would not comply with section 110(l).

We believe that the District could address this approvability issue by ensuring that sufficient offsets are set aside to cover any excess emissions associated with an AOC granted to sources subject to NSR.

Title V

Finally, the commenters believe that 110(l) prohibits EPA from approving Rule 518.2 because the rule violates title V of the Act. The commenters make two arguments in this regard. First, they argue that section 502(a) prohibits sources from violating terms of their title V permits and that the AOCs contemplated by Rule 518.2 would allow sources to do so. We disagree with the commenters on this point. We believe that the combination of an approvable version of Rule 518.2 and the process for approving AOCs under the title V program provides a means by which an applicable requirement and the title V permit may be temporarily modified and thus does not violate or circumvent the requirements of section 502(a). This approach may, however, conflict with the provisions of 40 CFR 70.6(a)(1)(iii), which provides for the creation of alternatives to SIP emission limits via the title V permit revision process. This section appears to limit the opportunities for such flexibility to situations in which the applicable implementation plan allows for it and in which the alternative limit is equivalent to that contained in the plan. EPA solicits comment on this issue. See also ''White Paper Number 2 for Improved Implementation of the part 70 Operating Permits Program, Attachment B,'' March 5, 1996.

Second, the commenters argue that because section 502(a) provides EPA with discretion to exempt certain nonmajor sources from the title V program entirely, but prohibits EPA from doing so for major sources, EPA is prohibited from approving the AOC process for major sources. However, Rule 518.2 does not in any way exempt major sources from the title V program. Rather, it provides a process for temporarily revising an applicable requirement and the related title V permit conditions. The source remains subject to title V and must comply with the conditions of the AOC and all remaining conditions of the Title V permit.

B. Compliance With Section 193 of the Act

In its 1998 FR document proposing to approve Rule 518.2, EPA solicited comment on whether allowing relaxations to pre-1990 rules [2] would violate the requirements of section 193 of the CAA, which prohibits the modification of any control requirement in effect before November 15, 1990 in an area which is a nonattainment area for any air pollutant, unless the modification ensures equivalent or greater emission reductions of such air pollutants. EPA noted that offsetting excess emissions from variances with the Rule 518.2 bank does not ensure equivalent emission reductions because the bank is ''funded'' with excess emissions included in the inventory rather than from real reductions.

Under the *de minimis* rule established by the D.C. Circuit in Alabama Power, unless Congress has been extraordinarily rigid, EPA may provide exemptions when the burdens of regulations yield a gain of trivial or no value. In its 518.2 proposal EPA noted that the language of section 193 and the legislative history associated with section 193 appear to be quite rigid and expressed concern that application of the *de minimis* exemption under Alabama Power might not be appropriate. EPA has considered the comments submitted and has concluded that the *de minimis* rule does not apply in this situation.

Does the *de minimis* Rule Apply to Section 193?

One commenter wrote that section 193 is clear on its face and that no backsliding from pre-1990 requirements is allowable. The commenter noted that the language in section 193 is very straightforward and rigid, and that any attempt to discount variances from pre-1990 requirements as *''de minimis''* is contrary to the Act and to case law interpreting it. The commenter concluded that Rule 518.2 does not comply with section 193.

After further consideration of this issue, EPA believes that the language of 193 is in fact ''extraordinarily rigid'' in its requirement to provide equivalent or greater emission reductions to offset relaxations to pre-1990 rules. The *de minimis* rationale for approving relaxations to pre-1990 rules is therefore unavailable.

Two commenters wrote in support of interpreting section 193 as not being ''extraordinarily rigid'' and therefore allowing a *de minimis* exemption to pre-1990 requirements. One of these commenters went on to state that section 193 is an ambiguous statute and that EPA could easily support an interpretation that allows a *de minimis* exemption from the emissions at issue under rule 518.2.

EPA believes that section 193 unambiguously requires any relaxations to control requirements or plans in effect prior to enactment of the CAA amendments of 1990 to be offset by equivalent or greater emission reductions. The clarity of the statutory language supported by the legislative history [3] evidences intent by Congress that relaxations to pre-1990 requirements should occur only where compensating strengthenings will result in no increase in emissions.

Does Rule 518.2 Relax pre-1990 Standards?

In the **Federal Register** document proposing approval of Rule 518.2, EPA

[2] By ''pre-1990 rules'' we mean rules in effect before November 15, 1990, the date of the enactment of the Clean Air Act Amendments of 1990.

[3] The Report on the House Energy and Commerce Committee on the 1990 Clean Air Act Amendments noted that the ''anti-backsliding'' language in section 193 ''prohibits the relaxation of control requirements currently in effect or required to be adopted. * * * Although many nonattainment areas are allotted additional years before they must attain ambient air quality standards under these amendments, all areas must continue to use pollution control measures already put in place, as well as those additional measures required under this Act, in order to assure attainment as expeditiously as practical.''

stated that it believes ''inclusion of pre-1990 rules in Rule 518.2 is justified because the variance bank is so small that any excused emissions would essentially be insignificant such that, in effect, no relaxation has occurred.'' Four commenters concurred with that statement, but others asserted that the statement was tantamount to saying those emissions increases are *de minimis.* EPA has reconsidered this issue and has concluded that it is not possible to draw a meaningful distinction between *de minimis* and insignificant in the context of this rule. EPA disagrees with the premise that Rule 518.2 will not relax rules. Alternative operating conditions issued under 518.2 do in fact modify the underlying requirement. The issuance of a variance, or in the case of 518.2, an AOC, temporarily allows a source to operate under a different set of requirements. For that particular source, the control requirement has been modified, regardless of the size of the emissions change allowed by the AOC.

Does the Emissions Bank in 518.2 Prevent Backsliding?

Three commenters argued that the inclusion of an excess emissions credit bank would ensure that any temporary emissions increases allowed under 518.2 would be offset, and that therefore, the anti-backsliding provisions of section 193 would not be violated. Because of the nature of the bank, EPA must disagree with this comment. Offsetting excess emissions from variances with the Rule 518.2 bank does not ensure equivalent emission reductions because that bank is ''funded'' with excess emissions included in the inventory rather than from real reductions.

Does 518.2 Modify or Relax Underlying Requirements?

Two commenters stated that Rule 518.2 would not delete any control measures that were already in place or scheduled to be put in place at the time of the 1990 CAA amendments. They argued that although Rule 518.2 provides federal recognition of temporary AOCs, the underlying control measures would stay in place and no modification or relaxation of those measures would occur.

EPA notes that the deletion of control measures is not at issue here: section 193 addresses the relaxation of pre-1990 control measures. The premise of Rule 518.2 is that it temporarily modifies a requirement with which a source is out of compliance by creating an alternative, less stringent set of conditions with which the source will comply. This will result in an increase of emissions beyond those allowed under the applicable requirement. Further, for the duration of the AOC, the underlying requirement is not enforceable against the source. This amounts to a relaxation.

Can EPA Provide *de minimis* Exemptions to pre-1990 Control Requirements?

Two commenters said that the EPA had authority before and after November 15, 1990 to recognize *de minimis* exceptions to pre-1990 requirements and that this authority was and is an integral part of each control requirement in effect on November 15, 1990. EPA disagrees with the premise that its authority to provide *de minimis* exemptions was or is an integral part of state or district adopted control requirements. Under Alabama Power, EPA may, under certain circumstances, approve control requirements that provide *de minimis* exemptions. EPA does not, however, agree that noncompliance with adopted control requirements can be overlooked because the violation resulted in relatively low excess emissions.

Can EPA Approve Variances From Control Requirements on a Case-by-Case-Basis?

Two commenters noted that EPA could approve a variance from a control requirement as a SIP revision on a case-by-case basis before 1990, and still can. One of those commenters also said that CAA section 193 does not prevent the recognition by EPA of variances from pre-1990 requirements.

EPA believes that if the appropriate procedural and substantive requirements [4] are met, including a demonstration that relaxations to pre-1990 rules will be offset by equivalent or greater emissions reductions, it can approve such variances. As discussed in this notice, Rule 518.2 does not fully meet these requirements. EPA is therefore proposing to disapprove it.

Are Variances an Integral Part of the Pre-1990 Rules?

Several commenters noted that SCAQMD's variance rules were in the SIP in 1990. Two of those commenters said that variances were an integral part of the pre-1990 SIP rules relating to the SCAQMD.

EPA acknowledges that variance rules were approved into the SIP in error. EPA has corrected this error by removing them. The fact that these rules were in the SIP is irrelevant and would not be recognized under section 193. Under *Train,* a variance would have to be submitted to EPA as an individual SIP revision to be effective. *See Train* v. *NRDC,* 421 U.S. 60 (1975).

Does the Anti-Backsliding Language of Section 193 Apply to Short-Term Variances?

EPA received comment from one party that the ''anti-backsliding'' language of section 193 was not intended to prevent short-term, carefully controlled issuance of alternative operating requirement, such as those contemplated by rule 518.2.

EPA believes the language of section 193 is very clear and that it does not allow for relaxations to pre-1990 rules without equivalent or greater emission reductions. There is no evidence that Congress intended to exempt alternative operating conditions from this statutory provision. Any AOCs that would relax pre-1990 rules are subject to section 193.

Would the Failure To Allow a *de minimis* Exemption Be Contrary to the Primary Legislative Goal of Section 193?

One commenter stated that the literal meaning of section 193 need not be followed where failure to allow a *de minimis* exemption is contrary to the primary legislative goal. The commenter said that the purpose of section 193 is to prevent backsliding in a manner that will interfere with attainment or rate of progress in reducing emissions and that the carefully circumscribed provisions of rule 518.2 will not have any negative air quality impact.

EPA does not believe that the literal meaning of section 193 is contrary to its primary legislative goal. The purpose of section 193 is to prevent backsliding and it sets out the means to do so: By requiring relaxations to pre-1990 control measures to be offset by equivalent or greater emission reductions.

Has EPA Previously Approved *de minimis* Exemptions of Much Greater Impact?

EPA received one comment that case law and U.S. EPA policy indicate that the magnitude of excess emission previously excused by the *de minimis* exemption is much greater than the variance emissions allowed under Rule 518.2. This commenter went on to say that U.S. EPA itself has utilized the *de minimis* exemption to allow ''nonmajor'' sources to avoid substantial CAA requirements such as conformity and new source review requirements.

[4] For a complete discussion of the procedural and substantive requirements that apply to EPA approval of relaxations to the SIP, see EPA's proposed approval of Rule 518.2. (63 FR 51325, September 25, 1998).

As noted previously, because section 193 is rigid, the *de minimis* rule under Alabama Power cannot be applied to this situation; therefore, other cases where EPA has applied the *de minimis* rule are not relevant.

Do the Reductions Required Under Section 193 Need To Come From Sources Regulated by the Same Rule From Which the AOC Is Being Sought?

EPA received comment from one party regarding the source of emission reductions used to offset any increases allowed under Rule 518.2. This commenter noted that, while some of the emission reductions will likely come from different sources than would occur (sic) under the rules under which the alternative operating condition is sought, this is also true of market trading programs. The commenter said that EPA has already approved market trading programs, such as RECLAIM, without insisting that emissions at each facility remain below levels authorized in 1990 and urged EPA to interpret section 193 similarly in this case.

EPA finds this comment unclear. We have interpreted the comment to address the requirement under section 193 that any modification that would relax a pre-1990 control requirement, settlement agreement, or plan must provide for equivalent emission reductions. Specifically, it appears that the commenter is arguing that the offsetting reductions need not come from a strengthening of the same control requirement that the AOC will modify. The comment also seems to imply that the emission bank established in Rule 518.2 is funded with real reductions, however, this is not the case.

EPA believes that the correct interpretation of section 193 is that, overall, the SIP must be strengthened so that increased emissions that result from any relaxations to pre-1990 requirements will be offset by decreases from modifications to other parts of the SIP. Because the statute prohibits modifications to pre-1990 requirements unless the modification ensures equivalent emissions reductions, the compensating reductions must be contemporaneous with the relaxation. If the district still wants rules enacted prior to 1990 to be a part of this program, we believe that the rule could be amended to cure this problem by funding the emissions bank with real emission reductions. EPA solicits comment on this proposal.

C. Criteria for Granting AOCs

EPA received comments opposing approval of the California Health and Safety Code standards for granting variances as the basis for approving AOCs under Rule 518.2. These standards, which are incorporated into Rule 518.2(e)(2), are as follows:

- The petitioner is or will be in violation of any applicable requirement(s) listed in paragraph (c)(1) of this rule;
- Due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either (1) an arbitrary or unreasonable taking of property or (2) the practical closing and elimination of a lawful business. In making those findings pursuant to paragraph (4) where the petitioner is a public agency, the Hearing Board shall consider whether or not requiring immediate compliance would impose an unreasonable burden upon an essential public service. For purposes of this subparagraph, ''essential public service'' means a prison, detention facility, police or fire-fighting facility, school, health care facility, landfill gas control or processing facility, sewage treatment works, or water delivery operation, if owned and operated by a public agency;
- The closing or taking would be without a corresponding benefit in reducing air contaminants;
- The petitioner for the Alternative Operating Condition has given consideration to curtailing operations of the source in lieu of obtaining an Alternative Operating Condition;
- During the period the Alternative Operating Condition is in effect, the petitioner will reduce excess emissions to the maximum extent feasible;
- During the period the Alternative Operating Condition is in effect, the petitioner will monitor or otherwise quantify emission levels from the source, and report these emission levels to the District pursuant to a schedule established by the District;
- The Alternative Operating Condition will not result in noncompliance with the requirements of any NSPS, NESHAP;
- Or other standard promulgated by the U.S. EPA under sections 111 or 112 of the Clean Air Act, or any standard or requirement promulgated by the U.S. EPA under Titles IV or VI of the Clean Air Act, or any requirement contained in a permit issued by the U.S. EPA, or other requirement contained in paragraph (c)(2); and
- Any emissions (calculated pursuant to subparagraph (h)(3)(B) of this rule) resulting from the Alternative Operating Condition will not, in conjunction with emissions (calculated pursuant to subparagraph (h)(3)(B)) resulting from all other Alternative Operating Conditions established by the Hearing Board and in effect at the time, cause an exceedance of the monthly or annual SIP Allowance established pursuant to subdivision (i) of this rule.

The commenters argue that these criteria are too vague, grant unfettered discretion to the district hearing board, and inappropriately focus on economic considerations. In addition, they argue, in practice these standards have failed to protect public health and to limit emissions growth.

We believe that these comments are well-taken. Section 110(a)(1) of the Act requires SIPs to provide for attainment and maintenance of the national ambient air quality standards (NAAQS). Because the NAAQS are health and welfare-based standards, Congress intended that they must be met continuously, not just intermittently. Accordingly, section 110(a)(2) of the Act requires SIPs to contain enforceable emission limitations, and section 302(k) of the Act defines ''emission limitations'' as a requirement ''which limits the quantity, rate, or concentration of emissions of air pollutants on a *continuous basis*'' (emphasis added).

EPA explained its interpretation of the term ''continuous compliance'' in a June 21, 1982 memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, to the Regional Air Division Directors. That guidance states that ''continuous compliance is essentially the avoidance of preventable excess emissions over time as a result of the proper design, operation, and maintenance of an air pollution source.'' The guidance also emphasizes that excess emissions resulting from malfunctions or other emergency situations must be minimized and terminated quickly.

On September 28, 1982, February 15, 1983, and September 20, 1999, EPA issued policy statements regarding the treatment of excess emissions arising during startup, shutdown, and malfunction. These memoranda are based on EPA's interpretation of the Act's requirements for continuous compliance and attainment and maintenance of the NAAQS.[5] These

[5] See September 28, 1982 and February 15, 1983 memorandums, both entitled ''Policy on Excess Emissions During Startup, Shutdown, and Malfunctions,'' from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, to the Regional Administrators and September 20, 1999 memorandum entitled ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' from Steven A. Herman, Assistant Administrator for Enforcement and Compliance and Robert Perciasepe, Assistant Administrator for Air and Radiation, to the Regional Administrators.

policies indicate that all excess emissions must be considered violations, although they clarify that SIPs may contain affirmative defenses that may excuse, under certain limited, unavoidable circumstances, the payment of civil penalties.

These policy statements are consistent with EPA's view that SIP limits must be met continuously because they are intended to protect the NAAQS; any exceptions should be narrowly drawn and clearly place the burden on the source to demonstrate that an exceedance was unavoidable. In responding to petitioner's comments, we have reevaluated the AOC criteria and have concluded that they are inconsistent with the requirements for SIPs in section 110 of the Act regarding enforceability and continuous compliance. For this reason, we agree that the criteria for granting AOCs in section 518.2(e)(2) must be revised before the rule can be approved.

Currently, the criteria in section 518.2(e)(2) provide that if, for reasons beyond the control of the petitioner, it would cause ''an arbitrary or unreasonable taking of property'' for the source to come into compliance, then the source should be able to obtain a variance. The criteria do not focus on the cause of the noncompliance. The lack of focus on the cause of noncompliance is a critical flaw because, given the words of the criteria, a variance can be granted even if the petitioner could have avoided the noncompliance in the first place.

This lack of focus in the criteria on the cause of the violation is problematic because variances are, by their very nature, allowed periods of noncompliance, or in other words, exceptions to the continuous compliance requirement imposed by the statute on emission limitations. EPA has recognized that it is appropriate to interpret this requirement to allow sources not to be penalized when periods of noncompliance are caused by unavoidable circumstances, but beyond that, exceptions to the continuous compliance requirement are not allowed. Therefore, in order for Rule 518.2 to comport with the continuous compliance requirement, it must ensure that AOC's are only granted when the underlying cause of the violation is unavoidable. EPA's September 20, 1999 policy on excess emissions provides helpful guidance on the precise provisions that should be added to Rule 518.2 to make it approvable.

The changes suggested above will correct what EPA sees as a flaw in the South Coast's variance program. Under the variance program, the District can excuse a violation based on the adverse consequences that a source might suffer it had to come into compliance. Given the statute's mandate that emission limitations provide for continuous compliance, EPA addresses this issue of economic inability to comply in other ways.

EPA has stated many times in several of its enforcement policy documents that it believes in enforcement responses that are commensurate with the seriousness of violations. In short, punishment should fit the crime. Minor violations might be addressed with a Notice of Violation, while more serious violations might be subject to civil or even criminal enforcement. Second, the focus of EPA's enforcement policies over the years has been returning sources to compliance as expeditiously as practicable, not shutting down companies.[6]

At the same time, EPA does not let companies in violation of environmental laws completely off the hook just because immediate compliance might cause a financial hardship. Rather, when EPA has taken action against financially troubled companies, it has required them to come into compliance in accordance with a set schedule laid out in a consent decree and required them to pay a penalty they can afford, if appropriate.

D. Compliance and Enforcement

EPA received comments expressing concerns that Rule 518.2 would have adverse effects on enforcement, both by government entities and citizens, and that the rule might act as a disincentive to voluntary compliance. We believe these concerns would be addressed by the changes necessary for approval outlined elsewhere in this document.

E. Title III

One commenter pointed out that, on its face, Rule 518.2(c)(2) does not prohibit the issuance of AOCs from title III requirements in situations where EPA has deemed a state or local rule to be equivalent to the federal requirements. While we believe that the intent of the rule is to include these requirements in the list of exemptions from applicability, we agree that the language is unclear and must be revised.

[6] *See* Price, Courtney M., Assistant Administrator for Enforcement and Compliance Monitoring, Memorandum (Subject: Clean Air Act Enforcement Policy Respecting Sources Complying By Shutdown) Nov. 27, 1985) (''EPA has consistently interpreted the Act as requiring compliance as expeditiously as practicable.'').

F. Environmental Justice

One commenter opposes approval of Rule 518.2 on the basis that it would violate Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.'' The commenter argues that communities of color and low income communities in the South Coast are disproportionately impacted by existing sources of air pollution, and by allowing existing sources to emit air pollutants in excess of their permitted levels, Rule 518.2 will have disproportionate impacts on these communities.

In the context of a workgroup drafting a version of Rule 518.2 to apply statewide, CARB has suggested addressing this issue by incorporating language based California Health and Safety Code section 41700. This language would provide that no AOC shall be granted if:

> operation under the AOC will result in the source discharging such quantities of air contaminants or other material which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or which endanger the comfort, repose, health, or safety of any such persons or the public, or which cause, or have a natural tendency to cause, injury or damage to business or property.

We believe that this language, incorporated into Rule 518.2, would address the commenter's concerns.

In conclusion, rules submitted to EPA for approval as revisions to the SIP must conform with the CAA and EPA policy in order to be approved by EPA. As described above, SCAQMD Rule 518.2 is deficient because it is inconsistent with sections 110(a)(2), 110(l), 302(k), and 193 of the CAA. Because of the identified deficiencies, EPA cannot grant approval of SCAQMD Rule 518.2 under section 110(k)(3) and part D. Therefore, in order to maintain the SIP, EPA is proposing a disapproval of this rule.

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

IV. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory

action from Executive Order 12866, Regulatory Planning and Review.

B. Executive Order 13132

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 proposed action 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 (64 FR 43255, August 10, 1999), because it does not affect state enforceability, 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.

C. Executive Order 13045

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 is does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.'' Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. 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 proposed rule will not have a significant impact on a substantial number of small entities because 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).

F. 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 annual 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 disapproval action being proposed does not include a Federal mandate that may result in estimated annual costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This proposed disapproval would not change existing requirements under State or local law, and would include no Federal mandate. If EPA were to disapprove the State SIP submittal, pre-existing requirements would remain in place and State enforceability of the submittal would be unaffected. The action would impose no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: December 10, 1999.

David P. Howekamp,

Acting Regional Administrator, Region IX.

[FR Doc. 99–32762 Filed 12–16–99; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. NJ41–206, FRL–6509–5]

Approval and Promulgation of Implementation Plans; New Jersey; Motor Vehicle Inspection and Maintenance Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to find that the State of New Jersey will have implemented the enhanced inspection and maintenance (I/M) program when mandatory testing begins on December 13, 1999 and to reinstate the interim approval granted under section 348 of the National Highway Systems Designation Act (NHSDA). Due to New Jersey's delays in starting the enhanced I/M program, EPA notified New Jersey by a December 12, 1997 letter that the sanctions clock was started for failure to implement the enhanced I/M program. The offset sanction began in New Jersey on June 14, 1999. The highway sanction would begin six months thereafter if New Jersey did not implement the program. This action is proposing to reinstate the interim approval and to stop the sanctions clock and lift any sanctions applied in New Jersey.

DATES: Comments must be received on or before January 18, 2000, and will be considered before taking final action.

ADDRESSES: All comments should be addressed to Raymond Werner, Acting Branch Chief, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866.

Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations: Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866 and New Jersey Department of Environmental Protection, Bureau of Air Quality Planning, 401 East State Street, CN418, Trenton, New Jersey 08625.

FOR FURTHER INFORMATION CONTACT: Judy-Ann Mitchell, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–4249.

SUPPLEMENTARY INFORMATION:

I. Background

New Jersey submitted changes to the existing I/M program on March 27, 1996 to satisfy the applicable requirements of both the Clean Air Act (CAA) and the National Highway System Designation Act (NHSDA). On October 31, 1996 (61 FR 56172), EPA published a notice of proposed conditional interim approval of New Jersey's enhanced I/M program. On May 14, 1997 (62 FR 26401), EPA published a final conditional interim approval of New Jersey's enhanced I/M program which began the 18-month interim period under section 348 of the NHSDA.

Due to New Jersey's delays in starting the enhanced I/M program, EPA notified New Jersey by a December 12, 1997 letter that the sanctions clock was started for failure to implement the enhanced I/M program, in accordance with section 179(a)(4) of the Act. The offset sanction began in New Jersey on June 14, 1999. The highway sanction would begin six months thereafter.

Additionally, on November 4, 1998, EPA informed New Jersey that the December 12, 1997 letter tolled the interim approval period for the State. Since approximately six months of the interim period had passed, the State will have the remaining 12 months of the interim approval period to demonstrate their I/M program's effectiveness.

II. Proposed Action

EPA is proposing to find that the State of New Jersey implemented the enhanced I/M program when mandatory testing begins on December 13, 1999 and to reinstate the interim approval granted under section 348 of the NHSDA. Elsewhere in this **Federal Register**, EPA is announcing an interim final determination that the sanctions have been stayed and deferred because the State will have more likely than not started up the approved I/M program. Implementing the program on a mandatory basis cures the deficiency cited in the December 12, 1997 letter. EPA is now proposing to find that the deficiency was corrected and proposing to make a finding that the State is implementing the I/M SIP and EPA is reinstating the interim approval granted under section 348 of the NHSDA. This will result in stopping the sanctions that were announced on December 12, 1997.

On November 19, 1999, New Jersey notified EPA by letter that the mandatory enhanced I/M program will be implemented on December 13, 1999. EPA has been working closely with the State during the phase-in period of the enhanced I/M program and agrees that the State will have the program implemented on December 13, 1999. If comments are received which cause EPA to conclude that the enhanced I/M program has not been implemented, EPA will not proceed with the final rulemaking and will withdraw the interim final rule finding that the state has more likely than not implemented the program. In such event, the sanctions will be immediately reinstated via a letter and a **Federal Register** notice.

III. Administrative Requirements

A. Executive Order 12866

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

B. Executive Order 13132

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