contained in any of the voluntary national model codes acceptable upon review by RHS.''

■ B. Revising the third sentence in the definition for ''Replacement housing'' to read ''The overall condition of the unit or dwelling must meet Thermal Standards adopted by the locality/jurisdiction for new or existing structures and applicable development standards for new or existing housing recognized by RHS in subpart A of part 1924 or standards contained in any of the voluntary national model codes acceptable upon review by RHS.''

PART 3550—DIRECT SINGLE FAMLY HOUSING LOANS AND GRANTS

■ 5. The authority citation for part 3550 continues to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C. 1480.

Subpart B—Section 502 Origination

§ 3550.57 [Amended]

■ 6. Section 3550.57(c) is amended by adding the word ''and'' after the word ''systems;'' and by removing ''and meet the thermal performance requirements for existing dwellings of 7 CFR part 1924, subpart A''.

Subpart C—Section 504 Origination and Section 306C Water and Waste Disposal Grants

§ 3550.106 [Amended]

■ 7. Section 3550.106(b) is amended by removing the words ''or thermal performance standards''.

Dated: November 28, 2007.

Russell T. Davis,

Administrator, Rural Housing Service.

[FR Doc. 07–6009 Filed 12–10–07; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 68

Provision of Free Public Education for Eligible Children Pursuant to Section 6, Public Law 81–874

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of Defense is removing 32 CFR Part 68, ''Provision of Free Public Education for Eligible Children Pursuant to Section 6, Public Law 81–874.'' The part has served the purpose for which it was intended and is no longer valid.

DATES: *Effective Date:* December 11, 2007.

FOR FURTHER INFORMATION CONTACT: L.M. Bynum, 703–696–4970.

SUPPLEMENTARY INFORMATION: DoD Directive 1342.16 was originally codified as 32 CFR Part 68. This Directive was canceled by DoD Directive 1342.20. Copies of DoD Directive 1342.20 may be obtained at *http://www.dtic.mil/whs/directives/.*

List of Subject in 32 CFR Part 68

Elementary and secondary education, Government employees, Military personnel.

■ Accordingly, by the authority of 10 U.S.C. 301, title 32 of the Code of Federal Regulations is amended by removing part 68:

PART 68—[REMOVED]

Dated: December 5, 2007.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, DoD.

[FR Doc. 07–6006 Filed 12–10–07; 8:45 am]

BILLING CODE 5001–06–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R09–OAR–2005–CA–0017; FRL–8504–2]

Finding of Failure To Attain; California—Imperial Valley Nonattainment Area; PM–10

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finding that the Imperial Valley serious PM–10 nonattainment area did not attain the 24-hour particulate matter (PM–10) National Ambient Air Quality Standard (NAAQS) by the deadline mandated in the Clean Air Act (CAA), December 31, 2001. In response to this finding, the State of California must submit a revision to the California State Implementation Plan (SIP) that provides for attainment of the PM–10 standard in the Imperial Valley area and at least five percent annual reductions in PM–10 or PM–10 precursor emissions until attainment as required by CAA section 189(d). The State must submit the SIP revision by December 11, 2008.

DATES: *Effective Date:* This finding is effective on January 10, 2008.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2006–0583 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901. While documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Adrienne Priselac, EPA Region IX, (415) 972–3285, *priselac.adrienne@epa.gov*.

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

I. Background

On August 11, 2004, EPA reclassified under the Clean Air Act (CAA or the Act) the Imperial Valley PM–10 nonattainment area (Imperial area) from moderate to serious in response to the opinion of the U.S. Court of Appeals for the Ninth Circuit in *Sierra Club* v. *United States Environmental Protection Agency, et al.*, 346 F.3d 955 (9th Cir. 2003), amended 352 F.3d 1186, *cert. denied,* 542 U.S. 919 (2004). See 69 FR 48792 (August 11, 2004).

Also on August 11, 2004 (69 FR 48835), EPA proposed to find under the CAA that the Imperial area failed to attain the annual [1] and 24-hour PM–10 standards by the serious area deadline of December 31, 2001. Our proposed finding of failure to attain was based on monitored air quality data for the PM–10 NAAQS from January 1999 through December 2001. A summary of these data was provided in the proposed rule and is not reproduced here.

EPA has the responsibility, pursuant to sections 179(c) and 188(b)(2) of the Act, of determining within 6 months of the applicable attainment date (i.e., June 30, 2002), whether the Imperial area attained the PM–10 NAAQS. Because the June 30, 2002 date has passed, EPA is required to make that determination as soon as practicable. *Delaney* v. *EPA*, 898 F.2d 687 (9th Cir. 1990).

Section 179(c)(1) of the Act provides that attainment determinations are to be based upon an area's ''air quality as of

[1] Effective December 18, 2006, EPA revoked the annual PM–10 standard. 71 FR 61144 (October 17, 2006). References to the annual standard in this proposed rule are for historical purposes only. EPA is not taking any regulatory action with regard to this former standard.

the attainment date,'' and section 188(b)(2), which is specific to PM–10, is consistent with that requirement. EPA determines whether an area's air quality is meeting the PM–10 NAAQS based upon air quality data gathered at monitoring sites in the nonattainment area and entered into EPA's Air Quality System (AQS) database. These data are reviewed to determine the area's air quality status in accordance with EPA regulations at 40 CFR part 50, appendix K.[2] For details about EPA's proposed failure to attain finding, please see the proposed rule.

II. EPA's Responses to Comments on the Proposed Rule

EPA received eight comment letters on the proposed finding. Summaries of the comments and EPA's responses are set forth below.

1. Retroactive Finding of Failure To Attain Is Unlawful

The Imperial County Air Pollution Control District (District or ICAPCD) claimed that EPA's proposed finding that the Imperial area failed to attain the serious area deadline of December 31, 2001, issued the same day as the reclassification of the area from moderate to serious, constitutes an unlawful and unjust retroactive rulemaking in that the area would be at once reclassified and punished for failing to meet the requirements of the new classification. The District strongly urged EPA to refrain from finalizing any rule that makes a nonattainment finding under these circumstances.

In support of its position that this type of rulemaking is illegal under the Administrative Procedure Act (APA), the District cited a number of federal court decisions and EPA rulemakings. The District believes that these decisions and rulemakings support its position that the nonattainment finding could create liabilities and penalties for missing long past deadlines associated with serious nonattainment areas and/or impose more rigorous requirements than would otherwise be justified, e.g., the requirement under CAA section 189(d) to submit a revised plan in 12 months rather than the 18 months allowed under section 189(b)(2) when a moderate area fails to meet its attainment deadline.

Response: At bottom, the argument that the District makes is that if the Imperial area had been reclassified as the CAA envisioned, the area would not now be subject to the requirements of section 189(d). In other words, EPA would have found that the area failed to attain the moderate area deadline of December 31, 1994 well before the serious area deadline of December 31, 2001. Consequently, the serious area plan for the Imperial area would have been due 18 months from the reclassification pursuant to section 189(b)(2) instead of being subject to the 12-month deadline in section 189(d). Furthermore, the argument goes, if the State had been able to demonstrate that attainment by 2001 was impracticable the area would have been able to avail itself of the attainment date extension provisions of section 188(e),[3] thereby potentially avoiding both the substantive and procedural requirements of section 189(d) entirely. Instead, the District argues, EPA's action has illegally circumvented the statutory scheme by precluding the area from taking advantage of allegedly more lenient submittal and substantive requirements.

The cases and EPA actions cited by the District, however, do not support its position. With respect to the Imperial PM–10 nonattainment area, EPA reclassified it from moderate to serious and immediately proposed to find that the area had failed to attain the serious area deadline. The result of these actions is that the State will be required to submit in the future a plan for the area under CAA section 189(d). In contrast, in *Sierra Club* v. *EPA*, 356 F.3d 296 (D.C. Cir. 2004), EPA set a prospective submittal date pursuant to CAA section 182(i) upon reclassification of the Washington, D.C. ozone nonattainment area from serious to severe because the severe area plan submittal deadline in the CAA had already passed. Similarly, in several other ozone reclassification actions, EPA also determined that where a submittal date had passed and was therefore impossible to meet, the Agency could administratively establish a later date. EPA's reasoning in these cases was that to do otherwise would have subjected these areas to an immediate finding of failure to submit and the immediate initiation of sanctions clocks.[4]

In the case of Washington, DC, EPA stated in its final rule that ''the Administrative Procedure Act * * * requires that before a rule takes effect, persons affected will have advance notification of its requirements. A failure to meet an obligation, especially one accompanied by sanctions, cannot occur in advance of the imposition of that obligation.'' 68 FR at 3414. The Court of Appeals agreed, quoting EPA, ''that adopting petitioner's suggestion [that EPA retain the original submittal deadlines] 'would give the reclassification retroactive effect by holding the States in default of their submission obligations before the events necessary to trigger that obligation (reclassification) * * * occurred.' '' 356 F.3d at 309.

In *Sierra Club* v. *Whitman*, 130 F.Supp. 2d. 78 (D.D.C. 2001), cited by the D.C. Circuit in *Sierra Club* v. *EPA* above and the District in its comment letter, and affirmed in *Sierra Club* v. *Whitman*, 285 F.3d 63, 68 (D.C. Cir 2002), the plaintiffs sought to compel EPA to backdate a nonattainment determination to the date on which the Agency was statutorily required to make such a determination. In affirming the District Court's denial of the relief sought, the D.C. Circuit opined that:

> Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club's proposed solution only makes the matter worse. Retroactive relief would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plans in 1997, even though they were not on notice at the time.

Id. at 68.[5]

In the instant case, however, by giving the State the benefit of a future plan submittal deadline for the Imperial area, EPA's action is consistent with the holdings of the cases and with the EPA regulatory actions cited by the District.

[2] Pursuant to appendix K, attainment of the 24-hour PM–10 NAAQS is achieved when the expected number of exceedances of the 24-hour NAAQS (150 mg/m^3) per year at each monitoring site is less than or equal to one. A total of three consecutive years of clean air quality data is generally necessary to show attainment of the 24-hour standard for PM–10. A complete year of air quality data, as referred to in 40 CFR part 50, appendix K, is comprised of all four calendar quarters with each quarter containing data from at least 75 percent of the scheduled sampling days.

[3] Section 188(e) provides for a one-time extension of the attainment deadline for serious PM–10 nonattainment areas if certain conditions are met. However such an extension cannot extend beyond December 31, 2006. Because that date has now passed, a section 188(e) extension for the Imperial area is unavailable under any circumstances. Nevertheless we address in this final rule the comments we received relating to section 188(e) insofar as doing so enables us to fully respond to those comments. For example, here a discussion of section 188(e) is relevant to the District's claim, among others, that EPA's action subjects the area to more stringent requirements than otherwise would have been imposed.

[4] See Washington, DC, 68 FR 3410, 3413 (January 24, 2003). See also Santa Barbara, California, 62 FR 65025 (December 10, 1997); Phoenix, Arizona, 62 FR 60001 (November 6, 1997); and Dallas-Fort Worth, Texas, 63 FR 8128 (February 18, 1998).

[5] The District also cites *Georgetown University Hospital* v. *Bowen* in which a federal agency reissued a procedurally defective rule and gave it retroactive effect. Both the D.C. Circuit and the U.S. Supreme Court invalidated the action, finding, among other things, that under the APA legislative rules must be given future effect only. 821 F.2d 759 (D.C. Cir. 1987); 488 U.S. 204 (1988).

Under section 189(d), the State must submit a plan revision for the Imperial area ''within 12 months after the applicable attainment date. * * *'' That date was December 31, 2002. However, because, at the time of EPA's proposed finding of failure to attain, that date had already passed, EPA proposed that the section 189(d) plan revision be due ''within one year of publication of a final finding of nonattainment pursuant to CAA section 179(d).'' 69 FR at 48837. Thus, rather than invoking the long past submittal deadline in section 189(d), EPA looked to another provision of the Act to supply a prospective deadline. In doing so, EPA alleviated the problem of imposing a retroactive deadline without imposing immediate sanctions.

While it is true, as the District points out, that a serious PM–10 area proceeding initially under section 189(b) instead of section 189(d) would in theory have had more time to submit a plan (18 rather than 12 months), in both instances the submittal deadlines are prospective and not retroactive. Furthermore, as we point out in our response to comment #3 below, the section 189(d) plan that the State is now required to submit is actually due later than the serious area plan would have been due under the scenario preferred by the District. Therefore, the retroactive penalty the District complains of with respect to the plan submittal deadline simply does not exist.

Moreover, while it is also true that, as a result of EPA's nonattainment finding, the Imperial area must comply with the substantive requirements of CAA section 189(d) instead of those of section 188(e), this consequence cannot be construed as ''punishment.'' Under both sections 189(d) and 188(e), implementation of best available control measures (BACM) under section 189(b)(1) and attainment of the PM–10 standards as expeditiously as practicable are required. In addition, while the respective substantive requirements of sections 188(e) and 189(d) are different, neither are necessarily more onerous than the other. See Corrected Brief of Respondent EPA, pages 40–42, in *Association of Irritated Residents, et al.* v. *EPA*, 423 F.3d 989 (9th Cir. 2005). Only if the State fails to submit the new plan in the future could sanctions come into play. Thus the substantive consequences here of EPA's nonattainment finding are not in fact retroactive, nor do they impose a penalty.

For the reasons discussed in its proposed finding, EPA is legally compelled to finalize the nonattainment finding with the result that section 189(d) applies to the Imperial area. The section 189(d) plan is due within one year of publication of this final finding of nonattainment.[6]

2. Waive the Attainment Date and Related Requirements

Several commenters suggested that instead of finding that the Imperial area failed to attain the serious area attainment date, EPA should waive that date and the related submittal requirements and penalties to reduce the burden of the Agency's action on Imperial County. While two commenters who suggested this approach did not describe EPA's legal authority to grant a waiver, one commenter, the District, cited CAA section 188(f) as providing EPA with the authority to waive a specific attainment date where the Agency determines that nonanthropogenic sources contribute significantly to violations in the area and to waive any requirement applicable to any serious PM–10 area where anthropogenic sources do not contribute significantly to violations. The District stated that in the Imperial area, dry soil from vast barren lands are entrained by high winds producing an impact on the monitors. The District asserted that EPA has determined that this type of dust raised by high wind events constitutes a nonanthropogenic source of PM–10 pursuant to section 188(f) and, citing a May 30, 1996 EPA memorandum, that monitoring data impacted by such events may be excluded from consideration in attainment decisions.

Response: Congress recognized in the Clean Air Act that there may be areas where the NAAQS may never be attained because of PM–10 emissions from nonanthropogenic sources, and that the imposition in such areas of certain state planning requirements may not be justified. Therefore, under section 188(f), Congress provided a means for EPA to waive a specific date for attainment and certain control and planning requirements when specified conditions are met in a nonattainment area. Section 188(f) provides two types of waivers. First, EPA may, on a case-by-case basis, waive any PM–10 nonattainment planning requirement applicable to any serious nonattainment area where EPA determines that anthropogenic sources of PM–10 do not contribute significantly to violation of the standards in the area. Second, EPA may waive a specific date for attainment of the standards where EPA determines that nonanthropogenic sources of PM–10 contribute significantly to the violation of the standards in the area.[7] In the Addendum, EPA set forth threshold levels for determining whether areas qualify for waivers under section 188(f). Addendum at 42004–42005.

In its comment letter, the District included and discussed a report[8] that it characterized as showing that windblown dust from barren lands represents over 92% or 792 tons per day (tpd) of the total PM–10 inventory in Imperial County. The District maintained that ''high winds frequently entrain large amounts of this dry soil into the ambient air, producing a documented impact on County monitors.'' As a result of comments provided to the District by EPA and the California Air Resources Board (CARB), the Windblown Dust Study was revised in 2005.[9] The Revised Study concluded, among other things, that there are 157 tpd of fugitive dust emissions from barren lands. Revised Study at A–15. The Windblown Dust Study and the Revised Study are primarily inventories of windblown dust emissions in Imperial County. These documents do not address the requirements of section 188(f) and EPA's guidance on that provision. Therefore they do not provide sufficient analysis and documentation to support a waiver of either the December 31, 2001 attainment deadline or any of the serious area requirements. However, the section 188(f) waivers, if the conditions for them can be met, are available to the State in the context of the section 189(d) serious area plan.[10]

The May 30, 1996 memorandum cited by the District is entitled ''Areas Affected by PM–10 Natural Events'' and

[6] Our rationale for this plan submittal deadline is discussed in the proposed rule. See at 69 FR at 48837.

[7] 59 FR 41998 (August 16, 1994) (''State Implementation Plans for Serious PM–10 Nonattainment Areas, and Attainment Date Waivers for PM–10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990'' (Addendum)).

[8] *Development of a Wind Blown Fugitive Dust Model and Inventory for Imperial County, California, ENVIRON International Corporation and Eastern Research Group,* 2004 (Wind Blown Dust Study).

[9] *Technical Memorandum: Latest Revisions of the Windblown Dust Study,* ENVIRON International Corporation, September 20, 2005 (Revised Study), attached as Appendix A to *Draft Final Technical Memorandum, Regulation VIII BACM Analysis,* ENVIRON, October 2005 (Regulation VIII BACM Analysis).

[10] With respect to the section 188(f) waiver of serious area requirements, EPA cautions that while the District in its comment appears to characterize the predominant issue in the Imperial area to be nonanthropogenic sources, the District has identified anthropogenic PM–10 source categories that contribute significantly to peak 24-hour average PM–10 values in the area. See Regulation VIII BACM Analysis.

is from Mary Nichols, Assistant Administrator for Air and Radiation to EPA Regional Division Directors (Natural Events Policy or NEP). This policy provides, among other things, that EPA believes it is appropriate to exclude air quality data attributable to uncontrollable natural events from the Agency's decisions regarding an area's attainment status. NEP at p. 2.[11] In the case of high winds, under the NEP EPA considers ambient PM–10 concentrations due to dust raised by unusually high winds as due to uncontrollable natural events (and thus excludable from attainment determinations) if either (1) the dust originated from nonanthropogenic sources or (2) the dust originated from anthropogenic sources controlled with BACM. NEP at pp. 4–5.

The NEP sets forth a process for declaring an exceedance as due to natural events and for documenting a natural events claim. NEP at pp. 7–10. Where a state believes that natural events caused the NAAQS exceedances it must establish through supporting documentation a clear causal relationship between the exceedance and the natural event. The amount and type of documentation must be sufficient to demonstrate that the natural event occurred and that it impacted a particular monitoring site in such a way as to cause the PM–10 concentrations measured. The documentation also should provide evidence that, absent the natural event emissions, concentrations at the monitoring site would not cause an exceedance.

Under the NEP, when air quality data affected by a natural event are submitted to EPA for inclusion into the AIRS database,[12] the state is to request that a flag be placed on the data to indicate that a natural event was involved. NEP at 8–9. A number of exceedances in 1999–2001 in the Imperial area were flagged as high wind and other natural events. Under the NEP, the documentation supporting a natural events flag was required to be submitted no later than 180 days from the time the exceedance occurred. However no documentation with respect to the 1999–2001 exceedances was submitted to EPA.[13] Because the State did not comply with the provisions of the NEP, the flagged 1999–2001 data cannot be excluded as affected by natural events from EPA's determination of whether the Imperial area attained the PM–10 standard by December 31, 2001.

3. EPA Should Grant a 5-Year Extension To Allow More Time To Develop Plan

Several commenters opposing our proposed action stated that our proposed time frame for the development and submittal of a serious area PM–10 plan, including a CAA section 189(d) plan, was too short, and that EPA should grant a 5-year extension of the attainment date for the Imperial area to provide time for preparation, submittal and consideration of an attainment demonstration. Of the commenters making this request, only the District cited any legal authority for a 5-year extension: ''* * * The District requests that EPA withdraw its proposed 12-month deadline for the County's serious area SIP submittal * * * and instead grant a five-year extension under Section 188(e) to allow sufficient time for preparation, submittal and consideration of the County's final PM–10 attainment demonstration.'' The District characterized the 12-month plan submittal schedule as ''abbreviated'' and as a ''penalty.'' One of the commenters suggesting the 5-year extension approach urged EPA to utilize our discretion under the CAA to extend the time allowed to prepare a plan so that unwarranted imposition of additional measures could be avoided.

Another commenter stated that although a preferable outcome would have been an extension of the attainment date, it was clear that no attainment date extension was in place, and thus, the finding of failure to attain by EPA was mandatory under the Clean Air Act with the one-year deadline for an attainment demonstration.

Response: CAA section 188(e) provides that, upon application by a state, EPA may extend the attainment deadline for a serious PM–10 nonattainment area no more than 5 years beyond, in this case, December 31, 2001, if: (a) Attainment by that date would be impracticable; (b) the state has complied with all requirements and commitments in the implementation plan for the area; and (c) the state demonstrates that the plan contains the most stringent measures (MSM) in the plan of any state or are achieved in practice in any state, and can feasibly be implemented in the area. The state must submit at the time of its extension application a demonstration of attainment by the most expeditious alternative date practicable.

As stated above, the Imperial area is no longer eligible for an attainment date extension under section 188(e) because that extension cannot extend beyond 2006. Regardless, the attainment date extension provided for in section 188(e) does not relate in any way to the submittal date for a serious area plan. Rather, under the Act, submittal dates for serious area PM–10 plans are initially governed by subpart 4 of part D of the CAA, i.e, either by section 189(b)(2) or 189(d). As explained in the proposed rule, EPA believes that section 189(d) applies to the Imperial area's situation. 69 FR at 48837. In the first instance, EPA looked to this provision, which applies exclusively to PM–10 nonattainment areas, for the applicable submittal date for the Imperial area's section 189(d) plan. Because the deadline for plan submittal under that section, December 31, 2002 has passed, EPA looked to subpart 1 of part D of the CAA in order to determine Congressional intent. Section 179(d) requires submittal of a plan revision within one year after EPA publishes a notice of a finding of failure to attain.

In case of the Imperial area, the application of the deadline provided for in section 179(d) has already resulted in a significantly longer time for submittal of the serious area plan than the deadline that would otherwise have applied. If the Imperial area had been reclassified to serious prior to the end of 2001, it would have been subject to section 189(b)(2). As such, the deadline for submittal of a serious area plan would be 18 months from the date of the reclassification. The effective date of the reclassification here was September 10, 2004; therefore, the alternative to the due date provided in section 179(d) would result in the plan having been due by March 10, 2006. Instead, the area's serious area plan is not due until one year from publication of the **Federal Register** notice of this action. EPA knows of no legal theory that would allow the Agency to provide the 5 years apparently sought by the commenters

[11] On March 22, 2007, EPA issued a final rule, intended to replace the NEP, governing the review and handling of air quality data influenced by exceptional events. 72 FR 13560. The rule became effective on May 21, 2007 and is codified at 40 CFR 50.1, 50.14 and 51.920. 72 FR 13560, 13580–13581. However, as discussed below, the 1999–2001 data relevant to this final action are not eligible for exclusion under the transition policy for the rule because the State did not meet the provisions of the NEP that were applicable at the time of the exceedances. See 72 FR 49046, 49048 (August 27, 2007).

[12] The AIRS database is the predecessor to the AQS database.

[13] Note that even if adequate documentation had been submitted for the flagged events, the Imperial area would not have attained the PM–10 standard because of the number of unflagged exceedances. See ''Imperial valley PM10 Exceedances 1999–2001,'' Excel Spreadsheet, Bob Pallarino, EPA.

for the development and submittal of a serious area PM–10 plan.[14]

4. Economic Hardship

A number of commenters claimed that an EPA finding of failure to attain would result in adverse economic consequences for Imperial County. One commenter stated that the County has one of the poorest economies in the State, that EPA's finding will place an undue hardship on an economy that is already on the brink of breaking, and that the Agency should take economic justice into account. Another commenter suggested that another set of government-imposed regulations would place an unnecessary financial hardship on area companies and could possibly disrupt farming operations. Another commenter cited the County's high unemployment rate that would increase under severe emission control requirements that undermine an agriculture-dependent economy. The commenters attributed these perceived hardships to various factors they believe to be related to a nonattainment finding: the five percent and BACM requirements applicable to serious PM–10 attainment areas; the inability of the County to control Mexican emissions; and the prevalence of high wind natural events. We address each of these factors below.

A. Five Percent and BACM Requirements

A number of commenters opposed to our proposed rule requested that EPA reduce or remove entirely the proposed requirement that Imperial County submit a plan that achieves at least 5 percent annual reductions in PM–10 or PM–10 precursor emissions as required by CAA section 189(d). Some commenters stated that this requirement was not feasible or was too burdensome for Imperial County. Another commenter attributed severe economic consequences to the serious area plan requirements for expeditious implementation of BACM.

Response: As stated above and in the proposed rule, EPA is legally compelled to finalize the nonattainment finding with the result that the 5 percent requirement of section 189(d) applies. Under section 189(b)(1)(B), the serious area PM–10 plan for the Imperial area is required to provide for the expeditious implementation of BACM. This requirement applies as a result of the Imperial area's reclassification to serious which was mandated by the U.S. Court of Appeals for the Ninth Circuit in *Sierra Club* v. *U.S. Environmental Protection Agency, et al.*, 346 F.3d 955 (9th Cir. 2003), amended 352 F.3d 1186, *cert. denied*, 542 U.S. 919 (2004). Therefore BACM would have to be implemented in the Imperial area even in the absence of EPA's finding that the area failed to attain the PM–10 standards by the end of 2001.

EPA has defined BACM as: ''* * * The maximum degree of emissions reduction of PM–10 and PM–10 precursors from a source * * * which is determined on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, to be achievable for such source through application of production processes and available methods, systems, and techniques for control of each such pollutant.'' Addendum at 42010. Therefore, while EPA cannot take into account the general economy of a nonattainment area in determining what statutory requirements apply in a serious nonattainment area, it can consider the cost of reducing emissions from a particular source category and costs incurred by similar sources that have implemented emission reductions. In addition, where the economic feasibility of a measure depends on public funding, an appropriate consideration is past funding of similar activities as well as availability of funding sources. *Id.* at 42013. Nevertheless, the CAA still requires that the State submit a plan for the Imperial area to, among other things, attain the PM–10 NAAQS as expeditiously as practicable. Moreover, there are economic benefits to attaining the NAAQS.

B. Mexican Emissions

Several commenters felt that the economic hardship was a result of the failure of EPA, in its proposed action, to consider the fact that significant amounts of particulate matter air pollution in Imperial County emanate from the large and growing city of Mexicali, Mexico. Many commenters opposing our proposed rule stated that EPA ignored the fact that emissions from Mexico are one of the reasons that poor air quality exists in Imperial County. Some commenters pointed out that in the past, EPA has agreed that Imperial County would have attained the PM–10 NAAQS but for emissions from Mexico (e.g., EPA's approval of CAA section 179B demonstration; 66 FR 53106, October 2001). Additionally, the commenters claimed that the PM–10 plan needs to include consideration of how emissions from Mexico impact the attainment of the PM–10 NAAQS in Imperial County.

Response: As explained in our proposed rule, EPA has the responsibility, pursuant to CAA sections 179(c) and 188(b)(2), to determine within 6 months of the applicable attainment date whether a PM–10 nonattainment area attained the 24-hour NAAQS. Section 179(c)(1) of the Act provides that determinations of failure to attain are to be based upon an area's ''air quality as of the attainment date,'' and section 188(b)(2) is consistent with this requirement. EPA determines whether an area's air quality is meeting the PM–10 NAAQS based upon air quality data gathered at monitoring sites in the nonattainment area and entered into EPA's AQS database. These data are reviewed to determine the area's air quality status in accordance with EPA regulations at 40 CFR part 50, appendix K. 69 FR at 48836. Thus, neither the CAA nor EPA regulations authorize the Agency to consider the economic circumstances of an area in making a finding of attainment or nonattainment; the determination is to be made solely on the basis of the ambient air quality in the area. Similarly, neither the CAA nor EPA regulations allow EPA to ignore the actual attainment status of an area based on the influx of a pollutant from another country. The attainment status is intended to reflect the actual ambient pollutant levels.

Section 179B(d) of the Act does allow a moderate PM–10 nonattainment area to avoid a reclassification to serious if a state establishes to the satisfaction of EPA that such an area would have attained but for emissions emanating from outside the United States. EPA did approve such a demonstration for the Imperial area but that approval was overturned by the Ninth Circuit in *Sierra Club*. See the discussion of this case and its aftermath, 69 FR at 48835. The State can, however, take the effect of Mexican emissions into account in addressing the CAA section 189(d) attainment demonstration requirement. See CAA section 179B(a) and the Addendum at 42000–42002. In this regard, note that section 179B does not provide authority to exclude monitoring data influenced by international transport from regulatory determinations related to attainment and nonattainment. Thus, even if EPA approves a section 179B ''but for'' demonstration for an area, the area would continue to be designated as nonattainment and subject to the applicable requirements, including nonattainment new source review,

[14] We note that subpart 4 of part D of title I which contains the Act's provisions specific to PM–10 does not have a provision that is analogous to section 182(i) which grants EPA considerable latitude to adjust submittal and other schedules upon an ozone area's reclassification. See also section 187(f).

nonattainment conformity, and other measures prescribed for nonattainment areas by the CAA.

C. High Wind Events

Several commenters felt that the economic hardship was a result of the failure of EPA's proposal to consider the fact that significant amounts of particulate matter air pollution in Imperial County are the result of high wind natural events. To support their claims, commenters cited the Wind Blown Dust Study.

Response: As discussed in our response to comment #2, EPA will under certain circumstances exclude from attainment determinations ambient PM–10 concentrations due to dust raised by unusually high winds. However, the State did not provide documentation to support the flagged high wind events from 1999–2001 and the data are therefore not eligible for exclusion here.[15] Moreover, as noted previously, even if the State had met the provisions of EPA's NEP that were applicable at the time of the relevant exceedances, the Imperial area would not have attained the PM–10 standard by December 31, 2001. The State can, however, if it meets the requirements of EPA's exceptional events rule, take future unusually high winds into account in developing its CAA section 189(d) attainment demonstration. See 72 FR at 13565–13566 and 13576–13577.

5. Governmental Entities Should Work Together

One commenter urged EPA to immediately initiate a coordinated effort involving the federal government, Mexican government counterparts and County officials to develop a federally funded international plan to reduce emissions. Another commenter requested that, given the short time provided in the CAA to develop and submit a plan in this case, and the need for the plan to consider international transport, and perhaps, nonanthropogenic sources, EPA be involved early in the plan development to ensure a timely plan submittal. One commenter also stated that EPA needs to work with other governmental agencies to implement reasonable policies for controlling PM–10 pollution in the Imperial area.

Response: EPA agrees with the commenters who encourage governmental entities to work together to address air pollution from Mexicali to Imperial County. Reducing air pollution anywhere along the U.S./Mexico border requires binational cooperation and coordination. Since 1983, EPA has been working with the Mexican Government and other stakeholders to reduce air pollution along the border region. Pursuant to the 1983 La Paz Agreement, the U.S. and Mexico developed the Border XXI Program and more recently its successor, the Border 2012 U.S.-Mexico Environmental Program. Through these programs, EPA and Mexico have worked together with border tribal, state, and local governments, as well as academia and the general public, to improve our understanding of the relative impacts of contributing international sources of air pollution and have developed and implemented cost-effective control strategies to reduce those emissions.

EPA continues to implement the Border 2012 regionally-based border program in the Mexicali-Imperial area. We are active participants in the Imperial/Mexicali Air Quality Task Force which provides a forum for the federal, state, and local governments to discuss and analyze with community stakeholders how to improve air quality in the binational region. EPA continues to fund numerous projects that study and manage air pollution in various crossborder airsheds like the Imperial/Mexicali area. In addition to supporting the District's work to develop its PM–10 plan, EPA also provides direct funding for the Mexicali-Imperial Air Quality Task Force for binational public forums to discuss the air quality of the Mexicali-Imperial region, and to carry out projects, including projects to monitor air quality (especially in Mexico), to demonstrate retrofit equipment technologies for diesel trucks, and to provide real time air quality information to residents of Imperial County.

Regarding the comment that EPA be involved early in the development of the air quality plan, we intend to provide guidance and assistance to the District and the State to support a technically sound and timely submittal.

Lastly, regarding the need to develop reasonable policies, EPA has worked closely with the State and District to improve the PM–10 emissions inventory for the Imperial area, to develop a natural events action plan (NEAP),[16] and to develop rules to control certain sources of fugitive dust in the nonattainment area.

6. Finding of Failure To Attain Is Mandatory Under the CAA and Fully Supported by Ambient Monitoring Data

One commenter stated that the proposal correctly reflects that the Imperial Valley is a serious PM–10 nonattainment area that has missed its attainment date and does not have an extension of the attainment date in place. The same commenter stated further that EPA correctly assessed that areas in situations like this have one-year to submit a plan including a 5 percent plan. Another commenter who agreed with EPA's proposed rule stated that EPA's proposal had omitted some statutory requirements (e.g., BACM implemented expeditiously, major source cutoffs), and reserved the right to comment further on EPA's proposed action on the PM–10 SIP.

Response: EPA agrees with comments supporting the proposal. We did not include a comprehensive list of the CAA requirements applicable to the Imperial area, but expect the plan to address all of them. See Section III below.

7. PM–10 Is Not a Regulated Pollutant

One commenter, California Cattlemen's Association (CCA), notes that the U.S. Court of Appeals for the District of Columbia Circuit in *American Trucking Ass'n* v. *Browner* vacated EPA's 1997 PM–10 standard because it included both coarse and fine PM and therefore was ''inherently confounded.'' CCA claims that the 1987 standard suffers from the same defect. Therefore, CCA argues, there is no 1987 standard and, as a result, the Imperial area cannot be out of compliance with it. CCA states that if EPA's response is that the 1987 standard was re-instituted in a final rule (65 FR 80776; December 22, 2000), there was not sufficient notice as that rule was noticed within a ruling for Ada County, Idaho (65 FR 39321; June 26, 2000). Also, CCA believes that because the same problem exists with the 1987 standard as the 1997 standard, simply reinstating the old standard was not the court's intention. Finally, CCA discusses EPA's then current process of revising the PM NAAQS and finds, among other things, similar confounding problems in measurements contained in studies that EPA is using to consider setting its new NAAQS.

Response: In a portion of *American Trucking Ass'ns* v. *EPA,* 175 F. 3d 1027, not later reversed by the Supreme Court, the D.C. Circuit held that, although there was ''ample support'' for EPA's decision to regulate coarse-fraction particles, EPA had not provided a

[15] See footnote 11.

[16] Under EPA's NEP, if natural events caused ambient concentrations of PM–10 that exceeded the NAAQS in an area, the State was responsible for developing a NEAP meeting certain specified requirements to address future events. NEP at 5–8. Under EPA's exceptional events rule NEAPs are not required, although similar requirements apply under 40 CFR 51.920. 72 FR at 13581.

reasonable justification for its choice of PM–10 as an indicator for coarse particles, especially given that PM–10 includes not only coarse particles but PM fine as well. 175 F. 3d at 1054–55.

Pursuant to the D.C. Circuit's decision, EPA deleted 40 CFR 50.6(d), the regulatory provision controlling the transition from the pre-existing 1987 PM–10 standards to the 1997 PM–10 standards. 65 FR 80776. EPA proposed this deletion in the context of a proposed rule to rescind a finding, made prior to the D.C. Circuit's vacatur of the 1997 standards, that the 1987 PM–10 standards no longer applied in Ada County, Idaho. As EPA explained in the proposed rule, the Ada County finding was based on the existence of the 1997 standards as well as the transition policy. Because the court vacated those standards, leaving in place the finding would have resulted in no federal protection from high levels of coarse particulate matter pollution. Finding that result untenable, EPA concluded that it was appropriate to restore the pre-existing PM–10 standards with respect to Ada County. 65 FR at 39323. As is clear from the final rule, however, the 1987 standards were never revoked with respect to the rest of the country. Therefore, although EPA deleted 40 CFR 50.6(d)(as required by the mandate of *ATA I*), the pre-existing NAAQS continue to apply. 65 FR at 80777. If CCA believes that insufficient notice was provided in connection with this final action, it was required under CAA section 307(b)(1) to file a petition for review of that action in the U.S. Court of Appeals within 60 days of December 22, 2000. CCA did not do so and is therefore foreclosed from raising this issue now.

Moreover, to the extent that CCA raises issues with respect to the pre-existing 1987 PM–10 standards, we note that those standards were upheld in *Natural Resources Defense Council, Inc., et al.* v. *EPA, et al.*, 902 F.2d 962 (D.C. Cir. 1990). In any case, the 1987 standards do not use PM–10 as an indicator exclusively for coarse particles, but rather are intended to address both PM–2.5 and PM–10–2.5, i.e. both fine and coarse particles. 52 FR 24634, 24639 (July 1, 1987). Thus, any concerns that PM–10 may be an inappropriate indicator for coarse particles exclusively are inapplicable to the 1987 standard.

When CCA submitted its comment letter in 2004, EPA was in the process of developing proposed regulations to again address thoracic coarse particles. The Agency subsequently finalized such regulations in 2006. 71 FR 61144 (October 17, 2006). CCA's concerns regarding new standards for PM–10, including putative confounding problems, were properly raised in the context of that rulemaking. In fact, challenges to the use of PM–10 as an indicator for coarse particles, as well as challenges to the scientific bases for the 2006 final rule have been raised by various petitioners in the pending D.C. Circuit cases (*American Farm Bureau Fed. et al.* v. *EPA* and consolidated cases) challenging the rule. CCA can, and is, pursuing its concerns in that forum.

III. Final Action

EPA is finding that the Imperial area failed to attain the 24-hour PM–10 NAAQS by the December 31, 2001 attainment deadline and is requiring the State to submit under section 189(d) of the Act ''plan revisions which provide for attainment of the PM–10 air quality standards and, from the date of such submission until attainment, for an annual reduction in PM–10 or PM–10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for such area.'' The plan must be submitted to EPA no later than one year from the publication of this final rule.

The pollutant-specific requirements for moderate and serious PM–10 nonattainment areas are found in section 189 of the CAA, and the general planning and control requirements for nonattainment plans are found in CAA sections 110 and 172. In addition to the attainment demonstration and 5 percent annual reductions requirements referenced above, the PM–10 plan for the Imperial area must include the following elements: [17]

- Transportation conformity and motor vehicle emissions budgets;
- Emissions inventories;
- Best available control measures for significant sources of PM–10;
- Reasonably available control measures for significant sources of PM–10;
- Control requirements applicable to major stationary sources of PM–10 precursors pursuant to section 189(e); and
- Reasonable further progress and quantitative milestones.

The District must also revise its new source review (NSR) rule to reflect the serious area definitions for major new sources in CAA section 189(b)(3) and must make any changes in its Title V operating permits program necessary to reflect the change in the major source threshold from 100 tpy for moderate areas to 70 tpy for serious areas. Revisions to the NSR and Title V rules must also be submitted no later than one year from the publication of this final rule.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this final action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely makes a determination based on air quality data and does not impose any additional requirements. Accordingly, the Administrator certifies that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule does not impose any additional enforceable duty, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does 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).

This action merely makes a determination based on air quality data and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Executive Order 12898 establishes a Federal policy for incorporating environmental justice into Federal agency actions by directing agencies to identify and address, as appropriate, disproportionately high and adverse

[17] For a brief discussion of these requirements, see our proposed approval of the San Joaquin Valley PM–10 plan at 69 FR 5413, 5414 (February 4, 2004). See also the final rule at 69 FR 30006 (May 26, 2004).

human health or environmental effects of their programs, policies, and activities on minority and low-income populations. Today's action involves determinations based on air quality considerations. It will not have disproportionately high and adverse effects on any communities in the area, including minority and low-income communities. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks''(62 FR 19885, April 23, 1997), because it is not economically significant. The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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 February 11, 2008. 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 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

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

Dated: November 30, 2007.

Laura Yoshii,

Acting Regional Administrator, Region IX.

[FR Doc. E7–23943 Filed 12–10–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R01–RCRA–2007–0999; FRL–8504–4]

Rhode Island: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: The State of Rhode Island has applied to EPA for final authorization of certain changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these changes satisfy all requirements needed to qualify for final authorization, and is authorizing the State's changes through this immediate final action.

DATES: This final authorization will become effective on February 11, 2008 unless EPA receives adverse written comment by January 10, 2008. If EPA receives such comment, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** and inform the public that this authorization will not take immediate effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–RCRA–2007–0999, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: biscaia.robin@epa.gov.*
- *Fax:* (617) 918–0642, to the attention of Robin Biscaia.
- *Mail:* Robin Biscaia, Hazardous Waste Unit, EPA New England—Region 1, One Congress Street, Suite 1100 (CHW), Boston, MA 02114–2023.
- *Hand Delivery or Courier:* Deliver your comments to Robin Biscaia, Hazardous Waste Unit, Office of Ecosystem Protection, EPA New England—Region 1, One Congress Street, 11th Floor, (CHW), Boston, MA 02114–2023. Such deliveries are only accepted during the Office's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Identify your comments as relating to Docket ID No. EPA–R01–RCRA–2007–0999. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or claimed to be other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: EPA has established a docket for this action under Docket ID No. EPA–R01–RCRA–2007–0999. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although it may be listed in the index, some information might not be publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the following two locations: (i) EPA Region 1 Library, One Congress Street—11th Floor, Boston, MA 02114–2023; by appointment only; tel: (617) 918–1990; and (ii) Rhode Island Department of Environmental Management, 235 Promenade St., Providence, RI 02908–5767, by appointment only through the Office of Technical and Customer Assistance, tel: (401) 222–6822.

FOR FURTHER INFORMATION CONTACT: Robin Biscaia, Hazardous Waste Unit, EPA New England—Region 1, One Congress Street, Suite 1100 (CHW), Boston, MA 02114–2023; *telephone number:* (617) 918–1642; *fax number:* (617) 918–0642, e-mail address: *biscaia.robin@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States which have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their